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PROHIBITION OF INCITEMENT TO HATRED IN INTERNATIONAL LAW

Master thesis

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LIST OF ABBREVIATIONS

CERD – Committee on the Elimination of Racial Discrimination

CoE – Council of Europe

CoHR – Commission on Human Rights

ECHR – European Convention on Human Rights

ECRI – European Commission against Racism and Intolerance

ECtHR – European Court on Human Rights

ICCPR – International Covenant on Civil and Political Rights

ICERD – International Convention on the Elimination of All Forms of Racial Discrimination

UDHR – Universal Declaration on Human Rights

UN – United Nations

UN HRC – United Nations Human Rights Committee

USA – United States of America

USSR – Union of the Soviet Socialist Republics

TABLE OF CONTENTS

INTRODUCTION

The first steps in the development of the Human Rights Law were made centuries ago with the adoption of separate documents such as the Magna Carta in 1215, the Bill of Rights in 1689, the Declaration of the Rights of Man and of the Citizen in 1789, and the United States Bill of Rights in 1791. Although those documents have a national character, they provide a ground for the further creation of the international human rights instruments.

The history of the International Human Rights Law begins after the Second World War. The atrocities of war which caused the devastation of the European continent was followed with the grave violations of the basic human rights and the death of the millions of people. Additionally, the world faced outrageous policy of the discrimination and the extermination of people based on the belief in the superiority of the one race over the other. It was conducted by Nazi Germany and resulted in the creation of concentration camps, forced deportations, gas chambers and the death of millions of Jews, Roma and other people which was suspected in hiding and helping them.

All these events lead to the creation of the new international system, which embodies in the United Nations Organisation and several other specific international organisations created under the umbrella of the UN and based on independent international treaties. Furthermore, human rights and it's guaranteeing became one of the major spheres of interest of the new international system. Thus, the Universal Declaration on Human Rights, the first international human rights instrument was adopted in 1949. However, it does not have any legal force it provides an extensive list of human rights and becomes a starting point for the development of the next international human rights instruments. The International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights were created as an implementation of the UDHR norms and providing them with the legal force. Further, the number of specific international instruments was adopted, and the International Convention on the Elimination of All Forms of Racial Discriminations is one of that system, created to promote an understanding among all races. Also, human rights instruments were adopted at the regional level, such as the European Convention on Human Rights, as well as American and African Conventions and provide own standards and mechanisms of its enforcement.

These instruments provide the wide range of rights and freedoms from the right to life, freedom from slavery and torture and the right to freedom of expression to the right on education, employment and freedom from discrimination. It also prohibits the dissemination of war propaganda and incitements to hatred. Despite that, after the adoption of that documents, there were number of events which was related to the gross violations of human rights, such as genocides

in Rwanda and Bosnia and Herzegovina and different armed conflicts around the world which is still ongoing.

Globalization processes and development of communication technologies provide for the humankind different possibilities for cooperation and an exchange of the most valuable resource information but at the same time bears particular challenges, such as dissemination of hatred, international terrorism, hybrid and informational wars. Nowadays, everyone with a smartphone may become a journalist or influencer, while governments do not refrain from using modern technologies for their political purposes. The impact of the media and propaganda is difficult to overestimate, and its role in the Holocaust and Rwandan genocide recognized on the international level. The twenty-first century challenges States and the international community as a whole with economic, military and migration problems, which can be used as a ground for dissemination and inciting hatred among people. So there is a need to establish boundaries between the right to freedom of expression and on information and the freedom from discrimination and the prohibition of incitement to hatred, as well as to find a way of differentiation between the prohibited incitement and allowed offensive, insulting or provocative speech.

Problems of research. International Human Rights Law establishes a right to freedom of expression as a non-absolute right, so there are certain restrictions which may be imposed, and one of them is the prohibition of incitement to hatred, discrimination and violence. This particular limitation provides in the ICCPR and ICERD as well as could be interpreted from provisions of the ECHR and consequently is implemented in the national legislations of different States. At the same time, these international instruments use confusing wording, which has a variety of interpretations, covers different types of incitement without defining it and providing clear elements. These features lead to the absence of the agreement on its meaning among recommendations of international organisations and scholars, while the practice of the judiciary bodies related to the public incitement to hatred is incoherent and controversial.

Research relevance. Prohibition of the public incitement to hatred is a way of ensuring the right to equality and freedom from discrimination. Although, such limitations are imposed on the freedom of expression, which is highly essential in the democratic society, so there is a need to find a balance between interests of individuals, groups and community. The different understanding of unclear provisions of international instruments by States as well as the absence of agreed approaches on the assessment of incitements and fragmental case law creates a situation in which some States introduce more severe restrictions on the freedom of expression than it is reasonably needed, while other States tolerate specific incitements to hatred, creating the hostile environment and violating rights of discriminated groups. Given that, there is a need to find a

unified approach on the elements of incitement as well as to draw certain thresholds which States may follow while analysing cases of public incitements to hatred.

Scientific novelty and overview of the research on the selected topic. The nature and difficulties of the public incitement to hatred have been studied by different scholars such as Wibke K. Timmermann, Toby Mendel, Alexander Verkhovsky, Sandra Coliver, Amal Clooney, Philippa Webb, Manfred Nowak and others. There are a number of works which constitute a basis of this research, such as "Incitement in International Law" by Wibke K. Timmermann who analyses international regulation related to the public incitement to hatred and offers own structure of that offence, "The Right to Insult in International Law" by Amal Clooney and Philippa Webb who assess boundaries and limitations of the freedom of expression with respect to the insulting, shocking and provocative materials, which possibly may incite hatred, "Study on International Standarts Relating to Incitement to Genocide or Racial Hatred" by Toby Mendel who provides a deep research on the issue of inciting to genocide and making parallels with the incitement to hatred and the policy brief made by ARTICLE 19 Free Word Centre "Prohibiting incitement to discrimination, hostility and violence", which offers recommendations to the understanding particular elements of incitement to hatred from the practical perspective.

Despite the existence of that number of works dedicated to the issues of public incitement to hatred, all of them cover certain aspects of that matter or analysing it from a particular perspective, offer different approaches on structure and elements of incitement and include contradictory arguments related to same features. This situation creates several parallel approaches which at the same time have specific differences in structure and content of elements, which is confusing and leaves many uncertain and discussing options related to incitement to hatred. Thus the scientific novelty of that research is related to the need in finding a coherent and balanced approach which would combine the best and the most effective solutions.

Significance of the research. This scientific research is important in theoretical and practical perspectives, which findings are relevant as for both scholars and legislators. The theoretical significance of the study consists of the detailed and holistic analysis of major concepts of the understanding of the public incitement to hatred and consequent drawing of a balanced and sophisticated structure of the incitement. The practical importance of this research is connected with the outlining of elements of incitement and its illustration with the relevant decisions of the international judicial bodies, which may be used by the lawyers and legislators to improve their understanding of that matter. The result of this study will be presented as conclusions and recommendations, which include the most relevant findings.

The aim of the research. The main aim of the research is to unify the existed findings and approaches of understanding of the public incitement to hatred and to present a balanced and clear

structure and elements of the public incitement to hatred with the examples from the case law. It aimed to encompass legislators and scholars with the systematic knowledge and practice on the incitement to prepare them for future challenges.

The objectives of the research.

1. To analyse the history of the development of the prohibition of the public incitement to hatred and its embodiment in International law;
2. To analyse different concepts of understanding of definition, structure and elements of the public incitement to hatred;
3. To assess the impact of the existed approaches on the practice of international judicial bodies;
4. To present the unified and comprehensive concept of the public incitement to hatred with practical illustrations from the case law.

Research methodology. During this study, several research methods will be used. Since international instruments provide different wording of the prohibition of public incitement to hatred and such norms require implementation in national legislation, there is a need to apply the method of legal interpretation. There are distinct concepts of understanding of the public incitement to hatred developed both scholars and international organisations the comparative method will be used. The case law of several international judicial bodies will be examined on the matter of application and interpretation of relevant international norms with the analytical method. The similar and differing situations related to the public incitement to hatred will be presented with the analytical-descriptive method.

Structure of research. The work has two sections embodied in 2 chapters. The first chapter is dedicated to the general study of the public incitement to hatred in International law. It will include the analysis of the international legal instruments which regulate the issue of the public incitement to hatred, the history of their development, its wording and elements as well as interpretation by the scholars and application by the respective international judicial bodies. The second chapter will cover detailed and specific analysis of the structure and elements of the public incitement to hatred. It will include a precise examination of the different concepts of structure and elements of the public incitement to hatred offered by the scholars and international organisations as well as a comparison of the findings in case law, which will also be used for the illustration of the elements of the public incitement to hatred.

Defence statements. Based on the ambiguous national and international practice of establishing public incitement to hatred there is a need to create the unified structure of the public incitement to hatred which sets up the elements for the qualification of the public incitement to hatred.

1. INTERNATIONAL REGULATIONS OF PUBLIC INCITEMENT TO HATRED: HISTORY OF DEVELOPMENT, DEFINITIONS, ELEMENTS AND INTERPRETATION

This chapter will cover examples of regulation of public incitement to hatred in international law, regional instruments and national legal system of Ukraine. It will review the drafting process of the provisions on public incitement to hatred in its historical context and its influence on the shaping of such norms. The scope and elements of related articles of instruments will be described and analysed through the theoretical and practical perspective. The interpretation of the relevant case law by the international and regional judicial bodies will help to assess the effectiveness and relevance of using such provisions.

1.1 Universal Declaration on Human Rights

The Second World War proved inefficiency and non-viability of the previous international law system, and as a result, the new system with the leading role of the United Nations Organization (henceforth - UN) was created. After the brutal war with billions of victims, the UN intended to introduce the general standards for human rights understanding, as a result of that work the Universal Declaration of Human Rights (henceforth - UDHR) was adopted in 1949. Having in mind the Holocaust and other inhumane crimes of Nazi's, the drafters of the UDHR, understood the role of propaganda and freedom of expression in those acts, so they had to evaluate the acceptance of different ideas and views[1]. The Soviet Union delegation offered to exclude from the right to freedom of expression Nazi and fascist groups, but instead of that, it was decided to create an interrelation between articles to provide a right to be protected from the hate speech and ensure the right to freedom of expression at the same time[2].

The result of that discussion was embodied in four articles. The Article 19 of the UDHR states: "Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers."[3] It provides a general right to freedom of expression, although it should be read in conjunction with three other articles of the UDHR, particularly Article 7, 29

[1] "Universal Declaration of Human Rights at 70: 30 Articles on 30 Articles - Article 19". Office of the United Nations High Commissioner for Human Rights. Accessed 05 February 2020. https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=23944&LangID=E

[2] Johannes Morsink. *The Universal Declaration of Human Rights: Origins, Drafting, and Intent* (1999), 333 (cited from: Peter Danchin. "The Universal Declaration on Human Rights. Article 19". Peter Danchin. Accessed 05 February 2020. http://ccnmtl.columbia.edu/projects/mmt/udhr/article_19.html)

[3] "Universal Declaration of Human Rights". UN. Accessed 05 February 2020. https://www.un.org/en/universal-declaration-human-rights/index.html

(2) and 30, which include some limitations to that right. Article 7 provides that: "All are equal before the law and are entitled without any discrimination to equal protection of the law. All are entitled to equal protection against any discrimination in violation of this Declaration and against any incitement to such discrimination."[4], in other words, everyone should be protected by the State from the discrimination or incitement to it, even if it was a result of the right to freedom of expression. That leads to the article 29 (2), which states that: "In the exercise of his rights and freedoms, everyone shall be subject only to such limitations as are determined by law solely for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society."[5], here UDHR provides a possibility for the state to establish some boundaries to rights and freedoms to avoid conflicts between rights of different people, *inter alia*, freedom of expression (Article 19) and freedom from discrimination (Article 7). Furthermore, Article 30 prescribes: "Nothing in this Declaration may be interpreted as implying for any State, group or person any right to engage in any activity or to perform any act aimed at the destruction of any of the rights and freedoms set forth herein."[6], thus, it provides the general rule for all provisions of the UDHR, that any of it can not be used with a purpose to limit or to eliminate some other's rights. These three articles together create a system of special "checks and balances" which, through the limitation of rights, prevents anyone, among other things, from using or abusing the right to freedom of expression with a purpose to discriminate or incite to discrimination of other people, which would be, definitely, the destruction of the principles and norms of the UDHR itself.

Moreover, UDHR is the first international document purely dedicated to human rights. Despite the fact that it is a declaration, which means that it is not legally binding, its importance for the human rights law is difficult to overestimate. That document sets up the general standards of human rights and became a core document for the International Covenant on Civil and Political Rights, as well as starting point for creating other international human rights instruments such as the International Convention on the Elimination of all Forms of Racial Discrimination, the European Convention on Human Rights and other treaties.

To sum up, the UDHR was created after the monstrosities of the Second World War, such as Holocaust and other grave violations of human rights, so it aimed to provide general standards and understanding of the phenomenon of human rights and its scope. Also, it provides a system of interrelated provisions which limit and supplement each other ensuring that the rights and freedoms of one person do not violate the rights and freedoms of another person. That mechanism

[4] Ibid
[5] Ibid
[6] Ibid

works for the right to freedom of expression as well. It provides conditions according to which, this right could not be used for discrimination, incitement to discrimination or would violate other provisions of the UDHR, for example, using right to freedom of expression for sharing hate speech or public incitement to hatred.

1.2 The International Covenant on Civil and Political Rights

The International Covenant on Civil and Political Rights (henceforth - ICCPR) was adopted and opened for signatories in 1966, but before that, it went through a continuous drafting process. Since the UDHR creates general standards and understanding of human rights but no legal obligations for its parties, it was decided to adopt legally binding International Covenant – an international treaty which would provide more specific examples of human rights with legal guarantees of its enforcing. Firstly, the UN General Assembly intended to create one Covenant for all types of rights such as, civil, political, economic, social and cultural[7], but after discussions of that issue, the Commission on Human Rights (henceforth – CoHR) in its report advised to create two different Covenants, having in mind the different methods of implementation of beforementioned types of rights.[8] Following that, the UN General Assembly adopted a resolution, which initiates drafting of two Covenants, one should include civil and political rights, and other economic, social and cultural, both of these drafts should be submitted to the General Assembly, in order to approve it and open for signature simultaneously.[9] It shows that ICCPR and UDHR creates a foundational system of international human rights instruments under the umbrella of the UN[10] and one continues and develops provisions of another as well as enforcing it.

ICCPR covers the issue of freedom of expression and public incitement to hatred more detailed than UDHR and develops its logic providing more clear scope and limitation to that right, although continual discussions followed the process of creating these provisions. The first proposal to criminalise in the national laws any advocacy of a discrimination or a privilege based on race, nationality or religion, as well as any hostility, hatred or contempt which was based on these grounds was offered by the delegation of the Soviet Union in the Sub-Commission on Prevention

[7] "Resolution of the General Assembly 421 E (V) of 4 December 1950". UN. Accessed 17 February 2020. https://undocs.org/en/A/RES/421(V)
[8] "Report of the Commission on Human Rights (seventh session) 384 (XIII)". UN. Accessed 17 February 2020. https://digitallibrary.un.org/record/212373?ln=ru#record-files-collapse-header
[9] "Resolution of the General Assembly 543 (VI) of 5 February 1952". UN. Accessed 17 February 2020. https://undocs.org/en/A/RES/543(VI)
[10] Henkin, Louis. "The Age of Rights". *New York* (1990) (cited from: Christopher N.J. Roberts. "William H. Fitzpatrick's Editorials on Human Rights (1949)". Quellen zur Geschichte der Menschenrechte. Accessed 17 February 2020. https://www.geschichte-menschenrechte.de/schluesseltexte/william-h-fitzpatricks-editorials-on-human-rights-1949/)

of Discrimination and Protection of Minorities in 1947, but it was rejected and redirected to the CoHR, which back then was working on the UDHR and the International Covenant.[11] The second session of the Drafting Committee of the CoHR was discussed among other the issue of advocacy of discrimination and incitement to discrimination and hatred, which was embodied in Article 20 and 21 respectively.[12] During the discussion, two different points of view were presented by the representatives of different states. The first one was from the USA and the United Kingdom and the second one from the Soviet Union and Chile.[13] The delegate from the Soviet Union argued that such provision "[…] could place a powerful weapon in the hands of democracy, serving to restrict the dissemination of Nazi-Fascist propaganda" and that failure to restrict such ideas resulted "[…] terrible destruction of lives and in the elimination of human rights in Germany"[14]. The USA was against that provision arguing that "[…] this problem was best treated by individual self-discipline rather than by the enactment of laws which played into the hands of those who would attempt to restrict freedom of speech entirely"[15] and "[…] whether certain types of restriction on speech were preferable to free speech"[16]. The United Kingdom supported that view adding "[…] that the only safe remedy was to let the people speak freely and clearly. In this way, one could finally trust to the good sense of the people to maintain a truly democratic philosophy."[17] At the same time, the delegate from the Chile disagreed with the opinion of the previous delegates stating that this article "[…] a spearhead against racism, fascism and other forms of totalitarian ideology" and "[…] it should not be permitted to disseminate ideas which threatened the very principles that the CoHR was trying to establish for the benefit of humanity".[18] The offer to include this article to the Draft Covenant was defeated by three votes for to four against with one abstention[19], although, this discussion showed the main arguments and concerns of the parties, which consisted of the balancing of the freedom of speech and its limitations in favor of protection from racial, national or religious hatred and incitement to it, so it was decided to postpone the discussion of that issue until the article on freedom of speech would be drafted.[20]

[11] Wibke K. Timmermann, *Incitement in International Law* (New York: Routledge, 2015), 109-110.
[12] "Report of the Drafting Committee [on an International Bill of Rights] to the Commission on Human Rights of 21 May 1948". UN. Accessed 19 February 2020. https://undocs.org/E/CN.4/95
[13] "Commission on Human Rights, Drafting Committee, 2nd Session, Summary Record of the 28th Meeting, 11 May 1948, UN Doc E/CN.4/AC.1/SR.28". UN. Accessed 19 February 2020. https://undocs.org/E/CN.4/AC.1/SR.28
[14] Ibid (Mr Pavlov, Union of Soviet Socialist Republics)
[15] Ibid (Mrs Roosvelt (Chairman), United States of America)
[16] Ibid (Mrs Roosvelt (Chairman), United States of America)
[17] Ibid (Mr Wilson, United Kingdom)
[18] Ibid (Mr Santa Cruz, Chile)
[19] Ibid
[20] "Commission on Human Rights, Fifth Session, Summary Record of the 123rd Meeting, 10 June 1949, UN Doc E/CN.4/SR.123". UN. Accessed 19 February 2020. http://hr-travaux.law.virginia.edu/document/iccpr/ecn4sr123/nid-1820

The second round of the debates about the proposals of parties was during the sixth session of the Commission in 1950.[21] The discussion about the draft of the article 21 had same positions as the previous one. Thus delegates from the USA and the UK were against that provision because "[…] It would be extremely dangerous to encourage Governments to issue prohibitions in that field, since any criticism of public or religious authorities might all too easily be described as incitement and consequently prohibited" also "[…] it was difficult to draw a distinction between advocacy and incitement" as well as "[…] between the various shades of feeling from hatred to ill-feeling and mere dislike".[22] The delegation from France noted that they were ready to amend their proposal "[…] to make a clear distinction between objective studies of a scientific nature and pure propaganda" and also emphasised that their proposal "[…] recognised both the right to freedom and the obligation to respect the rights and freedoms of others".[23] The discussion was continued during the fifth session of the General Assembly.[24] The delegation from the USSR pointed out that in the draft there was no explicit "[…] propaganda encouraging discrimination on racial or national grounds" so they offered a provision which requires to prohibit by law any propaganda of fascist or Nazi ideas and inciting to hatred or contempt.[25] After the debates on the amendments of Poland and Chile, the proposition of the Sub-Commission on Prevention of Discrimination and Protection of Minorities was adopted with amendments from Chile by 11 votes to 3, with 3 abstentions.[26] The USA, UK and Australia, which vote against because "[…] the possibility of government censorship, might lead to the destruction of certain fundamental freedoms" and that "[…] the conception of incitement to violence well known to the law of his own and many other countries".[27] That round of discussion again showed differences between the USA and UK on the one hand and the USSR, Chile and other developing countries.

The last discussion on the article which was adopted by the CoHR was during the Sixteenth Session of the UN General Assembly, where the delegates decided to include it into the Covenant or not. One of the decision of that meeting changed the place of article in the Covenant from 26 to 20 with the reason to write it after the article 19, since it was discussed before and it implied the logic that "while article 19 set forth the standards relating to freedom of opinion and expression,

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[21] "Commission on Human Rights, Sixth Session, Summary Record of the 174th Meeting,28 April 1950, UN Doc E/CN.4/SR.174". UN. Accessed 19 February 2020. http://hr-travaux.law.virginia.edu/document/iccpr/ecn4sr174/nid-1741

[22] Ibid (Mrs Roosvelt (Chairman), United States of America)

[23] Ibid (Mr Cassin, France)

[24] "United Nations General Assembly, Fifth Session, Summary Record of the 289th Meeting, 19 October 1950, UN Doc A/C.3/SR.289". UN. Accessed 20 February 2020. http://hr-travaux.law.virginia.edu/document/iccpr/ac3sr289/nid-1839

[25] Ibid

[26] "Commission on Human Rights, Ninth Session, Summary Record of the 379th Meeting, 3 May 1953, UN Doc E/CN.4/SR.379". UN. Accessed 20 February 2020. https://digitallibrary.un.org/record/1483669?ln=ru

[27] Ibid

article 26 was designed to prohibit specific forms of expression".[28] After that, the General Assembly discussed two main proposals of wording the article 20 which, since it had common ideas and provisions, later were replaced by one joint amendment from sixteenth countries, which was consisted of two paragraphs, first against the propaganda of war and second against incitement to hatred, discrimination and violence.[29] This proposal was adopted as a whole by 50 to 18 votes with 15 abstentions, where the countries which voted for that article was mostly developing and communist countries, while a majority of Western European countries and the USA were against that article.[30] The main arguments against the article were the danger to the freedom of expression and the possibility of abusing such norm by the Governments against opposition and criticism and an impossibility to embody that provision in legal form since "[…] "incitement to violence" was a legally valid concept, while "incitement to discrimination" or "incitement to hostility" was not".[31] Despite the continuous debates, the Article was adopted and found its place in the ICCPR directly after Article 19 on freedom of expression in such wording: "1. Any propaganda for war shall be prohibited by law. 2. Any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law."[32]

Since the Article 20 was quite controversial, the debated around it did not end with its adoption, this issue became more noticeable after the ICCPR entered into force and states were obliged to fulfil their duties according to that Covenant. Thus, the Human Rights Committee (henceforth - HRC) adopted few General Comments related to Article 20 in which it was provided with an information regarding that article and issues regarding its implementation. ICCPR General Comment No. 11 pointed out that despite the obligation of State parties to adopt legislative measures on executing provisions of Article 20, reports from some States did not show that it took actions concerning the application of that Article or efforts intended to do so, as well as information regarding that issue in the national legislation.[33] First of all, HRC noted that exercising of the right to freedom of expression includes special duties and responsibilities, like those provided in Article 20, so it does not conflict with each other.[34] The Committee stressed that "[…] paragraph 2 is directed against any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence, whether such propaganda or advocacy has aims which are

[28] "UN General Assembly, Sixteenth Session, Official Records, Third Committee, 23 October1961, UN Doc A/5000". UN. Accessed 20 February 2020. https://hr-travaux.law.virginia.edu/document/iccpr/a5000/nid-110
[29] Ibid
[30] Ibid
[31] Ibid
[32] "International Covenant on Civil and Political Rights, UN General Assembly, 16 December 1966". UN General Assembly. Accessed 20 February 2020. https://www.ohchr.org/en/professionalinterest/pages/ccpr.aspx
[33] "CCPR General Comment No. 11: Article 20 […] 29 July 1983". UN HRC. Accessed 20 February 2020. https://www.refworld.org/docid/453883f811.html
[34] Ibid

internal or external to the State concerned".[35] Also, HRC emphasised that States should clearly prescribe that such actions, as referred in Article 20, are inconsistent with the public policy and provide reasonable sanction for its violation, as well as refrain from such actions by States themselves.[36] The CCPR General Comment No. 24 while explaining issues of reservations to the ICCPR and its Optional Protocols emphasised that some of the provisions in the Covenant are the rules of customary law and it is not possible to make a reservations related to that norms because it is contrary to the objects and purposes of the Covenant to establish the standards on human rights and among other examples of customary law provisions the Committee mentioned the prohibition of advocacy of racial, national and religious hatred.[37] Although there are some reservations to Article 20, most of them related with the fact that these States have been legislated this provision in their laws on free speech and freedom of expression and do not need in further legislative measures (f. e. Australia, Malta, United Kingdom) and the USA made a reservation because implication of that Article contradicts to the principles of free speech provided in the Constitution and laws of the USA[38], which is logically having in mind the primacy of national laws over international norm in the USA.

The first case which was brought to the HRC concerning the application of Article 20 of the ICCPR is J.R.T. and W.G. Party v Canada. The Canadian court punished the Complainants to one-year imprisonment for "T" and to a fine of USD 5.000 for the "WG" Party for the propaganda of hatred to Jewish people through prerecorded phone messages which were accessible to the public by calling particular number.[39] General idea of messages was blaming Jewish people in "[…] leading the world into wars, unemployment and inflation and the collapse of world values and principles" and stating that "[…] some corrupt Jewish international conspiracy is depriving the callers of their birthright and that the white race should stand up and fight back".[40] The authors of the complaint were arguing about violation of Article 19 of the Covenant but the Committee stated that "[…] the opinions which Mr. T. seeks to disseminate through the telephone system clearly constitute the advocacy of racial or religious hatred which Canada has an obligation under Article 20 (2) of the Covenant to prohibit", so they complain incompatible with the provisions of

[35] Ibid
[36] Ibid
[37] "CCPR General Comment No. 24: […], UN Human Rights Committee (HRC), 4 November 1994, CCPR/C/21/Rev.1/Add.6". UN HRC. Accessed 21 February 2020. https://www.refworld.org/docid/453883fc11.html
[38] "International Covenant on Civil and Political Rights. Chapter IV. Human Rights, 16 December 1966". UN Treaty Collection. Accessed 21 February 2020. https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-4&chapter=4&clang=_en
[39] "J. R. T. and the W. G. Party v. Canada, Communication No. 104/1981, U.N. Doc. CCPR/C/OP/2 at 25 (1984)". UN HRC. Accessed 21 February 2020. http://hrlibrary.umn.edu/undocs/html/104-1981.htm
[40] Ibid

the Covenant.[41] Manfred Novak criticises this decision because of the deprivation of authors from communication services, such as telephone and post: "[…] Art. 20 does not in any way authorize restrictions on freedom of opinion guaranteed by Art. 19(1), nor does it permit interference with freedom of expression forbidden by Art. 19(2) and (3), such as prior censorship"[42], he also compares such actions to the killing or torturing of persons who advocates incitement to hatred. At the same time, Article 20, as a *lex specialis* to Article 19, should fall within the legitimacy of restrictions according to article 19(3), which mean to fulfil the category of a necessity for the respect of the rights of others and the protection of *orde public*.[43] He also states that the HRC should examine the contents of the messages of WG Party on matter of advocacy of hatred and whether Canadian sanctions were according to Article 19, but he agreed that such examination goes beyond admissibility proceedings, even though "[…] the result reached by the Committee - namely, that the case involved a permissible restriction on freedom of expression - is correct".[44] General Comment No. 34 proves that point of view stating: "Articles 19 and 20 are compatible with and complement each other. The acts that are addressed in article 20 are all subject to restriction pursuant to article 19, paragraph 3. As such, a limitation that is justified on the basis of Article 20 must also comply with article 19, paragraph 3".[45] It also states that difference between acts which fall within the scope of limitations by Article 20 and Article 19(3) consists in special obligation for States to have prohibited by law only those particular form of expressions prescribed in Article 20, consequently "[…] only to this extent that article 20 may be considered as *lex specialis* with regard to article 19".[46] Although, when the State limits freedom of expression "[…] it is necessary to justify the prohibitions and their provisions in strict conformity with article 19".[47] Generally, it should not be a problem for actions prescribed in Article 20 (2) to fall within the scope of Article 19 (3), since incitement to actual discrimination, hatred or violence would constitute a violation of the rights of others, for example, the right to respect for one's dignity or the right to freedom from discrimination, or to threat *orde public*.[48] Consequently, the case J.R.T. and W.G. Party v Canada and the General Comment No. 34 followed the main idea of the preparatory materials which was mentioned above that article 19 and 20 are closely interrelated and while article 19 provides general standards to freedom of expression and its' limitations, the

[41] Ibid
[42] Manfred Nowak, *U.N. Covenant on Civil and Political Rights: CCPR Commentary.* (N.P. Engel: 2005), 478
[43] Ibid
[44] Ibid
[45] "General comment no. 34, Article 19, Freedoms of opinion and expression. UN Human Rights Committee (HRC), 12 September 2011, CCPR/C/GC/34". UN HRC. Accessed 21 February 2020. https://www.refworld.org/docid/4ed34b562.html
[46] Ibid
[47] Ibid
[48] [48] Wibke K. Timmermann, *Incitement in International Law* (New York: Routledge, 2015), 121.

article 20 logically continues it providing particular types of speech which is unacceptable and should be prohibited by states, but such a prohibition should fully comply with the general requirements for limitations provided in Article 19.

The next significant case concerning public incitement to hatred is the Faurisson v France where the HRC looked at a similar situation from a totally different perspective. Robert Faurisson, a university professor from France, was convicted by France according to Article 20 (2) for denying the existence of Nazi gas chambers.[49] During the decision on the admissibility of the case, France claimed to apply the same reasoning as in the case J.R.T. and W.G. Party v Canada because "[…] the claim of the author based on article 19 was inadmissible as incompatible with the provisions of the Covenant"[50], but the Committee went against the previous decision and recognised the admissibility of the claim and applying Article 19 of the Covenant.[51] The court held that limitations of the freedom of expression was permissible according to the Article 19 (3) because "[…] the statements made by the author, read in their full context, were of a nature as to raise or strengthen anti-semitic feelings, the restriction served the respect of the Jewish community to live free from fear of an atmosphere of anti-semitism."[52] It is strange that the Committee decided to ignore Article 20 instead of using it as an additional or even main argument in this case, which is proved by the individual opinions of the Committee members, who tend to believe that Article 20 would be a better ground for the restriction of the freedom of expression.[53]

The case Ross v. Canada became an attempt of the Committee to clarify the controversial situation which was created by two previous cases. Malcolm Ross was a teacher in New Brunswick, who published a number of articles as well as made public statements on television, related to Judaism and Christianity, which includes international conspiracy lead by Jewish people and calls for all Christians to join the battle against them.[54] After complaints from parents of kids who were attended schools in that district and suffered poisoned environment there, Ross was replaced on the non-teaching position with the condition to refrain from the publication or distribution his views.[55] The Committee refused to declare the case inadmissible based on reference to the case J.R.T. and W.G. Party v Canada since "[…] restrictions on expression which may fall within the scope of article 20 must also be permissible under article 19, paragraph 3, which lays down requirements for determining whether restrictions on expression are

[49] "Robert Faurisson v. France, Communication No. 550/1993, U.N. Doc. CCPR/C/58/D/550/1993 (1996)". UN HRC. Accessed 22 February 2020. http://hrlibrary.umn.edu/undocs/html/VWS55058.htm
[50] Ibid, para. 7.8
[51] Ibid, para. 6.5
[52] Ibid, para. 9.6
[53] Ibid
[54] "Malcolm Ross v. Canada, Communication No. 736/1997, U.N. Doc. CCPR/C/70/D/736/1997 (2000)". UN HRC. Accessed 22 February 2020. http://hrlibrary.umn.edu/undocs/736-1997.html
[55] Ibid, para. 4.2, 4.3

permissible", so the restrictions based on article 20 is relevant, but its permissibility should be assessed on the merits.[56] The Committee decided that the restrictions imposed on the claimant were aimed to protect the rights and reputation of others, mainly "[…] the right to have an education in the public school system free from bias, prejudice and intolerance", so it is permitted under article 19, furthermore, since it was connected with the religious believes the article 20 (2) brings additional arguments to the limitation of the right to freedom of expression of the claimant.[57] Given that, in this case, the Committee found an average attitude between two previous cases, which represent opposite opinions, on the matter of interrelation of Articles 19 and 20 of the ICCPR regarding limitations of freedom of expression, thus falling within the scope of Article 20 may be an additional reason to restrict someone's right to freedom of expression.

The HRC examines other applications on violation of Article 20, but declare some of them inadmissible. Committee member Mr. Abdelfattah Amor in the individual opinion to the case of Maria Vassilari et al. v. Greece disagreed with the Committee stating that "[w]as it advocacy of racial hatred or just words? Was a racist offence committed or not? Was there the intention to offend, and who must prove this? These are questions that should be discussed, analysed and assessed on the merits. To say, subsequently, that the facts have been insufficiently substantiated for the purposes of admissibility is indefensible both legally and factually."[58] In the case of A.W.P v. Denmark, the HRC also declared an application inadmissible because of the "[…] lack of victim status due to the collective nature of the harm allegedly afflicted by the acts or omissions of the State party."[59] At the same time, in the case of Mohamed Rabbae v. Netherlands, the HCR does not examine the matter of the public incitement to hatred focusing merely on the assessing of mechanisms of its prohibition created by the State and stating that "[t]he obligation under article 20(2), however, does not extend to an obligation for the State party to ensure that a person who is charged with incitement to discrimination, hostility or violence will invariably be convicted by an independent and impartial court of law."[60] Thus, there is a small number of the case law which is directly related to the interpretation of the public incitement to hatred.

To sum up, Article 20 is a reflection of thoughts and fears of the states after the terrible events and outrageous violations of human rights during the Second World War and caused discussions on its content since its first draft. Despite all objections and fears of countries which

[56] Ibid, para. 10,6
[57] Ibid, para. 11.5, 11.6
[58] "Maria Vassilari et al. v. Greece, Communication No. 1570/2007, U.N. Doc. CCPR/C/95/D/1570/2007 (2009)". UN HRC. Accessed 22 February 2020. https://juris.ohchr.org/Search/Details/1482
[59] "A.W.P v. Denmark, Communication No. 1879/2009, U.N. Doc. CCPR/C/109/D/1879/2009 (2013)". UN HRC. Accessed 22 February 2020. https://juris.ohchr.org/Search/Details/1678
[60] "Mohamed Rabbae v. Netherlands, Communication No. 2124/2011, U.N. Doc. CCPR/C/117/D/2124/2011 (2017)". UN HRC. Accessed 22 February 2020. https://juris.ohchr.org/Search/Details/2153

represent Western democracies, the article was included in the ICCPR by the majority of developing and communist countries. Through the drafting process, there were different offers and changes to that article but its final version requires states to prohibit by law any propaganda of war and any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence, which is a quite unusual requirement within the human rights document. Its practical application is as controversial as the discussions during its adoption. The relevant case law, to some extent, resolve specific issues of application of Article 20. Thus it proves the relation between Article 19 of the ICCPR which provides the right to freedom of expression and Article 20, which restricts such freedom in certain situations. With that regard, Article 20 treated as *lex specialis* to the Article 19 and restrictions enforced based on Article 20 should comply with the general requirements to the restrictions of freedom of expression which is set in Article 19. Even though the further interpretation of Article 20 is still relevant for a better understanding of its scope in real conditions.

1.3 International Convention on Elimination of All Forms of Racial Discrimination

Within the international human rights instruments, the special place belongs to the International Convention on Elimination of All Forms of Racial Discrimination (henceforth - ICERD). This Convention was adopted as a response to one of the biggest problems of humanity, mainly racial, national and ethnic discrimination and the ideas of racial superiority or hatred which causes in its most radical forms apartheid, segregation and separation, and not only "[…] scientifically false, morally condemnable, socially unjust and dangerous" but also violates such general principles of the UDHR as "[…] that all human beings are born free and equal in dignity and rights and that everyone is entitled to all the rights and freedoms set out therein, without distinction of any kind, in particular as to race, colour or national origin".[61] The UN and State parties to ICERD assemble to set up norms and obligations for themselves to eliminate "[…] racial discrimination in all its forms and manifestations, and to prevent and combat racist doctrines and practices"[62] as fast as possible to ensure friendly and peaceful relations between nations, to secure "[…] understanding of and respect for the dignity of the human person", [63] and "[…] to build an international community free from all forms of racial segregation and racial discrimination".[64]

[61] "International Convention on the Elimination of All Forms of Racial Discrimination. UN General Assembly. 21 December 1965, United Nations, Treaty Series, vol. 660, p. 195" Accessed 23 February 2020. https://www.refworld.org/docid/3ae6b3940.html
[62] Ibid
[63] Ibid
[64] Ibid

The history of the adoption of the Article 4 of the ICERD, which provides the obligation for States to prohibit any incitement to hatred or discrimination based on the grounds of race or nationality, was less complicated and controversial than the history of a compatible article from ICCPR, even though their initial drafts were quite similar.[65] The first recommendation of the CoHR suggested to prohibit by law "all incitement to racial discrimination resulting in acts of violence as well as all acts of violence or incitement to such acts", later during the Third Committee of the General Assembly it was offered by Czechoslovakia to prescribe as punishable offence all "dissemination of ideas and doctrines based on racial superiority or hatred" without reference to violence and providing with that amendment political and ideological context.[66] That amendment was highly criticised by Scandinavian delegations which offered another option to make the article less restrictive and to secure from limitations all general civil rights which are listed in Article 5 of the ICERD.[67] Finally, after debates and redrafting, delegates reached a compromise and introduced the final draft which contained "with due regard clause" and became Article 4 of the ICERD, but even though its interpretation remains highly controversial.[68]

The Article 4 of the ICERD requires from its State parties "[…] to 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"[69]. This demand has two interesting and highly discussed points "immediate and positive measures" and "with due regard" clause. The Committee on the Elimination of Racial Discrimination in its General Recommendation No. 15 explained the meaning of the phrase "immediate and positive measures" it states that "[…] to satisfy these obligations, States parties have not only to enact appropriate legislation but also to ensure that it is effectively enforced. Because threats and acts of racial violence easily lead to other such acts and generate an atmosphere of hostility, only immediate intervention can meet the obligations of an effective response."[70] It emphasised again on the importance of actions of States to fight racial discrimination or hatred most efficiently and to eliminate its manifestations as soon as possible.

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[65] Karl Josef Partsch, "Racial Speech and Human Rights: Article 4 of the Convention on the Elimination of All Forms of Racial Discrimination", in *Striking a Balance: Hate Speech, Freedom of Expression and Nondiscrimination*, Sandra Coliver (ed.), (Article 19, London and Human Rights Centre, University of Essex, 1992), 21, 24

[66] Ibid. p. 24

[67] Ibid. p. 24

[68] Ibid. p. 24

[69] "International Convention on the Elimination of All Forms of Racial Discrimination. UN General Assembly. 21 December 1965, United Nations, Treaty Series, vol. 660, p. 195" Accessed 23 February 2020. https://www.refworld.org/docid/3ae6b3940.html (emphasis added)

[70] "Committee on the Elimination of Racial Discrimination, General Recommendation 15, Measures to eradicate incitement to or acts of discrimination (Forty-second session, 1993), U.N. Doc. A/48/18 at 114 (1994)". UN CERD. Accessed 23 February 2020. http://hrlibrary.umn.edu/gencomm/genrxv.htm

The other element, mainly "with due regard" clause, raises much more discussions among the State parties and scholars because it gives to States a possibility to decide on their own to what extent to restrict the rights and freedoms of their citizens for ensuring the execution of the Article 4 of the ICERD and usually the states take different approach depends on their legal system and historical background. Among the 182 State parties to ICERD, more than 20 introduced reservations or declarations to the Article 4 justifying this with a need of protection of freedom of expression, although most of the states have adopted to some extent legislations to enforce that article.[71] Karl Josef Partsch states that there are three schools which have a different approach on understanding and interpretation of "with due regard" clause. The first school, presented by the USA and the UK, which made reservations to the ICERD regarding that issue, considers the limitations of human rights, especially freedom of expression, unacceptable and unconstitutional even though it is used as a mechanism to combat racial discrimination and hatred.[72] The second school represented by Canada and the majority of Western European states, f. e. Italy, Belgium and France, believe that there should be some middle position according to which the law on the implementation of Article 4 would success to punish such offences and fight with the racial discrimination and hatred without infringing or jeopardising human rights and freedoms guaranteed by the UDHR and Article 5 of ICERD.[73] The third understanding of the "due regard" clause was mentioned during the seminar of the UN Human Rights Division which was held in Geneva in July 1979 and it reflects opinions that the clause has no limitations of its implementation to reach its purpose and that "[…] the freedom of expression can be reduced to zero"[74], even though it would violate Article 30 of the UDHR which prohibit "[…] the complete destruction of a human right through the exploitation of a limitation clause".[75] Given that, there are different approaches among the signatories of ICERD, which reflects the will of states to restrict the rights of their citizens and the extent of that restrictions to eliminate racial discrimination and hatred.

The Committee on Elimination of Racial Discrimination has adopted a number of opinions based on communications send to it by individuals concerning implementation and enforcement of the provisions of ICERD in their countries, where they stated that states violate or fail to enforce the provisions of the Convention, particularly Article 4. Thus, in the case, P.S.N v Denmark,

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[71] "International Convention on the Elimination of All Forms of Racial Discrimination. UN General Assembly. 21 December 1965, United Nations, Treaty Series, vol. 660, p. 195". UN. Accessed 24 February 2020. https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-2&chapter=4&clang=_en

[72] Karl Josef Partsch, "Racial Speech and Human Rights: Article 4 of the Convention on the Elimination of All Forms of Racial Discrimination", in *Striking a Balance: Hate Speech, Freedom of Expression and Non-discrimination*, Sandra Coliver (ed.), (Article 19, London and Human Rights Centre, University of Essex, 1992), 24

[73] Ibid, 25

[74] Ibid, 25

[75] "Universal Declaration of Human Rights". UN. Accessed 05 February 2020. https://www.un.org/en/universal-declaration-human-rights/index.html

concerning anti-Muslim statements, the Committee held that "[…] the Convention does not cover discrimination based on religion alone, and that Islam is not a religion practiced solely by a particular group, which could otherwise be identified by its "race, colour, descent, or national or ethnic origin.""[76], so it is contrary to Article 1 of the Convention, which provides the definition of "racial discrimination".

The other important issue in fighting racial discrimination is an effective investigation of such situations which was reviewed by the Committee in Gelle v Denmark case. The Committee stated that the law enforcement bodies failed to investigate a speech of Denmark politician who, while discussing the criminalisation of genital mutilation, compared Somali association with rapist and paedophiles, based on their practice of genital mutilation in the country of origin, on the matter of discriminative character.[77] The Committee states that such remarks "[…] can be understood to generalise negatively about an entire group of people based solely on their ethnic or national origin and without regard to their particular views, opinions or actions regarding the subject of female genital mutilation." and the fact of political discussion, during which such statements were made, does not protect it from investigation on the context of racial discrimination.[78] In the L.K. v Netherlands the Committee concluded that "[…] remarks such as "We've got enough foreigners in this street" and "They wave knives about and you don't even feel safe in your own street"" as well as petition "signed by a total of 28 local residents, it bore the inscription "Not accepted because of poverty? Another house for the family please?"" concerning Moroccan citizen residing in the Netherlands, constitutes racial discrimination and that is not enough for a State to "[…] claim that the enactment of law-making racial discrimination a criminal act in itself represents full compliance with the obligations of States parties under the Convention.".[79]

The other interesting case which also related to the statement made by a political figure is Jama v Denmark. Danish politician stated that she was attacked and "[…] her aggressors in the 1998 incident came out of the Somali clubs" and that "[…] was rage for blood"[80]. The Committee agreed that "[…] statement was merely a description of a specific sequence of events, in that she stated that the aggressors came out of the Somali clubs but did not make any disparaging or degrading remarks about persons of Somali origin.", thus, it does not fall within the scope of

[76] "P.S.N. v. Denmark, Comm. 36/2006, U.N. Doc. A/62/18, at 123 (2007)". UN CERD. Accessed 25 February 2020. http://www.worldcourts.com/cerd/eng/decisions/2007.08.08_PSN_v_Denmark.htm
[77] "Gelle v. Denmark, Comm. 34/2004, U.N. Doc. A/61/18, at 124 (2006)". UN CERD. Accessed 25 February 2020. http://www.worldcourts.com/cerd/eng/decisions/2006.03.06_Gelle_v_Denmark.htm
[78] Ibid
[79] "L.K. v. The Netherlands, Communication No. 4/1991, U.N. Doc. A/48/18 at 131 (1993)". UN CERD. Accessed 25 February 2020. http://hrlibrary.umn.edu/country/decisions/CERD-DLR.htm
[80] "Jama v. Denmark, Comm. 41/2008, U.N. Doc. A/64/18, at 123 (2009)". UN CERD. Accessed 25 February 2020. http://www.worldcourts.com/cerd/eng/decisions/2009.08.21_Jama_v_Denmark.htm

Article 4 of the ICERD.[81] The Committee does not find racial discrimination in the case Quereshi v. Denmark when during the annual meeting of the political party there was such statement among other: "[…] The State has given the foreigners work. They work in our slaughterhouses where they can easily poison our food and endanger the agricultural exports. Another form of terrorism is to break into our water-works and poison the water.".[82] Contrary to the opinion in L.K. v Netherlands, the Committee held that in such case "[…] a general reference to foreigners does not at present single out a group of persons, contrary to article 1 of the Convention, on the basis of a specific race, ethnicity, colour, descent or national or ethnic origin."[83] and can not be considered as a racial discrimination, furthermore the statement does not have threats or calls to violence as it was in L.K. v Netherlands.

One of the most recent cases regarding Article 4 of ICERD and "due regard" clause is TBB-Turkish Union in Berlin/Brandenburg v Germany. The claim was brought to the Committee because Germany did not find any racial discrimination in the interview of Thilo Sarrazin, the member of the Board of Directors of the German Central Bank, who stated that "[…] about 20% of the population, who are economically not needed" and "[…] this part of the population needs to disappear over time".[84] He also pointed out that "[…] a large number of Arabs and Turks in this city, […], have no productive function, except for the fruit and vegetable trade" and "[…] large segments are neither willing nor able to integrate".[85] He suggested that "[…] the solution to this problem can only be to stop letting people in" "[…] except for highly qualified individuals".[86] Also, he noted that he "[…] don't have to accept anyone who lives off the state and rejects this very state, who doesn't make an effort to reasonably educate their children and constantly produces new little headscarf girls" and that "[…] they encourage a collective mentality that is aggressive and ancestral".[87] He alerted: "The Turks are conquering Germany just like the Kosovars conquered Kosovo: through a higher birth rate."[88] After that interview, the biggest right-wing parties supported statements of Mr. Sarrazin.[89] The Office of Public Prosecution and General Prosecutor do not find any incitement to hatred and considered the interview as a "[…] contribution to the intellectual debate in a question that [was] very significant for the public" and the "[…] comments

[81] Ibid
[82] "Quereshi v. Denmark, Comm. 33/2003, U.N. Doc. A/60/18, at 142 (2005)". UN CERD. Accessed 25 February 2020. http://www.worldcourts.com/cerd/eng/decisions/2005.03.09_Quereshi_v_Denmark.htm
[83] Ibid
[84] "TBB–Turkish Union in Berlin/Brandenburg v. Germany, Communication No. 48/2010, UN Doc. CERD/C/82/D/48/2010, (Apr. 4, 2013)". UN CERD. Accessed 25 February 2020. http://www.worldcourts.com/cerd/eng/decisions/2013.02.26_TBB_v_Germany.pdf
[85] Ibid 2.1
[86] Ibid 2.1
[87] Ibid 2.1
[88] Ibid 2.1
[89] Ibid 2.8

were made in the context of a critical discussion about; inter alia, structural problems of economic and social nature in Berlin."[90] The Committee decided that statements of Mr. Sarrazin "[…] contain ideas of racial superiority, denying respect as human beings and depicting generalized negative characteristics of the Turkish population, as well as incitement to racial discrimination in order to deny them access to social welfare and speaking about a general prohibition of immigration influx except for highly qualified individuals, within the meaning of article 4 of the Convention."[91] Further, the Committee analyse whether the State used the "due regard" clause to protect that speech under the right to freedom of expression and admitted that State "[…] failed its duty to carry out an effective investigation" because the organs did not consider that statements threatening public peace and the Committee, having in mind broad support of right parties, believes that statements "[…] reach the threshold of dissemination of ideas based upon racial superiority or hatred".[92] Wibke K. Timmermann emphasised that the Committee "[…] did not conduct a real balancing exercise" between freedom of expression and restrictions according to Article 4 and thus, follows the third school presented by Partsch, although it "[…] would have been preferable for the Committee to undertake a more thorough balancing exercise, analysing the contents and context of the impugned statements".[93]

Given that, the Article 4 provides an obligation for State parties of ICERD to criminalise any racial, national or ethnic discrimination or hatred and to take actions to eradicate all incitement to, or acts of, such discrimination, with due regard to the rights of other people provided in Article 5 of the ICERD and UDHR. Even though it has a purpose to eliminate all forms of racial discrimination it has quite controversial "due regard" clause which was interpreted by the State parties and the Committee in some different ways, relating to the extent of allowed limitations of human rights. While analysing the case law on that issue, it is noticeable that the Committee reviews each situation separately trying to take into account not only circumstances of the case but also the context in which that circumstances happen and reaction which they cause in the society. Consequently, cases with similar situations have different outcomes, because similar actions happen in a different context and it changes the importance and value of all elements of the case. Thus, the contextual element is highly essential in determining the fact of racial discrimination and incitement.

[90] Ibid 2.3, 2.4
[91] Ibid para 12.7
[92] Ibid 12.8
[93] Wibke K. Timmermann, *Incitement in International Law* (New York: Routledge, 2015) p. 140

1.4 European Instruments Related to Public Incitement to Hatred

The devastation of Europe and spreading of anti-democratic ideologies at the beginning of the twentieth century became a solid ground for states which want to maintain the rule of law and protect human rights in the creation of the Council of Europe (henceforth - CoE), a regional organisation where the European States would cooperate for the protection of abovementioned values. Nowadays, it has 47 member countries from European continent and consist of diverse range of organs, which dedicated to discussions, making decisions and recommendations, monitoring and dispute resolution, although directly related to the issue of public incitement to hatred and discrimination and freedom of expression is European Commission against Racism and Intolerance (henceforth - ECRI) and European Court of Human Rights (henceforth - ECtHR), which reviews complains from the citizens of states which is parties to one of the most important human rights document the Convention for the Protection of Human Rights and Fundamental Freedoms, also known as European Convention on Human Rights (henceforth - ECHR), which was adopted under the umbrella of Council of Europe and became the first instrument which made the provisions of UDHR obligatory.

The ECRI is a human rights monitoring body, which the main scope of competences derives from its name, such as racism, intolerance and discrimination, based on monitoring it makes reports and issues recommendations for the Member States. The first document related to the incitement to hatred and discrimination is the ECRI General Policy Recommendation No. 6 on Combating the dissemination of racist, xenophobic and antisemitic material via the internet.[94] That documents states that ECRI is "deeply concerned by the fact that the Internet is also used for disseminating racist, xenophobic and antisemitic material, by individuals and groups aiming to incite to intolerance or racial and ethnic hatred" and calls member States "[…] to act efficiently against the use of the Internet for racist, xenophobic and antisemitic aims", "[…] ensure that relevant national legislation applies [to such acts] and prosecute those responsible for this kind of offences", "[…] support existing [and new] anti-racist initiatives on the Internet", "[…] clarify […] the responsibility of content host and content provider and site publishers" and "[…] support the self-regulatory measures taken by the Internet industry".[95] General Policy Recommendation N°7, provides a definitions of racism, direct and indirect discrimination and advice to a member States to penalise intentional public incitement to violence, hatred or discrimination, public insults and defamation or threats "[…] against a person or a grouping of persons on the grounds of their

[94] "ECRI General Policy Recommendation N°6 on Combating the dissemination of racist, xenophobic and antisemitic materiel via the internet (15 December 2000)". Council of Europe, ECRI. Accessed 26 February 2020. https://rm.coe.int/ecri-general-policy-recommendation-no-6-on-combating-the-dissemination/16808b5a8d

[95] Ibid

race, colour, language, religion, nationality, or national or ethnic origin", as well as "[…] the public expression, with a racist aim, of an ideology which claims the superiority", "[…]the public denial, trivialisation, justification or condoning, with a racist aim" of international crimes, public dissemination, distribution, production or storage materials containing manifestations of abovementioned ideas, "[…] the creation or the leadership of a group which promotes racism" support and participation in its activities.[96] The ECRI also adopted a recommendation which is dedicated to the hate speech, where it provides ten measures to improve and to strengthen the fight against the hate speech, among it is withdrawal restrictions to Article 4 of the ICERD and Article 20 of the ICCPR, ratification of the Additional Protocol to the Convention on Cybercrime and few other international instruments, research the conditions, extent and harm of the hate speech, provide support for targeted by hate speech, take measures to increase public awareness about hate speech, "[…] use regulatory powers with respect to the media […] to promote action to combat the use of hate speech and to challenge its acceptability, while ensuring that such action does not violate the right to freedom of expression and opinion", "[…] clarify the scope and applicability of responsibility under civil and administrative law for the use of hate speech […] while respecting the right to freedom of expression and opinion" and "[…]take appropriate and effective action against the use, in a public context, of hate speech […] through the use of the criminal law provided that no other, less restrictive, measure would be effective and the right to freedom of expression and opinion is respected".[97] It is also worth mentioning the Additional Protocol to the Convention on Cybercrime, concerning the criminalisation of acts of a racist and xenophobic nature committed through computer systems. This protocol introduces additional definition to the Convention on Cybercrime, mainly ""*racist and xenophobic material*" means any written material, any image or any other representation of ideas or theories, which advocates, promotes or incites hatred, discrimination or violence, against any individual or group of individuals, based on race, colour, descent or national or ethnic origin, as well as religion if used as a pretext for any of these factors". Also, it provides the measures for the parties which should be taken concerning the dissemination of such material through computer systems, racist and xenophobic motivated threat and insult and denial, gross minimisation, approval or justification of genocide or crimes against humanity, as

[96] "ECRI General Policy Recommendation N°7 (revised) on national legislation to combat racism and racial discrimination (adopted: 13 December 2002; revised: 07 December 2017)". Council of Europe, ECRI. Accessed 26 February 2020. https://rm.coe.int/ecri-general-policy-recommendation-no-7-revised-on-national-legislatio/16808b5aae

[97] "ECRI General Policy Recommendation N°15 on Combating Hate Speech (08 December 2015)". Council of Europe, ECRI. Accessed 26 February 2020. https://rm.coe.int/ecri-general-policy-recommendation-no-15-on-combating-hate-speech/16808b5b01

well as aiding and abetting such acts.[98] Given that, the ECRI has an important role in monitoring and analysing situations concerning discrimination within Council of Europe member States, and based on that to issue a general and individual recommendations concerning that subject to help States to improve their legislation and to increase the effectiveness of their actions in fighting racial discrimination and intolerance.

Probably, one of the most significant achievements of the Council of Europe is an adoption of the European Convention on Human Rights. Concerning the drafting process of the ECHR, creating the set of rights which provides was not a problematic issue, since it was based on the UDHR but the more problematic was its intention to became innovative in the enforcement of provided rights.[99] It was an intention to create a regional judiciary body which offers a possibility to bring a case against a State to establish the violation of the ECHR and consequently human rights, by another State or even to give such a right to individuals.[100] The process of drafting the mechanism of such institution faced significant opposition from the members who believed that it is not necessary[101], it seems to be a logical reaction to the possibility of allowing individuals to sue a State in the independent regional court. Nevertheless, these provisions were adopted with the "[…] compromise, that the right of individual petition and the jurisdiction of the Court were to be subject to optional declarations."[102] Since the ECHR has quite broad wording of the rights, the European Court of Human Rights while examining cases also executes the interpretation of the norms of the Convention and findings in its decisions became a part of ECRH system.

The ECHR and its Optional Protocols protect all fundamental human rights, the prohibition of the death penalty, rights of aliens, right to property, education and free elections and a general prohibition on discrimination. The other important element of the Convention is the concept of the "margin of appreciation", which "[…] is most often invoked in fields where there is no consensus across the Council of Europe about how a matter should be addressed"[103] and reflects the subsidiary role of the Court. Thus it allows the Court to uphold different decisions on the same subject but in different States since they have a margin of appreciation regarding securing and guaranteeing human rights on their territory.

Regarding the public incitements to hatred, the ECHR, unlike the ICCPR and the ICERD, does not have an obligation of direct prohibition of such acts, although in the case Erbakan v

[98] "Additional Protocol to the Convention on cybercrime, concerning the criminalisation of acts of a racist and xenophobic nature committed through computer systems (28 January 2003)" Council of Europe. Accessed 27 February 2020. https://www.coe.int/en/web/conventions/full-list/-/conventions/rms/090000168008160f
[99] Council of Europe. *The Conscience of Europe: 50 Years of the European Court of Human Rights.* (Council of Europe, London, 2010) https://www.echr.coe.int/Documents/Anni_Book_Chapter01_ENG.pdf, 23
[100] Ibid
[101] Ibid
[102] Ibid
[103] Article 19 *Prohibiting incitement to discrimination, hostility or violence*. Free World Centre, London: 2012. 14

Turkey the Court stated that "[…]it may be considered necessary in certain democratic societies to sanction or even prevent all forms of expression which spread, incite, promote or justify hatred based on intolerance (including religious intolerance), provided that any 'formalities', 'conditions', 'restrictions' or 'penalties' imposed are proportionate to the legitimate aim pursued."[104] While reviewing cases the Court usually takes one out of three approaches to access the conformity of measures taken by state with the provisions and principles of the ECHR: applying margin of appreciation or three-part test, applying Article 10 (2) of the ECHR (limitations to freedom of expression) or applying Article 17 of the ECHR (prohibition of abuse of rights).[105] The first approach uses a margin of appreciation or three-part test to evaluate whether the violation of Article 10 of the ECHR is prescribed by law, have a legitimate aim and necessary in a democratic society. The Court held in the case Thorgeirson v Iceland that 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" and that such limitation should be only executed based on requirements of Article 10 (2) of the ECHR, and thus it was found a violation of Article 10 because of the sentence of person who was writing in the newspaper about violence of police forces and fulfilling the role of "public watchdog".[106] Another case where the Court was using the margin of appreciation is the Handyside v the United Kingdom, it states that the freedom of expression "[…] is applicable not only to "information" or "ideas" that are favourably received or regarded as inoffensive or as a matter of indifference but also to those that offend, shock or disturb the State or any sector of the population."[107] However, the Court found no violation of Article 10 in actions of the State, mainly seizure of the books for children older than twelve years which include chapters about sex and drugs, relying on its margin of appreciation in the protection of public moral and stating that the actions were necessary and proportional in that case.[108]

The second approach is applying of Article 10 (2), which states that "[…] much harmful expression falls within the scope of the protection of Article 10(1), but is subject to the permissible grounds for restriction under Article 10(2) […] the ECtHR has taken a case-by-case approach to assess the need for the restriction on the expression "in the light of the case as a whole.""[109] The practice of the Court emphasises that "[…] the intent of the applicant is central to their determination", whether he want to spread public incitements to hatred or to take part in the public

[104] Ibid
[105] Ibid
[106] "Case of Thorgeir Thorgeirson v. Iceland, App No. 13778/88, 25.06.1992". ECtHR. Accessed 27 February 2020. http://hudoc.echr.coe.int/eng?i=001-57795
[107] "Case of Handyside v the United Kingdom, App. No. 5493/72, 07 December 1976". ECtHR. Accessed 27 February 2020. http://hudoc.echr.coe.int/eng?i=001-57499
[108] Ibid
[109] Article 19 *Prohibiting incitement to discrimination, hostility or violence*. Free World Centre, London: 2012. 15

discussion of an important matter.[110] The second significant element is the content of expression, thus in Erbakan v Turkey the Court "[…] attaches particular importance to political discourse or matters in the public interest, and is reluctant to impose restrictions in this regard"[111]. In the cases concerning religion the ECHR tend to provide a broad margin of appreciation for the States in examination of lawfulness of limitations on expressions, thus in Gunduz v Turkey the Court held that "[…] certain margin of appreciation is generally available to the Contracting States when regulating freedom of expression in relation to matters liable to offend intimate personal convictions within the sphere of morals or, especially, religion".[112] Additionally, in the case Otto-Preminger-Institut v Austria it was concluded that to the duties and responsibilities which goes together with the enjoyment of the rights "[…] may legitimately be included an obligation to avoid as far as possible expressions that are gratuitously offensive to others and thus an infringement of their rights, and which therefore do not contribute to any form of public debate capable of furthering progress in human affairs"[113]. There is also a difference between facts and personal judgements, which is not possible to prove.[114] The context of the expression is an important element as well. The Court pointed out next elements: the speaker's status in the society (f.e. politician, journalist, teacher), the status of the targeted persons by remarks in issue and the dissemination and political impact (f.e. type of broadcasting programme, impact on the audience, whether it was in the context of public interest debates and the presence of counterbalancing views).[115]

The third approach is an application of Article 17 of the ECHR to exclude the application of Article 10. The Article 17 provides that: "Nothing in this Convention may be interpreted as implying for any State, group or person any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms set forth herein or at their limitation to a greater extent than is provided for in the Convention."[116] This Article is used by Court when the expression in the case is racist or xenophobic in nature, for example in the case of Norwood v the United Kingdom, where the poster of the Twin Towers in flame, the words "Islam out of Britain – Protect the British People" and a symbol of a crescent and star in a prohibition sign was displayed

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[110] Ibid
[111] Erbakan v Turkey para. 55, cited from: Article 19 *Prohibiting incitement to discrimination, hostility or violence*. Free World Centre, London: 2012.
[112] "Case of Gunduz v Turkey, App. No. 35071/97, 04 December 2003". ECtHR. Accessed 27 February 2020. http://hudoc.echr.coe.int/eng?i=001-61522
[113] "Case of Otto-Preminger-Institut v Austria, App. No. 13470/87, 20 September 2020". ECtHR. Accessed 27 February 2020. http://hudoc.echr.coe.int/eng?i=001-57897
[114] "Case of Pedersen and Baadsgaard v. Denmark, App. No. 49017/99, 19 June 2006". ECtHR. Accessed 27 February 2020. http://hudoc.echr.coe.int/eng?i=001-67818
[115] Article 19 *Prohibiting incitement to discrimination, hostility or violence*. Free World Centre, London: 2012. 15
[116] "European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14, 4 November 1950". Council of Europe, ETS 5. Accessed 27 February 2020. https://www.coe.int/en/web/conventions/full-list/-/conventions/rms/0900001680063765

from the window. The Court agrees with the national courts that it amounted to a public expression of an attack on all Muslims in the United Kingdom and states that such action falls within the Article 17 and does not enjoy the protection of Article 10.[117] The same Article also implies when the expression includes anti-Semitism or Holocaust denial as it was stated in the case of Garaudy v France that "[…] The denial or rewriting of this type of historical fact undermines the values on which the fight against racism and anti-Semitism are based and constitutes a serious threat to public order. Such acts are incompatible with democracy and human rights because they infringe the rights of others."[118] The Court defines a scope of actions which fall within the exclusion from protection of Article 10 based on Article 17 as "[…] the aim of the offending actions must be to spread violence or hatred, to resort to illegal or undemocratic methods, to encourage the use of violence, to undermine the nation's democratic and pluralist political system, or to pursue objectives that are racist or likely to destroy the rights and freedoms of others".[119]

Furthermore, the Court pays attention to the sanctions which were imposed on the persons to establish whether the proportionality requirement was satisfied. When the State imposes a criminal conviction, the Court states that "[…] does not accept the Government's argument that the limited nature of the fine is relevant; what matters is that the journalist was convicted."[120], thus the fact of application of criminal measures are enough to violate the principle of proportionality. Regarding administrative sanctions such as excluding from the political service and prohibition to take part in some political organisations the Court also found disproportionate.[121] The Court emphasises that the criminal conviction should not be used in such cases unless other "[…] means of intervention and rebuttal, particularly through civil remedies" is available.[122]

Given that, there is a wide range of organisations and instruments which is dedicated to the protection of human rights. The Council of Europe is the biggest European organisation which the main goal is to promote human rights and the rule of law, at the same time, under its umbrella the other important organisations were created and multinational treaties were adopted. The European Commission against Racism and Intolerance monitors and issues recommendations to the member states of the Council of Europe regarding the measures on improvement legislation and practice

[117] "Case of Norwood v the United Kingdom, App. No. 23131/03, 16 September 2004". ECtHR. Accessed 27 February 2020. http://hudoc.echr.coe.int/eng?i=001-67632
[118] "Case of Garaudy v France, App. No. 65831/01, 26 June 2003". ECtHR. Accessed 27 February 2020. http://hudoc.echr.coe.int/eng?i=001-23829
[119] "Case of Lehindeux and Isorni v France, App. No. 24662/94, 23 September 1998". ECtHR. Accessed 27 February 2020. http://hudoc.echr.coe.int/eng?i=001-58245
[120] "Case of Jersild v Denmark, App. No. 15890/89, 23 September 1994". ECtHR. Accessed 27 February 2020. http://hudoc.echr.coe.int/eng?i=001-57891
[121] "Case of Incal v Turkey, App. No. 22678/93, 9 June 1998". ECtHR. Accessed 27 February 2020. http://hudoc.echr.coe.int/fre?i=001-58197
[122] "Case of Lehindeux and Isorni v France, App. No. 24662/94, 23 September 1998". ECtHR. Accessed 27 February 2020. http://hudoc.echr.coe.int/eng?i=001-58245

on fighting discrimination and ensuring equality for instance through eliminating hate speech and public incitements to hatred. The most important achievement of the Council of Europe is an adoption of the ECHR and creation on its enforcement the European Court of Human Rights, where an individual can like an application in case a State violates rights provided in the ECHR and its Optional Protocols to which a State is a party. Even though the ECHR does not have a specified provision on the prohibition of public incitement to hatred that issue develops through the practice of the Court, where it finds three approaches while examining cases about limitation of freedom of expression and particularly public incitements to hatred. Depending on the approach, there is a different attitude of the Court to the situation in cases. Thus while applying the margin of appreciation and the provision of Article 10 (2), it tends to protect freedom of expression especially when it goes to the assessing the level of proportionality of the action of the state to motivate it to find a balance and to use less restrictive measures while reaching the aim of guaranteeing public order and rights of others. The Court uses the third approach mainly Article 17 in the situation where the person wants to abuse freedom of speech to harm other persons, democracy or principles and values of the ECHR. As a result, the Court declares such application inadmissible depriving it of protection against measures imposed by State and a right to challenge it.

1.5 Ukrainian Legislation

Ukraine is a party to all abovementioned documents such as ICCPR, ICERD, ECHR, Additional Protocol to the Convention on Cybercrime and makes no reservations or declarations concerning articles which provide a prohibition of public incitement to hatred. Furthermore, the Ukrainian Soviet Socialist Republic was engaged in drafting of ICCPR and ICERD. Nowadays, having in mind annexation of Crimea and armed conflict on Eastern Ukraine, which cause almost 1,5 million of internally displaced persons[123], and the aim of European integration it is relevant to analyse the provisions concerning public incitements to hatred.

Ukrainian Criminal Code has one Article No. 161 (1) dedicated to that matter, and it criminalises: "[…] willful actions inciting national, racial or religious enmity and hatred"[124], while next paragraphs number two and three provide more severe punishment for: "[…] all the above actions when accompanied by violence, deception or threats, or committed by an official"[125] and

[123] "Information for Internally displaced persons. Ministry of Social Policy of Ukraine" Accessed 28 February 2020. https://www.msp.gov.ua/timeline/Vnutrishno-peremishcheni-osobi.html
[124] "ECRI Report on Ukraine (fifth monitoring cycle), 19 September 2017". Council of Europe, ECRI. Accessed 28 February 2020. https://rm.coe.int/fifth-report-on-ukraine/16808b5ca8
[125] Ibid

"[…] actions provided in paragraphs 1 and 2 committed by organized group or caused grave consequences".[126] Additionally, Article 300 of the Criminal Code prohibits "[…] Importation, making or distribution of works that propagandize violence and cruelty, racial, national or religious intolerance and discrimination."[127] Furthermore, there is no information about practice of application of that articles concerning public incitements to hatred, since there is no final judgement of the court concerning that matter and law enforcement bodies has no separate data regarding that issue and since Article 161 of the Criminal Code includes other offences related to discrimination it is not possible to find any statistics related mainly to the prosecution of public incitements to hatred.[128] Although it should be noted that there are few grounds, which is used for discrimination and inciting to it, for example internally displaced persons usually blamed for supporting separatism and terrorism on Eastern Ukraine, there is a significant problem of integration of Roma. Also, the conflict between Ukraine and Russia affected religion and created tensions between Ukrainian and Russian Orthodox, the separate issue is acceptance of the LGBT group.

Concerning administrative and civil remedies, Ukrainian legislation does not have any administrative misconducts concerning public incitement to hatred as well as any special procedure for such cases within the civil jurisdiction and the practice of sharing or shifting the burden of proof in the cases on discrimination is not provided by law. At the same time, in the media, there is a National Council of Ukraine on Television and Radio Broadcasting, which empowered to monitor and impose sanction on broadcasting companies for having on-air anything which incites to hatred or violence.

Given that, Ukrainian legislation is not developed enough to covers all possible type of acts which can publicly incite to hatred, such as public expressions with the racist aim, denial, trivialisation or justification of international crimes, creating and leadership of the group which promotes racism. Legislation has only one provision which theoretically could cover all abovementioned actions, but having in mind that there was no conviction and court decision based on that article, it becomes evident that there should be amendments to the law which would provide an extensive list of prohibited actions as well as separate punishment depends on its danger. Also, the changes needed in the administrative and civil procedures, concerning shifting the burden of proof, establishing special procedures and other less strict than criminal remedies in that type of cases.

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[126] Alexander Verkhovsky. *Criminal Law on Hate Crime, Incitement to Hatred and Hate Speech in OSCE Participating States*. The Hague: SOVA Center, 2016, 133 https://www.sova-center.ru/files/books/osce-laws-eng-16.pdf

[127] Ibid

[128] "ECRI Report on Ukraine (fifth monitoring cycle), 19 September 2017". Council of Europe, ECRI. Accessed 28 February 2020. https://rm.coe.int/fifth-report-on-ukraine/16808b5ca8

1.6 Summary on Chapter

The development of the provisions dedicated to fighting public incitements to hatred similarly to all human rights instruments was influenced by the results of the First and mainly Second World War. The millions of victims, terrible acts against humanity, genocide and war crimes, as well as desolated Europe, became a significant reason to create a new effective international system of cooperation between states. It is logical that having in mind a role of media and propaganda in the death of millions of people and especially Holocaust the drafters of that new human rights documents were intended to eliminate any possibility of repetition of such events.

The first intention to ban public incitements to hatred was announced by the delegation from the USSR during the drafting process of the Universal Declaration of Human Rights, even though it was focused only on the dissemination of fascist and Nazi ideas. Despite that offer was rejected the UDHR become the first international document purely dedicated to human rights, which become the corner-stone for the next human rights instruments, nevertheless it imposes no obligation for the State parties. While the drafters decided to exclude the offer to prohibit fascist and Nazi ideology, they created an interrelated system of articles, which guarantees freedom of expression (Article 19) and at the same time provides certain limitations for the using rights, such as freedom from discrimination and incitement to such discrimination (Article 7), limitations provided by law on ensuring rights and freedoms of others, public moral, order and welfare in the democratic society (Article 29 (2)), and prohibition to use the rights to destruct rights and freedoms provided in UDHR (Article 30), such measures theoretically covers the issue of public incitement to hatred, because it leads to discrimination, violation of the rights of others and it is contrary to the principles of UDHR.[129]

The International Covenant on Civil and Political Rights was created with the primary purpose to enforce the rights provided in the UDHR for the States parties and to guarantee their fulfilment through its obligatory form and a judicial mechanism to contest their violation. Firstly, it was an intention to create one Covenant but after discussion of the nature of the rights which should be included, it was decided to separate civil and political rights from economic, social and cultural. During the drafting of the ICCPR, the delegation from the USSR again offered to prohibit any fascist and Nazi ideology, but after the problematic discussion, the draft was changed and shaped into its current form and was adopted with a disagreement from the USA and majority of Western European countries, who saw in that provision a threat to the freedom of expression. The

[129] "Universal Declaration of Human Rights". UN. Accessed 05 February 2020. https://www.un.org/en/universal-declaration-human-rights/index.html

adoption of the Article was supported mainly by communist and developing countries. Article 20 (2) of the ICCPR provides that any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law.[130] Later the Human Rights Committee interpreted the scope and limitations of that article. Thus, Article 20 should be considered as *lex specialis* to Article 19 (freedom of expression), which arises from the preparatory materials and the logic of writing one article after another.[131] At the same time, as a special norm which impose limitations to the freedom of expression it has to comply with the general requirements for limitation, which should be necessary for the respect of the rights or reputations of others or the protection of national security, public order, public health or morals.[132] Unfortunately, having in mind, the opposite approach which was used by the court in similar cases, further interpretation is needed.

The Convention on Elimination of All Forms of Racial Discrimination is a document which is dedicated to the problems of racial discrimination and covers issues of public incitement to hatred in this field. This Convention was intended to solve as soon as possible such problematic issue as racial discrimination and the State parties were more purposeful while creating that document, despite a discussion regarding the Article 4, which USA and Western European countries, similarly to Article 20 of the ICCPR, considered as a threat to the freedom of expression. Although, Article 4 of the ICERD provides that State parties 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.[133] This measures should be executed with due regard to the principles of the UDHR and Article 5, which provides the set of fundamental rights. "With due regard" clause was a result of compromise during the drafting of the Convention and created a space for the State parties to find a better solution for a particular situation, which leads to a different interpretation of that norms and consequently different results. The Committee on the Elimination of Racial Discrimination has the power to examine complains from individuals concerning the measures which were imposed by a State. With that regard, the Committee tends

[130] "International Covenant on Civil and Political Rights". UN. Accessed 19 February 2020. https://www.ohchr.org/en/professionalinterest/pages/ccpr.aspx
[131] "General comment no. 34, Article 19, Freedoms of opinion and expression. UN Human Rights Committee (HRC), 12 September 2011, CCPR/C/GC/34". UN HRC. Accessed 21 February 2020. https://www.refworld.org/docid/4ed34b562.html
[132] Ibid
[133] "International Convention on the Elimination of All Forms of Racial Discrimination. UN General Assembly. 21 December 1965, United Nations, Treaty Series, vol. 660, p. 195". UN. Accessed 23 February 2020. https://www.refworld.org/docid/3ae6b3940.html

to take an individual approach while assessing a case to establish whether actions of a State was sufficient to eliminate a fact of racial discrimination and whether it fulfils its obligations according to Article 4 of the ICERD. While analysing the practice of the Committee, it becomes noticeable that the contextual element has one of the most essential places in establishing a fact of racial discrimination, which was proven by different outcomes in cases where the wording was similar but the personalities and social context were different.

The European system related to the human rights is extensive. Under the umbrella of the Council of Europe, the regional organisation dedicated to the development and maintenance the rule of law and human rights the number of multinational instruments was adopted and created a number of organisation which the main goal to monitor, recommend and help the European states to comply with the European standards of human rights. The European Commission against Racism and Intolerance is an observation body which is entitled to monitor the members of the European Council on the matter of existing laws on the equality and its enforcement and to issue recommendations based on the collected data with advice on the improvement of their legislation. Also, it issues general recommendations on the topic of public incitements to hatred as well, for example, definition for direct and indirect discrimination, racist and xenophobic materials, measures which states can adopt to increase an efficiency in fighting hate speech and incitements in the media and the internet, as well as proposition on criminalisation of such acts.

The European Convention on Human Rights is one of the most essential and authoritative multinational instrument in the field of human rights. It was the first convention which allows individuals to file a claim against a State to the special judiciary body and in case of violation to receive compensation. The drafters of the ECHR intentionally broadly write the rights and freedoms and provide for the States a margin of appreciation, a unique mechanism on the implementation of the Conventional provisions, which allows adapting the broad definition of rights to the conditions within particular State. The ECHR does not have separate provision on prohibition of public incitements to hatred, but the Article 10 which provides the right to freedom of expression, has a second paragraph which allows for the States to impose formalities, conditions, restrictions or penalties, which is provided by law, necessary in democratic society and adopted "[…] in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary."[134], so the acts of public

[134] "European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14, 4 November 1950". Council of Europe, ETS 5. Accessed 27 February 2020. https://www.coe.int/en/web/conventions/full-list/-/conventions/rms/0900001680063765

incitements to hatred can fall within these limitations. Also, Article 17 of the ECHR prohibit the execution of rights aimed at the destruction of the rights and more severe limitations than it is allowed in that Convention.

Given that, the European Court on Human Rights takes on out of three approaches when examining the violation of the freedom of expression, the margin of appreciation, Article 10 (2) and Article 17 of the ECHR.[135] Regarding the practice of the European Court on Human Rights, in the cases where the freedom of speech was used to incite violence or hatred, the court applies Article 17 of the ECHR and declares the case inadmissible, depriving the claimant of the right to contest the decision of the State. When the situation is more complicated, the Court assesses it on merits and usually applies three-step test, to establish whether the limitations on freedom of speech was legal, reasonable and proportional. When the States failed to balance between freedom of speech and its restrictions, the Court declares the measures disproportionate and consequently violations of freedom of expression. There are general recommendations, which directed to provide more options for States to pass the proportionality test, such as avoiding criminal prosecution if it is possible in the case and using administrative, civil and other remedies to solve the conflict between freedom of expression and the rights of others or national interests.

The analysis of the Ukrainian legislation shows that the issue of public incitements to hatred is not developed. The law provides only criminal responsibility for the intentional acts which incites racial, national or religious enmity and hatred, but on practice, there is no single court decision which uses that ground.[136] The law enforcement bodies tend to use other articles of Criminal Code, such as hooliganism because it is easy to prove, but it has less severe punishment. Also, there are no specialised administrative or civil remedies which would deal with public incitements to hatred, except in the media sphere where the State can dismiss the broadcasting license for such acts during the ether. Having in mind the massive number of internally displaced persons and religious controversy which was caused by the annexation of Crimea and armed conflict on the Eastern Ukraine, the importance of developing the state policy on hate speech and public incitements to hatred is difficult to overestimate.

Given that, the international and regional instruments which are analysed above does not provide a clear definition or instruction on establishing whether the act constitutes public incitement to hatred or not. The international judiciary bodies examine such a situation on a case-by-case basis, which is needed to establish and assess all facts of the case and its context. Although, there are some elements which are common in all cases, such as targeted group based on some

[135] Article 19 *Prohibiting incitement to discrimination, hostility or violence*. Free World Centre, London: 2012. 14
[136] "ECRI Report on Ukraine (fifth monitoring cycle), 19 September 2017". Council of Europe, ECRI. Accessed 28 February 2020. https://rm.coe.int/fifth-report-on-ukraine/16808b5ca8

common ground like race, religion or nationality, the form of expression which is directed against such group and leads to the intense anticipation, discrimination or violence of such group. At the same time, there are contextual elements, which should be assessed in each separate situation, such as the personality of the speaker, the content and context of expression, and other relevant circumstances, which will be analyzed in next chapter.

2. STRUCTURE, ELEMENTS AND PRACTICAL CHALLENGES OF ESTABLISHING THE PUBLIC INCITEMENT TO HATRED

This chapter will focus on practical implementation and interpretation of the public incitement to hatred. The different approaches in the understanding of structure and elements of the public incitement to hatred will be analysed. The elements will be established based on the international and regional human rights instruments, the case-law of relevant judicial bodies, recommendations of human rights organisations and doctrine. The best elements and structures will be selected and unified into the new approach for the defining incitement to hatred, which would be easy to implement and to use in the national legal systems.

2.1 Different Approaches to Understanding Incitement to Hatred

The phenomenon of the public incitement to hatred is covered by the number of international and regional instruments, such as UDHR, ICCPR, ICERD, ECHR. However, each document has its objectives and, consequently, the specific wording of the provision regarding the public incitement to hatred. Thus, ICCPR is an international instrument which covers a wide scope of civil and political rights and embodies principles of the UDHR, has a universal character and requires States to prohibit by law "[a]ny advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence […]"[137]. At the same time, ICERD, the convention which has a specific objective to eliminate racial discrimination, has the provision on incitement to hatred influenced by the main aim of all document and covers only "[…] 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"[138]. Furthermore, the ECHR does not have any separate provision dedicated to public incitement to hatred, but provides general limitations to freedom of expression, based on which the States could prohibit incitements to hatred on their discretion. Although, the Faurisson v France case gives an explanation of the inefficiency of precise defining incitement to hatred. Thus, in the individual opinion of the Evatt, Kretzmer and Klein it is stated that:

> […] there may be circumstances in which the right of a person to be free from incitement to discrimination on grounds of race, religion or national origins cannot

[137] "International Covenant on Civil and Political Rights. Chapter IV. Human Rights, 16 December 1966". UN Treaty Collection. Accessed 23 March 2020. https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-4&chapter=4&clang=_en

[138] "International Convention on the Elimination of All Forms of Racial Discrimination. UN General Assembly. 21 December 1965, United Nations, Treaty Series, vol. 660, p. 195". UN. Accessed 23 March 2020. https://www.refworld.org/docid/3ae6b3940.html

> be fully protected by a narrow, explicit law on incitement that falls precisely within the boundaries of article 20, paragraph 2. This is the case where, in a particular social and historical context, statements that do not meet the strict legal criteria of incitement can 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.[139]

Since that, it is more efficient for the protection from incitement to define its elements which could be used while assessing whether a particular expression has patterns to constitute an incitement or not. It gives a possibility to use international treaties as well as national laws as living instruments which will be relevant within a long time and in different circumstances. There are some approaches on the understanding of the structure and elements of the incitement to hatred which is used by the judicial bodies of the particular international instrument, like the HRC for the ICCPR or the ECtHR for the ECHR.

Based on the wording of the Article 20 (2) of the ICCPR and related case law there is a concept of understanding of elements of the incitement to hatred which was introduced in the Camden Principles on Freedom of Expression and Equality. This document was created by the ARTICLE 19 as a result of discussion between UN officials, academic experts in relevant areas and civil society, which aimed to provide a better and similar understanding of the relation of freedom of expression and equality and constitutes a set of principles and recommendations for the States. The Principle 12 provides elements of the incitement to hatred stated in Article 20 (2) of the ICCPR and its definitions, such as "advocacy", "incitement" and "hatred" or "hostility"[140]. Thus, the term "advocacy" means "[…] an intention to promote hatred publicly towards the target group"[141], so the first element is an intent of the person to incite hatred. The next term is an incitement itself, and the Camden Principles states that it should be not only an expression about a national, racial or religious group but also such an expression should create "[…] an imminent risk of discrimination, hostility or violence against persons belonging to those groups"[142]. It provides two other elements of the public incitement to hatred, mainly incitement and causal link, which is essential to establish the consequences of the hate speech or the likelihood of a harmful

[139] "Robert Faurisson v. France, Communication No. 550/1993, U.N. Doc. CCPR/C/58/D/550/1993 (1996)". UN HRC. Accessed 23 March 2020. http://hrlibrary.umn.edu/undocs/html/VWS55058.htm
[140] ARTICLE 19, *The Camden Principles on Freedom of Expression and Equality.* (Free World Centre, London: 2009), https://www.article19.org/data/files/pdfs/standards/the-camden-principles-on-freedom-of-expression-and-equality.pdf
[141] Ibid
[142] Ibid

effect for the targeted group. This structure is also mentioned in the article by Toby Mendel, where he states that it is key aspects of the offence of hate speech.[143] It should be noted that based on the content of these elements, they represent the structure of an offence in the common law countries. Thus, an intent falls within the scope of *the Mens Rea,* the state of mind of the person inciting hatred; an incitement reflects *the Actus Reus*, the action and context in which such action occurred; and a causal link between the aim of the person who incites hatred and the real consequences which happen or likely to happen after such action.

The other concept was drafted as a result of analysis of the legislation, judicial practices and policies, which was conducted during the number of expert workshops on the prohibition of incitement to hatred, which was organised under the umbrella of the Office of the High Commissioner for Human Rights (henceforth - OHCHR). The conclusions and recommendations from these workshops were unified and led to the adoption by the experts of the Rabat Plan of Action on the prohibition of advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence. The experts point out that the limitations of the freedom of expression, incitement to hatred, and the application of Article 20 of the ICCPR should be used only when the high threshold of severity is reached, especially for the incitement to hatred.[144] There are a wide range of elements which could be used to assess the severity of the incitement to hatred, f.e. frequency, quantity and extent of the expression, cruelty or intent of the speech, so the Rabat Plan of Action includes a six-part threshold test for expressions considered as criminal offences[145], but could be used as a guide for the assessing of expression on the matter of hate speech despite its severity. This test includes such categories as context, speaker, intent, content and form, the extent of the speech act and likelihood, including imminence.[146] The practice of the international judicial bodies gives evidence of interdependence and complementarity of these criteria, which means that only with a presence of all elements, one can state that expression constitutes incitement to hatred. This concept is upheld by the ARTICLE 19 in its policy paper which has a set of recommendations for implementation of provisions of ICCPR and ICERD related to the prohibition of incitement to discrimination, hostility and violence, where this test is offered for the distinction of speech which should be tolerated in democratic society and speech which should be sanctioned based on Article 20 of the ICCPR.[147] The six-part threshold test was

[143] Toby Mendel. "Hate Speech Rules Under International Law". Centre for Law and Democracy. Accessed 23 March 2020. http://www.law-democracy.org/wp-content/uploads/2010/07/10.02.hate-speech.Macedonia-book.pdf
[144] "Rabat Plan of Action on the prohibition of advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence, 5 October 2012". OHCHR. Accessed 24 March 2020. https://www.ohchr.org/Documents/Issues/Opinion/SeminarRabat/Rabat_draft_outcome.pdf
[145] Ibid
[146] Ibid
[147] ARTICLE 19, *Prohibiting incitement to discrimination, hostility or violence*. Free World Centre, London, 2012, https://www.article19.org/data/files/medialibrary/3548/ARTICLE-19-policy-on-prohibition-to-incitement.pdf

developed after the first concept and nowadays is more used since it gives a detailed list of elements on which the bodies could assess the speech on the presence of incitement and consequently the necessity of applying respective sanctions.

The slightly different concept is mentioned by Wibke K. Timmermann in his book "Incitement in International Law". He emphasizes on five general components of the concept of incitement to hatred, partially based on the work of Anthony Oberschall.[148] The first suggested element is a "[n]egative stereotyping of the target group as inferior, different, threatening or morally corrupt, […] on the basis of race, religion, ethnicity, nationality, sexual orientation, gender, culture, politics or other grounds which are impermissible under international law".[149] The second element requires the positioning of the targeted group as a demographic, economic, cultural or other threat to survival or wellbeing of the group of the speaker's race, nationality or religion.[150] The next element is "[a]dvocacy for an 'eliminationist' solution to the perceived threat (in the sense of exclusion of the members of the target group from society in general or the human commonwealth), involving the destruction of the rights and freedoms of the individuals belonging to the target group", this may include discrimination and different limitations or even physical elimination of the threat.[151] Two last elements are related to the speech act, it should happen publicly, f. e. on radio, television or the Internet, and it "[…] forms part of a particular context which dramatically increases the effectiveness of the inciting words", which could be related to the status of the speaker in the State, general conditions within a State and its reflection on the relations between different racial, national or religious groups, which could be negative even before the act of speech.[152] It worth to emphasize that for the international criminalisation of the incitement to hatred, it is obligatory that the actor should be a State or other organisation which has similar to State power.[153] Further, the author distinguishes incitement to hatred in different contexts such as human rights law and international criminal law and based on that changes or extends some of the elements, since the international criminal law context requires more sufficient criteria to qualify an incitement as an international crime.[154] At the same time, for this work, the context of the human rights law is relevant as well as abovementioned elements.

[148] Wibke K. Timmermann, *Incitement in International Law* (New York: Routledge, 2015), 17
[149] Ibid, 18
[150] Ibid, 18
[151] Ibid, 18
[152] Ibid, 18
[153] Ibid, 18
[154] Ibid, 19

2.2 Incitement as an Objective Side of the Public Incitement to Hatred and its Elements

The incitement is the most significant and the most complicated element of the incitement to hatred. Thus, the UN High Commissioner on Human Rights expressed an opinion, that the effectiveness of the norms which prohibits incitement to hatred is low because of the absence of clarity on the core elements of such laws, mainly definitions of incitement, hatred and hate speech.[155] That fact rises a need to discuss the different views and definitions on the incitement in general before analysing its elements. The Cambridge Dictionary defines the word "incite" as "to encourage someone to do or feel something unpleasant or violent" and the word "incitement" as "the act of encouraging someone to do or feel something unpleasant or violent".[156] Generally, the definition offered in the Cambridge Dictionary reflects the main sense of the word in the context of the incitement to hatred which is to create in someone's mind negative emotions and attitudes. The Camden Principles on Freedom of Expression and Equality has its own definition which is created as an attempt to define the term incitement in the context and for the purposes of Article 20 (2) of the ICCPR. It states that "[t]he term 'incitement' refers to statements about national, racial or religious groups which create an imminent risk of discrimination, hostility or violence against persons belonging to those groups."[157] This definition detailed with categories such as grounds for incitement and the reality of the danger which such a group is going to face as a result of that speech. At the same time, having in mind the articles 2 (1) and 26 of the ICCPR which provides an equal enjoyment and legal protection of the rights listed in the ICCPR irrespective to "race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status", it is clear that nowadays the prescribed list of grounds of incitement is too narrow and does not correspond with the current situation. This opinion supported by the number of international and non-governmental organisations. ECRI in its General Recommendation on Combating Hate Speech extends the list of grounds to the "[…] "race", colour, language, religion, nationality, national or ethnic origin, gender identity or sexual orientation" allowing to apply the protection based on other grounds *mutatis mutandis*.[158] The ARTICLE 19 stresses that all relevant human rights instruments were adopted approximately fifty years ago in the totally different social

[155] "Study of the United Nations High Commissioner for Human Rights compiling existing legislations and jurisprudence concerning defamation of and contempt for religions, 5 September 2008, A/HRC/9/25" UN Human Rights Council. Accessed 25 March 2020. https://www.refworld.org/docid/48e61dc72.html
[156] "Cambridge Dictionary". Cambridge University Press. Accessed 25 March 2020. https://dictionary.cambridge.org/
[157] ARTICLE 19, *The Camden Principles on Freedom of Expression and Equality.* (Free World Centre, London: 2009), https://www.article19.org/data/files/pdfs/standards/the-camden-principles-on-freedom-of-expression-and-equality.pdf
[158] "ECRI General Policy Recommendation N°15 on Combating Hate Speech (08 December 2015)". Council of Europe, ECRI. Accessed 27 February 2020. https://rm.coe.int/ecri-general-policy-recommendation-no-15-on-combating-hate-speech/16808b5b01

and political context and needs to be interpreted as a "living instruments" to correspond the modern conditions and in a "generous" way to enable their full realisation, despite the formal wording and even the intent of the drafters.[159] They point out that "[t]he provisions of Article 20(2) of the ICCPR and respective regulations in domestic laws should either be seen as non-exhaustive or should be interpreted to include other grounds (e.g. disability, sexual orientation or gender identity, tribe, caste and others)".[160] Wibke K. Timmermann also argues for the broad list of grounds such as "[…] race, religion, ethnicity, nationality, sexual orientation, gender, culture, politics or other grounds which are impermissible under international law."[161] The other approach is held by the ECHR, which has no specific prohibition of incitement to hatred but provides a possibility to restrict freedom of expression in certain situations leaving a margin of appreciation for the State parties, which allows interpreting the provisions of the Convention with respect to the diversity of States and particular challenges. Given that, there is a need to change the approach of strict understanding of the wording of the respected human rights treaties, as well as national legislation, to extend the protection from incitement on the grounds other than race, nationality or religion, leaving for the States the possibility to choose those grounds according to their social and cultural conditions, but encouraging them to make it as broad as possible.

The incitement as an objective side of the public incitement to hatred has not only the definition but also consists of the elements which detail it and provides more advanced conditions which should be satisfied to establish the incitement in the particular form of expression. These elements derive mainly from the six-part threshold test, suggested by the Rabat Plan of Action, ARTICLE 19 and the conditions of the incitement to hatred offered by the Wibke K. Timmermann, and deepens with the practice of the international human rights judicial bodies as well as recommendations and findings of the scholars. The objective side of the incitement to hatred includes the elements which are different to the person of the speaker and the intent which that speaker has, as well as consequences which that incitement could cause. That elements are the form of expression and its content, extent and magnitude of that expression and the context in which the expression takes place. It relates to the definition of the incitement in the way that act of expression should have some form, such as speech, picture or text, this form should have something which would raise the negative feelings or hatred, and it is content. Since the work is focused on the public incitement to hatred, the form and content should have some sufficient or unlimited number of addresses to have the public character. The context is the most important element of incitement because it is difficult to incite hatred in a society, which is tolerant, has no

[159] ARTICLE 19, *Prohibiting incitement to discrimination, hostility or violence*. Free World Centre, London, 2012, https://www.article19.org/data/files/medialibrary/3548/ARTICLE-19-policy-on-prohibition-to-incitement.pdf
[160] Ibid
[161] Wibke K. Timmermann, *Incitement in International Law* (New York: Routledge, 2015), 17-18

conflicts, economically developed and secure. Thus it would need much more efforts to disseminate ideas of discrimination or violence than in the socially unstable society, which has many internal tensions between the groups of people, for example, based on their ethnicity or beliefs. Thus, the meanings of these elements requires careful consideration.

2.2.1 The Form of Expression and its Content

The first element of the objective side of the incitement is the form of expression and its content. The ECRI Recommendation on Hate Speech states that "expression" means "[…] speech and publications in any form, including through the use of electronic media, as well as their dissemination and storage"[162]. Further, the Recommendation has a list of forms of hate speech which is relevant for the forms of incitement as well and includes "[…] the form of written or spoken words, or other forms such as pictures, signs, symbols, paintings, music, plays or videos. It also embraces the use of particular conduct, such as gestures, to communicate an idea, message or opinion."[163] At the same time, there are some specific forms of expression which due to its nature have "little scope for restrictions of freedom of expression".[164] The ARTICLE 19 provides a list of the forms of expression which should have special attention from the judicial bodies while deciding an issue about its restrictions. These types include artistic expression, public interest disclosure, religious expression, academic disclosure and research and statements of facts and value judgements.[165]

The freedom of artistic expression has great importance for those who create some new art, which could rise different feelings within a society, be part of public discussion, shock or offends someone, but still contributes to the cultural exchange and pluralism. The ECRI Recommendation on Hate Speech emphasised on the importance of such form of artistic expression as satire and its value in the democratic society.[166] Although, it is important to assess these type of cases carefully since the satire could be used to incite hatred and consequently falls outside of the protection.[167]

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[162] "ECRI General Policy Recommendation N°15 on Combating Hate Speech (08 December 2015)". Council of Europe, ECRI. Accessed 27 February 2020. https://rm.coe.int/ecri-general-policy-recommendation-no-15-on-combating-hate-speech/16808b5b01

[163] Ibid

[164] Erbakan v Turkey para. 55, cited from: Article 19 *Prohibiting incitement to discrimination, hostility or violence*. Free World Centre, London: 2012. https://www.article19.org/data/files/medialibrary/3548/ARTICLE-19-policy-on-prohibition-to-incitement.pdf

[165] ARTICLE 19, *Prohibiting incitement to discrimination, hostility or violence*. Free World Centre, London, 2012, https://www.article19.org/data/files/medialibrary/3548/ARTICLE-19-policy-on-prohibition-to-incitement.pdf

[166] "ECRI General Policy Recommendation N°15 on Combating Hate Speech (08 December 2015)". Council of Europe, ECRI. Accessed 27 February 2020. https://rm.coe.int/ecri-general-policy-recommendation-no-15-on-combating-hate-speech/16808b5b01

[167] Amal Clooney; Philippa Webb. "The Right to Insult in International Law." *Columbia Human Rights Law Review* 48, 2 (2017): 26. http://hrlr.law.columbia.edu/hrlr/the-right-to-insult-in-international-law/

The case of M'Bala M'Bala v France, where on the show of the comedian, Robert Faurisson, a well-known academic who was sentenced for the revisionist works on denying gas chambers in concentration camps, received a prize for "unfrequentability and insolence" from the actor who was dressed like Jewish deportee in a concentration camp, was considered as an inadmissible. The Court established that in present circumstances the event was a political and not an entertaining character and that through the comedy the author promoted negationism and anti-Semitism and that "[…] the applicant had sought to deflect Article 10 from its real purpose by using his right to freedom of expression for ends which were incompatible with the letter and spirit of the Convention".[168] At the same time, the ECtHR states that the State violates right to freedom of expression by removing from the public access the painting with a group of public figures involved in sexual activities, declaring it as caricature contributing to social and cultural dialogue.[169]

The expression which is related to the matter of public interest also needs special attention, because on the one hand it could contribute to the public discussion and provides a critique on some issues and on the other hand someone could use it for further incitement without the aim of social dialogue.[170] This matter has significant importance during the political debates or elections when the candidates want to persuade as many people as possible to support their political power. This opinion is supported in the case Erbakan v Turkey, where the applicant's freedom of expression was restricted during the municipal elections campaign, the ECtHR noted that during the political debate the freedom of expression has the highest importance because "[…] the political disclosure should not be restricted without imperious reasons".[171] The other case relevant to this matter is Gunduz v Turkey, where the leader of the Islamic sect was convicted in the dissemination of hatred and insults, while he was on the television program specially organized to present his sect and him as a leader. The ECtHR states that his views were highly discussed in public before the programme and that live broadcasting was intended to discuss the principles of that sect, to ask its leader about particular things or express own arguments, this programme was intended to contribute to the public discussion, and the extremist statements were expressed during the pluralistic debate[172].

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[168] "Case of M'Bala M'Bala v. France, App No. 25239/13, 10 November 2015". ECtHR. Accessed 27 March 2020. http://hudoc.echr.coe.int/eng-press?i=003-5219244-6470067

[169] "Case of Vereinigung Bildender Kunstler v. Austria, App No. 68354/01, 25 January 2007". ECtHR. Accessed 27 March 2020. http://hudoc.echr.coe.int/fre?i=001-79213

[170] ARTICLE 19, *Prohibiting incitement to discrimination, hostility or violence*. Free World Centre, London, 2012, https://www.article19.org/data/files/medialibrary/3548/ARTICLE-19-policy-on-prohibition-to-incitement.pdf

[171] Erbakan v Turkey, cited from: Article 19 *Prohibiting incitement to discrimination, hostility or violence*. Free World Centre, London: 2012. https://www.article19.org/data/files/medialibrary/3548/ARTICLE-19-policy-on-prohibition-to-incitement.pdf

[172] "Case of Gunduz v Turkey, App. No. 35071/97, 04 December 2003". ECtHR. Accessed 27 March 2020. http://hudoc.echr.coe.int/eng?i=001-61522

The other important form of expression which needs detailed assessment is a religious expression. ARTICLE 19 emphasises on the importance of distinguishing expression of opinion about religion, sharing religious information and discrimination and incitement against the believers of religion; also they state that "[…] an insult [or critisism] to a principle or dogma or representative of religion does not necessarily incite hatred against individual believers of that religion [and] an attack on a representative of the church does not automatically discredit and disparage a sector of the population on account of their faith in the relevant religion"[173] It is proved by the practice of the ECtHR which in the abovementioned case Gunduz v Turkey states that promoting sharia without calls for violent establishing it is acceptable during the television programme dedicated to that Islamic sect.[174] With relation to the connection of particular figure of religion and religious belief as such, in the case Klaine v Slovakia the ECtHR pointed out that "[t]he applicant's strongly-worded pejorative opinion related exclusively to the person of a high representative of the Catholic Church in Slovakia […] discredited and disparaged a sector of the population on account of their Catholic faith".[175]

The highly important form of freedom of expression is academic disclosure and research. The science and research is significant to the society and a State since it promotes development and progress, so even the most extreme views and the discussion, which brings controversial opinions on historical events should be protected.[176] The case Lehindeux v France is about publications regarding the activities of French authorities, which generally known as collaborationists with Nazi Germany, during the Second World War which emphasized on their acts and decisions which was directed against Nazi Germany or for minimization of the Nazi influence. The ECtHR states that "[…] every country must make to debate its own history openly and dispassionately [and] such are the demands of that pluralism, tolerance and broadmindedness without which there is no "democratic society"".[177] Also, in the case Aksu v Turkey, the ECtHR defends the academical research on the lifestyle of Roma community in Turkey, which includes not only the traditions, language and culture of that group, but also testimonies from its members and police authorities about their involvement into some illegal activities.[178] At the same time, the

[173] ARTICLE 19, *Prohibiting incitement to discrimination, hostility or violence*. Free World Centre, London, 2012, https://www.article19.org/data/files/medialibrary/3548/ARTICLE-19-policy-on-prohibition-to-incitement.pdf
[174] "Case of Gunduz v Turkey, App. No. 35071/97, 04 December 2003". ECtHR. Accessed 27 March 2020. http://hudoc.echr.coe.int/eng?i=001-61522
[175] "Case of Klein v Slovakia, App No. 72208/01, 31 October 2006". ECtHR. Accessed 28 March 2020. http://www.bailii.org/eu/cases/ECHR/2006/909.html
[176] ARTICLE 19, *Prohibiting incitement to discrimination, hostility or violence*. Free World Centre, London, 2012, https://www.article19.org/data/files/medialibrary/3548/ARTICLE-19-policy-on-prohibition-to-incitement.pdf
[177] "Case of Lehindeux and Isorni v France, App. No. 24662/94, 23 September 1998". ECtHR. Accessed 27 February 2020. http://hudoc.echr.coe.int/eng?i=001-58245
[178] "Case of Aksu v Turkey, App No. 4149/04 and 41029/04, 15 March 2012". ECtHR. Accessed 28 March 2020. https://www.legal-tools.org/doc/d4f13a/pdf/

ECtHR has a special attitude to the cases on academic works which denies Holocaust where it mostly uses Article 17 declaring these applications inadmissible without any assessment and balancing process.[179]

The last but not the least form of expression which needs careful assessment is the statements of facts and value judgements. The ECtHR stated that "[…] a careful distinction needs to be made between facts and value-judgments. The existence of facts can be demonstrated, whereas the truth of value-judgments is not susceptible of proof. […] As regards value-judgments this requirement [to prove value-jadgement] is impossible of fulfilment, and it infringes freedom of opinion itself."[180] At the same time, the value judgement should have some factual basis to support it, otherwise, it will be recognized excessive.[181] The other issue is the relation between statements of facts and incitement to hatred. Thus, in the case "Incal v Turkey", the ECtHR does not assess the leafets which "[…] criticised certain administrative and municipal measures taken by the authorities, in particular against street traders […] as incitement to the use of violence, hostility or hatred between citizens" and states that "[…] these phrases appeal to, among others, the population of Kurdish origin, urging them to band together to raise certain political demands", so the facts were used to raise a political discussion and not to incite hatred.[182] The other issue is the using the different names of ethnic groups, as it was in the case "Aksu v Turkey" where two dictionaries include the word "Gypsy" as definition to the ethnic group originating from India and the second meaning as "miserly", which was the personal insult for the Roma applicant.[183] The ECtHR agreed with the national judiciary authority that "[…] the definitions and expressions in the dictionaries were based on historical and sociological reality and that there had been no intention to humiliate or debase an ethnic group [and] these expressions are part of spoken Turkish."[184] A different approach was held by the CERD in the case Hagan v Australia about the large sign which was installed in the 1960s at the stadium and was dedicated to the player E. S. "Nigger" Brown, who received that nickname because of the shoeshine brand.[185] The CERD states that the ICERD should be treated as a living instrument and respond to the circumstances of

[179] David Keane. "The Innocence of Satirists: Will Caricatures of the Prophet Mohammad Change the ECHR Approach to Hate Speech?". EJIL:Talk! Blog of the European Journal of International Law. Accessed 28 March 2020. https://www.ejiltalk.org/the-innocence-of-satirists-will-caricatures-of-the-prophet-mohammad-change-the-echr-approach-to-hate-speech/

[180] "Case of Lingens v Austria, App No. 9815/82, 08 July 1986". ECtHR. Accessed 29 March 2020. http://hudoc.echr.coe.int/eng?i=001-57523

[181] ARTICLE 19, *Prohibiting incitement to discrimination, hostility or violence*. Free World Centre, London, 2012, https://www.article19.org/data/files/medialibrary/3548/ARTICLE-19-policy-on-prohibition-to-incitement.pdf

[182] "Case of Incal v Turkey, App. No. 22678/93, 9 June 1998". ECtHR. Accessed 27 February 2020. http://hudoc.echr.coe.int/fre?i=001-58197

[183] "Case of Aksu v Turkey, App No. 4149/04 and 41029/04, 15 March 2012". ECtHR. Accessed 28 March 2020. https://www.legal-tools.org/doc/d4f13a/pdf/

[184] Ibid

[185] "Stephen Hagan v. Australia, Communication No. 26/2002, U.N. Doc. CERD/C/62/D/26/2002 (2003)". UN CERD. Accessed 29 March 2020. http://hrlibrary.umn.edu/country/decisions/26-2002.html

contemporary society, thus the "[…] use and maintenance of the offending term can at the present time be considered offensive and insulting, even if for an extended period it may not have necessarily been so regarded."[186] These cases show the importance of the context and the tolerance of society in which the term is used.

Despite the nature of expression, its particular content should be analysed on the criteria what was said, who was targeted (the audience), who was targeted (the potential victims of discrimination violence and hostility), how it was said (tone).[187] These elements partially correspond to the elements offered by Wibke K. Timmerman in his definition of the incitement to hatred, which is the presence of targeted group based on their race, religion, nationality or other groud, characterization of the targeted group as a threat to the speaker's group (the audience) and the advocacy of radical solution to that threat, which constitutes the main element of what was said.[188]

While analysing the content of the expression the Courts or other bodies should pay attention to "[t]he degree to which the speech involved advocacy is particularly relevant".[189] The advocacy in the particular speech means that it includes "[…] a direct call for the audience to act in a certain way", especially when it calls for violence, discrimination or hostility and could not be understood in another way by the audience.[190] This call may include the exclusion of the targeted group from the society, limitation or elimination their rights and freedoms, from imposing some quotas and discrimination to killing.[191] The audience of the expression is also relevant since the speaker incites them to hatred, and they would share similar to the speaker ground, such as race, religion, nationality or ideas.[192] It is important to analyse the cultural and other relations between the inciting groups, and the possible positioning of the targeted group as a threat to the audience, to excuse the violence and hatred as self-defence.[193] The targeted group is also essential because they constitute potential victims of discrimination and violence. Incitement to hatred against that group could include the direct or indirect naming of the group, its negative characterization, comparing to animals or insects, which is the form of dehumanization or even demonization, which would additionally justify actions against them and took place during the

[186] Ibid
[187] ARTICLE 19, *Prohibiting incitement to discrimination, hostility or violence*. Free World Centre, London, 2012, https://www.article19.org/data/files/medialibrary/3548/ARTICLE-19-policy-on-prohibition-to-incitement.pdf
[188] Wibke K. Timmermann, *Incitement in International Law* (New York: Routledge, 2015), 17-18
[189] ARTICLE 19, *Prohibiting incitement to discrimination, hostility or violence*. Free World Centre, London, 2012, https://www.article19.org/data/files/medialibrary/3548/ARTICLE-19-policy-on-prohibition-to-incitement.pdf
[190] Ibid
[191] Wibke K. Timmermann, *Incitement in International Law* (New York: Routledge, 2015), 18
[192] ARTICLE 19, *Prohibiting incitement to discrimination, hostility or violence*. Free World Centre, London, 2012, https://www.article19.org/data/files/medialibrary/3548/ARTICLE-19-policy-on-prohibition-to-incitement.pdf
[193] Ibid

Holocaust and Rwandan Genocide.[194] The significant importance has the tone of the speech and how it was said, the provocative level of the speech, whether it includes "[…] mitigating material and without drawing a clear distinction between the opinion expressed and the taking of action based on that opinion".[195] Additionally, the speech could contain "[…] phrases, words, or coded language that has taken on a special loaded meaning, in the understanding of the speaker and audience", for example "[…] the phrase "go to work," used as code for killing during the Rwandan genocide, or the word "inyenzi" (Kinyarwanda for "cockroach"), used to refer to Tutsi or even to non-Tutsi who sympathized with Tutsi."[196] Given that, it is important while examining of the content of the expression to pay attention to what was said, who was the audience, who was the targeted group, what tone and language were used. The other important part which could change the attitude to the content is its form of expression, such as artistic, religious, disclosure of the public interest, academic research or statements of facts and value judgements, since it changes the nature of the speech and could be allowed under certain circumstances.

2.2.2 The Extent and Magnitude of an Incitement

The next element of the objective side of the incitement is its extent and magnitude, which is also used as a threshold for establishing whether an expression becomes an incitement. This element includes three key issues such as public nature of the expression, means of its dissemination and its magnitude.[197] To constitute an incitement, the expression should be addressed to the general public or to some number of people in a public space.[198] The expression made in private circumstances has more protection because of the right to privacy and its location, which is widely recognized by the European countries.[199] There is a number of factors which could influence the public nature of incitement. Firstly, it should be considered where that expression was circulated in a restricted environment, for example only for academical research, or was accessible to the general public, or whether it took place where only the limited number could access with a ticket or other permit or it was exposed in the public space, for example, street, park, etc.[200] The other important factor is the audience at which the communication was directed, for

[194] Wibke K. Timmermann, *Incitement in International Law* (New York: Routledge, 2015), 17-18
[195] ARTICLE 19, *Prohibiting incitement to discrimination, hostility or violence*. Free World Centre, London, 2012, https://www.article19.org/data/files/medialibrary/3548/ARTICLE-19-policy-on-prohibition-to-incitement.pdf
[196] Susan Benesh "*Dangerous Speech: A Proposal to Tackle Violence*", 2011, cited from: ARTICLE 19, *Prohibiting incitement to discrimination, hostility or violence*. Free World Centre, London, 2012, https://www.article19.org/data/files/medialibrary/3548/ARTICLE-19-policy-on-prohibition-to-incitement.pdf
[197] ARTICLE 19, *Prohibiting incitement to discrimination, hostility or violence*. Free World Centre, London, 2012, https://www.article19.org/data/files/medialibrary/3548/ARTICLE-19-policy-on-prohibition-to-incitement.pdf
[198] Ibid
[199] Ibid
[200] Ibid

example, the specific audience, such an order for militaries or instructions for the secret service or the general public.[201] For the expression to a non-specific audience, it is relevant to establish whether it was addressed to a people in some public place or to members of the general public, for example, the stadium or meeting of a political party.[202] Also, there are some situations when the Internet could be understood on the one hand as a public space, and on the other hand, some websites could have private character.[203]

Means of dissemination of the expression is closely connected to the public nature of the speech because it is a way how the speech or other form of expression could reach the audience. There is a number of the well-known means of dissemination, such as public speech, radio, television, printed media and books, art, the internet. Thus, the public performance to the number of individuals in the place accessible with a ticket was used to disseminate hate speech in the case M'Bala M'Bala v. France where the applicant has a performance at the stadium. The books with revisionist antisemitic research were directed to the general public in the case of Robert Faurisson v. France. As it was mentioned above the radio had a significant role for dissemination of public incitements to hatred during the Rwandan Genocide. The cases Jersild v Denmark and Gunduz v Turkey shows the example where the statements which were treated by the countries as incitement were disseminated on the television. The other false understanding of expression which was shared on the leafets was in the case Incal v Turkey. Also, the ARTICLE 19 states that "[I]t is commonly acknowledged that the audiovisual media have often a much more immediate and powerful effect than the print media; the audiovisual media have means of conveying through images meanings which the print media are not able to impart".[204] At the same time, even though the press should follow the laws on the protection of the interests of a State, the freedom of media has an important role in the democratic society "[…] to impart information and ideas on political issues, including divisive ones [and] the public also has a right to receive them. The freedom to receive information or ideas provides the public with one of the best means of discovering and forming an opinion on the ideas and attitudes of their leaders."[205]

The last but not the least factor for the determining public nature of incitement is its magnitude or intensity. It could be connected in the frequency, amount and the extent of expressions, as well as how many time such expression was repeated, for example, one painting, thousand leaflets or livestream broadcasting on the media. Thus, in the case Feret v Belgium the

[201] Ibid
[202] Ibid
[203] Ibid
[204] Ibid
[205] Halis Doğan v. Turkey. no. 71984/01, 7 February 2006 cited from: ARTICLE 19, *Prohibiting incitement to discrimination, hostility or violence*. Free World Centre, London, 2012, https://www.article19.org/data/files/medialibrary/3548/ARTICLE-19-policy-on-prohibition-to-incitement.pdf

ECtHR found no violation of freedom of expression in the form of a criminal sanction of the chairman of a political party for distributing leaflets and posters with inciting and discriminating content against minorities and immigrants.[206] In the case, J. R. T. and the W. G. Party v. Canada UN HRC found an incitement in the racist messages which were prerecorded on the phone line and accessible to everyone who called on a particular phone number.[207]

2.2.3 The Context of the Incitement

The context as the next element of the objective side of the incitement has a crucial role in assessing the cases on public incitement to hatred. This element has significant importance on defining other elements of the incitement to hatred, such as intent and causation.[208] So, the analysis of the context of the speech should be conducted in conjunction with the political and social context of factual events which occur when the speech was made. On the one hand, it could be discrimination, persecution and violence against persons which is based on race, religion, nationality or other grounds and could be supported by the media or happens during the tensions between different groups or take place in the general atmosphere of hostility. On the other hand, the situation within a country or a region on which the incitement is disseminated has no confrontation or displeasure among the population, the society is tolerant and equal, and the acts of discrimination and hostility are rare or absent, so it is difficult to incite hatred in these conditions. At the same time, even in such conditions, it is important to assess "[…] the degree to which the opposing or alternative ideas are present and available".[209]

Having in mind the number and variety of different factors which constitute the contextual element of public incitement to hatred "[…] it is extremely difficult to drawn 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."[210] This feature of the context has an influence on the practice of judiciary bodies which analyse the cases on an individual basis and "[…] 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."[211] Despite

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[206] "Press release on the Case of Feret v Belgium, App No. 15615/07, 16 June 2009". ECtHR. Accessed 29 March 2020. http://hudoc.echr.coe.int/eng-press?i=003-2800730-3069797
[207] "J. R. T. and the W. G. Party v. Canada, Communication No. 104/1981, U.N. Doc. CCPR/C/OP/2 at 25 (1984)". UN HRC. Accessed 21 February 2020. http://hrlibrary.umn.edu/undocs/html/104-1981.htm
[208] Toby Mendel, *Study on International Standarts Relating to Incitement to Genocide or Racial Hatred* (Toby Mendel, 2006), http://www.concernedhistorians.org/to/239.pdf
[209] ARTICLE 19, *Prohibiting incitement to discrimination, hostility or violence*. Free World Centre, London, 2012, https://www.article19.org/data/files/medialibrary/3548/ARTICLE-19-policy-on-prohibition-to-incitement.pdf
[210] Toby Mendel, *Study on International Standarts Relating to Incitement to Genocide or Racial Hatred* (Toby Mendel, 2006), http://www.concernedhistorians.org/to/239.pdf
[211] Ibid

that, there was a number of attempts of systematisation and classification of the contextual factors which were repeated in the case law and could be used as general directions for the beginning of the assessment of the context of incitement. The ARTICLE 19 offers the next contextual factors which could be found in the case of public incitement to hatred: the existence of conflicts, existence and history of institutionalized discrimination, history of clashes and conflicts, the existed legal framework and the media landscape.[212] These factors require further development and illustrations from the case law, for the better understanding of its content.

The first contextual factor is the existence of conflicts within a society. It is important to establish whether there were previous conflicts between inciting groups; other acts of hostility or violence which were caused by other incitements to hatred; the real status of the state or governmental power to suppress, settle or eliminate the consequences of the incitement, f. e. mass violence, which is not possible in the country with weak democratic structures and the rule of law. Probably the most noticeable decision related to that contextual factor is the Nahimana case, where the radio host was sentenced for the dissemination of incitement to genocide. The International Criminal Tribunal for Rwanda emphasised that "[a] statement of ethnic generalization provoking resentment against members of that ethnicity would have a heightened impact in the context of a genocidal environment. It would be more likely to lead to violence. At the same time, the environment would be an indicator that incitement to violence was the intent of the statement".[213] This example demonstrates the importance of the context in establishing not only the fact of incitement but also the intent of the person.

The next contextual factor is the existence and history of institutionalized discrimination. It finds an embodiment in the structure of the society, where the differentiation and inequalities of some group or groups take place as well as the social response to the hostile statements targeting the groups or groups and what part of the society disapprove or criticize that statements.[214] It is difficult to find an example for that factor, but it seems that the most appropriate case is the abovementioned Stephen Hagan v Australia, where the CERD supported the removal of the nickname of the sportsman E.S. "Nigger" Brown, which was created because of the brand of the shoeshine, which this sportsman used, finding its racially offensive for the aboriginal people, even though it was used in the past but is unacceptable nowadays.[215]

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[212] ARTICLE 19, *Prohibiting incitement to discrimination, hostility or violence*. Free World Centre, London, 2012, https://www.article19.org/data/files/medialibrary/3548/ARTICLE-19-policy-on-prohibition-to-incitement.pdf

[213] "The Prosecutor v. Ferdinand Nahimana, Jean-Bosco Barayagwiza, Hassan Ngeze (Judgement and Sentence), ICTR-99-52-T, 3 December 2003". International Criminal Tribunal for Rwanda (ICTR). Accessed 30 March 2020. https://www.refworld.org/cases,ICTR,48b5271d2.html

[214] ARTICLE 19, *Prohibiting incitement to discrimination, hostility or violence*. Free World Centre, London, 2012, https://www.article19.org/data/files/medialibrary/3548/ARTICLE-19-policy-on-prohibition-to-incitement.pdf

[215] "Stephen Hagan v. Australia, Communication No. 26/2002, U.N. Doc. CERD/C/62/D/26/2002 (2003)". UN CERD. Accessed 30 March 2020. http://hrlibrary.umn.edu/country/decisions/26-2002.html

The authorities, while assessing the context of the incitement to hatred, should pay attention to the history of previous clashes and conflicts between the targeted groups, which could happen over resources or other reasons. These reasons may include the economic insecurity, such as lacking in food, shelter or employment; the fear among the audience of the future clashes, which could be grounded or not and could be used by a speaker to increase the influence on the audience.[216] There are a few cases which partially related to that contextual factor and could be used to derive some conclusions. The first case is the Perincek v Switzerland, where the ECtHR decided whether the denying of the Armenian genocide by the Turkish politician in his speeches in Switzerland could constitute an incitement to discrimination or hatred. The Court states that because of the controversies on the nature of the events which occur in Turkey in 1915 and the absence of agreed understanding of it as genocide, the long time period which passes since the events and its influence on the Swiss historical experience, the small number of the members of the Armenian and Turkish community in Switzerland, the speech denying such events as genocide is not likely to incite hatred or violence between the abovementioned groups in Switzerland.[217] The other case which illustrates the importance of previous hostilities for the context of the incitement is the case of Leroy v France, where the newspaper and its authors were convicted in the promotion of terrorism for the publication of the drawing "[…] representing the attack on the twin towers of the World Trade Centre, with a caption which parodied the advertising slogan of a famous brand: "We have all dreamt of it... Hamas did it" [which] was published in the newspaper on 13 September 2001".[218] The ECtHR examined whether the public interest in that context justified the use of such provocation or exaggeration and noted that the applicant must have realized the significance of that publication, having in mind the close date of publication to the tragic event, the impact of such publication in a Basque Country, a politically sensitive region with the history of using violence and terrorist attacks to gain independence, even though the circulation of the weekly newspaper is limited.[219] Thus, the ECtHR stated that "[…] the drawing's publication had provoked a certain public reaction, capable of stirring up violence and demonstrating a plausible impact on public order in the region".[220]

The next contextual factor is the legal framework, which is relevant for the particular circumstances of the case. The special attention should be dedicated to the laws in the fields of

[216] ARTICLE 19, *Prohibiting incitement to discrimination, hostility or violence*. Free World Centre, London, 2012, https://www.article19.org/data/files/medialibrary/3548/ARTICLE-19-policy-on-prohibition-to-incitement.pdf
[217] "Case of Perincek v Turkey (Grand Chamber's Judgement), App No. 27510/08, 15 October 2015". ECtHR. Accessed 31 March 2020. http://hudoc.echr.coe.int/eng?i=001-158235
[218] "Press release on the case of Leroy v France, App No. 36109/03, 02 October 2008". ECtHR. Accessed 31 March 2020. http://hudoc.echr.coe.int/eng-press?i=003-2501837-2699727
[219] Ibid
[220] Ibid

anti-discrimination, freedom of expression and the access to justice[221], f. e. mechanisms and sanctions for maintaining equality, the level of pluralism and the real possibility to receive protection of own interests from the state. Thus, in the case, L. K. v Netherlands the CERD was assessing whether the state-imposed enough measures to fulfil the obligations provided in Article 20 (2) of the ICCPR. The Committee states that "[a] legislative framework through which statements contemplated by article 20(2) of the Covenant are prohibited under criminal law, and which allows victims to trigger, and participate in, a prosecution" as well as the possibility to join the civil claim to the criminal proceeding are "[…] the necessary and proportionate measures to "prohibit" statements made in violation of article 20(2) and to guarantee the right of the authors to an effective remedy in order to protect them against the consequences of such statements".[222] Furthermore, the CERD emphasized that "[t]he obligation under article 20(2), however, does not extend to an obligation for the State party to ensure that a person who is charged with incitement to discrimination, hostility or violence will invariably be convicted by an independent and impartial court of law".[223]

The last contextual factor offered by the ARTICLE 19 is the media landscape, which includes the diversity and pluralism of the media in the country.[224] It could be established by assessing the presence of the "[…] censorship; the existence of barriers to establishing media outlets; limits to the independence of the media or journalists; broad and unclear restrictions on the content of what may be published or broadcast; evidence of bias in the application of these restrictions."[225] The level of the criticism of the government, the debates on political matters in the media or other form of communication as well as the possibilities for the audience to access the different sources of information, views and speeches, constitute some other situations which can be used as a contextual factor.[226] There is a number of cases in which the dissemination of statements and ideas was conducted through the media. Thus in the case Jersild v Denmark, while assessing the criminal conviction of the journalist, which made a television programme during which the representatives of the radical organisation were disseminating racist ideas, the ECtHR partially based its decision on the fact that "[…] the item was broadcast as part of a serious Danish news programme and was intended for a well-informed audience" and that the author was counterbalancing such statements during the programme, so as a result "[…] the filmed portrait

[221] ARTICLE 19, *Prohibiting incitement to discrimination, hostility or violence*. Free World Centre, London, 2012, https://www.article19.org/data/files/medialibrary/3548/ARTICLE-19-policy-on-prohibition-to-incitement.pdf
[222] "L.K. v. The Netherlands, Communication No. 4/1991, U.N. Doc. A/48/18 at 131 (1993)". UN CERD. Accessed 25 February 2020. http://hrlibrary.umn.edu/country/decisions/CERD-DLR.htm
[223] Ibid
[224] ARTICLE 19, *Prohibiting incitement to discrimination, hostility or violence*. Free World Centre, London, 2012, https://www.article19.org/data/files/medialibrary/3548/ARTICLE-19-policy-on-prohibition-to-incitement.pdf
[225] Ibid
[226] Ibid

surely conveyed the meaning that the racist statements were part of a generally anti-social attitude of the Greenjackets."[227] The similar situation was determined in the case Gunduz v Turkey, where the applicant was convicted for the hate speech statements during the live television programme, the ECtHR states that the programme was dedicated to the well-known Islamic sect and its leader and constitutes the matter of the public interest. Also, the live character of the discussion is a significant element, since the "[…] statements were made orally during a live television broadcast so that he had no possibility of reformulating, refining or retracting them before they were made public".[228]

It is worth to mention a few other cases, which can contribute to the understanding of what facts have an importance on the context of incitement. Thus, the ECtHR differentiates the abovementioned Gunduz v Turkey and the case Refah v Turkey, based on the fact that in the first case there were debates on the issue of public interest, while in the last one there were "[…] the real potential to seize political power without being restricted by the compromises inherent in a coalition" [229], so the context in which the cases occurred was different, since in Gunduz v Turkey there was no real danger to the democratical principles. The individual opinion of Evatt, Kretzmer and Klein in the case of Robert Faurisson v France emphasized that the denial of Holocaust in the conditions of present-day France may constitute an incitement to anti-Semitism, not because of the challenge of well-established and internationally recognized historical facts, but because of the context where "[…] 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"".[230]

Also, there are two similar cases in which the ECtHR made different conclusions because of their context. In the case of B.H., M.W., H.P. and G.K v Austria, the ECtHR upheld the criminal convictions imposed by national courts on the members of right-wing political organisations, which were based on the ideas of National Socialism and were engaged in the activities such as denying Holocaust, promoting racial superiority and discrimination, using the similar to Nazi's uniform and shouting of Nazi paroles, justifying it with the historical experience of Austria and general condemnation of National Socialist ideology.[231] Nine years later, the ECtHR takes a

[227] "Case of Jersild v Denmark, App. No. 15890/89, 23 September 1994". ECtHR. Accessed 27 February 2020. http://hudoc.echr.coe.int/eng?i=001-57891
[228] "Case of Gunduz v Turkey, App. No. 35071/97, 04 December 2003". ECtHR. Accessed 27 February 2020. http://hudoc.echr.coe.int/eng?i=001-61522
[229] "Case of Refah v Turkey (Grand Chamber's Judgement), App Nos. 41340/98, 41342/98, 41343/98 and 41344/98, 13 February 2003". ECtHR. Accessed 31 March 2020. http://hudoc.echr.coe.int/eng?i=001-60936
[230] "Robert Faurisson v. France, Communication No. 550/1993, U.N. Doc. CCPR/C/58/D/550/1993 (1996)". UN HRC. Accessed 22 February 2020. http://hrlibrary.umn.edu/undocs/html/VWS55058.htm
[231] "Case of B.H., M.W., H.P. and G.K. v Austria, App No. 12774/87, 12 October 1989". ECtHR. Accessed 31 March 2020. http://echr.ketse.com/doc/12774.87-en-19891012/view/

different approach on the historical experience in the case Lehideux v France, the events of which occurred six years after the events in the previously-mentioned case, and was related to the discussion of the collaboration of France with Nazi Germany and the actions of the French government during that times on minimization of the consequences of Nazi policy. It states that "[E]ven 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".[232] These different approaches on the sensitivity of historical experience of France and Austria could be explained with different nature of cooperation of states with the Nazi which is "[…] in Austria's past was involved in the Nazi genocide whereas, for France, the issue was collaboration with the Nazis".[233] The opinion of Toby Mendel seems logical that even though these decisions are controversial "[…] 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".[234]

The contextual factor became crucial for the decisions of the ECtHR in two other cases, which have similar situations. In the case Zana v Turkey, the ECtHR agrees with the national authorities on the conviction of the former major of the most important city in south-east Turkey, for the supporting and defence of the terrorist group and their acts in the interview to the major daily newspaper.[235] The conviction was justified because of the significance of statements which the applicant must have realised in the context of the speech occurred, because "[…] the interview coincided with murderous attacks carried out by the PKK on civilians in south-east Turkey, where there was extreme tension at the material time" and in that circumstances, the interview "[…] had to be regarded as likely to exacerbate an already explosive situation in that region"[236] The other case is the Incal v Turkey where the applicant was convicted for the dissemination of leaflets which "[…] criticised certain administrative and municipal measures taken by the authorities, in particular against street traders. They thus reported actual events which were of some interest to the people of İzmir".[237] The ECtHR purposely emphasized on the difference between Incal and Zana cases states that "[i]t observes, however, that the circumstances of the present case are not

[232] "Case of Lehindeux and Isorni v France, App. No. 24662/94, 23 September 1998". ECtHR. Accessed 27 February 2020. http://hudoc.echr.coe.int/eng?i=001-58245
[233] Toby Mendel, *Study on International Standarts Relating to Incitement to Genocide or Racial Hatred* (Toby Mendel, 2006), http://www.concernedhistorians.org/to/239.pdf
[234] Ibid
[235] "Case of Zana v Turkey, App No. 18954/91, 25 November 1997". ECtHR. Accessed 01 April 2020. https://www.legislationline.org/documents/id/9047
[236] Ibid
[237] "Case of Incal v Turkey, App. No. 22678/93, 9 June 1998". ECtHR. Accessed 27 February 2020. http://hudoc.echr.coe.int/fre?i=001-58197

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".[238]

To sum up, the context has a significant role in determining of the public incitement to hatred, as similar statement could have a different meaning in a different context. Despite the practice of the international judicial authorities, there are no generally recognized types of context which could be used for an objective assessment of particular form of expression on the matter of incitement, and furthermore, in some cases, courts tend to justify instead of ground their decisions based on the context.[239] Even though there are some recommendations for factors which could help to establish the context of the expression such as the existence of conflicts, existence and history of institutionalized discrimination, a history of clashes and conflicts, a legal framework, a media landscape[240] and whether the expression is related to the discussion of the matter of public interest.[241] Given that, it is difficult to overestimate the importance of the context in the cases related to the public incitement to hatred, so the courts and other authorities should carefully assess all circumstances of the case individually.

2.3 The Speaker and the Intent as a Subjective Side of the Public Incitement to Hatred

The subjective side of the public incitement to hatred is interrelated with the objective side and causation. It seems obvious that an incitement to be disseminated must be expressed by someone, this person is a subject in the classical meaning of the law. Contrary, it is more difficult to draw the other part of the subjective side of an incitement, since there are some differences within the international instruments. Thus, the Article 20 (2) of the ICCPR requires the prohibition of advocacy of hatred that constitutes incitement, which, according to the Camden Principles, could be understood "[…] as requiring an intention to promote hatred publicly towards the target group."[242] This understanding of the word "advocacy" is supported by international organisations as well as scholars. ECRI General Policy Recommendation No. 15 defines the term "advocacy" as "[…] in connection with denigration, hatred or vilification shall mean the explicit, intentional

[238] Ibid
[239] Toby Mendel, *Study on International Standarts Relating to Incitement to Genocide or Racial Hatred* (Toby Mendel, 2006), http://www.concernedhistorians.org/to/239.pdf
[240] ARTICLE 19, *Prohibiting incitement to discrimination, hostility or violence*. Free World Centre, London, 2012, https://www.article19.org/data/files/medialibrary/3548/ARTICLE-19-policy-on-prohibition-to-incitement.pdf
[241] Toby Mendel, *Study on International Standarts Relating to Incitement to Genocide or Racial Hatred* (Toby Mendel, 2006), http://www.concernedhistorians.org/to/239.pdf
[242] ARTICLE 19, The Camden Principles on Freedom of Expression and Equality. Free World Centre, London, 2009, https://www.article19.org/data/files/pdfs/standards/the-camden-principles-on-freedom-of-expression-and-equality.pdf

and active support for such conduct and attitudes with respect to a particular group of persons".[243] Toby Mendel states that "[a]lthough '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 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".[244] So, the word "advocacy" in Article 20 (2) of the ICCPR could be read as a requirement of the intent of the speaker to incite hatred. At the same time, the Article 4 of the ICERD is more confusing, since it has no requirement of advocacy in two of the four hate speech provision and the rest two provisions require incitement instead of advocacy. Thus, the dissemination of ideas based on racial superiority or hatred does not require the intent of the speaker to promote hatred, which creates a problem for the right to freedom of expression. The other question is whether provisions on incitement to racial discrimination and acts of violence would require intent. The ARTICLE 19 emphasizes on the significance of the intent element and stipulates that both, the Article 20 (2) of the ICCPR and the Article 4 of the ICERD should be understood as "[…]requires intention on the part of the speaker, as opposed to recklessness or negligence".[245] Given that, it is reasonable to understand the subjective side of the public incitement to hatred as including elements of the speaker and the intent.

2.3.1 The Speaker

While assessing the expression, which may include the public incitement to hatred it is important to pay attention to the person of the speaker or originator of the communication and its attributes since it has an influence on the effectiveness and engagement of the expression. The courts and other authorities should analyse the "[…] position or status in society and their [speakers] standing or influence".[246] There are certain features of the speaker which should be considered, such as the official position of the speaker, the level of the speaker's authority or influence over the audience and whether the speaker acts in his or her official capacity, during the expression of views, which may include the incitement to hatred.[247] The ARTICLE 19 also differentiates two categories of speakers whose actions because of their role and status in the

[243] "ECRI General Policy Recommendation N°15 on Combating Hate Speech (08 December 2015)". Council of Europe, ECRI. Accessed 26 February 2020. https://rm.coe.int/ecri-general-policy-recommendation-no-15-on-combating-hate-speech/16808b5b01
[244] Toby Mendel, *Study on International Standarts Relating to Incitement to Genocide or Racial Hatred* (Toby Mendel, 2006), http://www.concernedhistorians.org/to/239.pdf
[245] ARTICLE 19, *Prohibiting incitement to discrimination, hostility or violence*. Free World Centre, London, 2012, https://www.article19.org/data/files/medialibrary/3548/ARTICLE-19-policy-on-prohibition-to-incitement.pdf
[246] Ibid
[247] Ibid

society requires careful consideration such as politicians and prominent members of political parties and public officials or persons of similar status.[248] At the same time, there are two more categories of persons whose statements should also be assessed carefully, such as journalists and public figures.[249]

The official position of the speaker is important "[…] whether he/she was in a position of authority over the audience"[250] or whether there is a direct or indirect subordination between the speaker and the audience. Also, the Article 4 (c) of the ICERD requires from the States Parties to prohibit specifically for the "[…] public authorities or public institutions, national or local, to promote or incite racial discrimination"[251] and with that regard, UN CERD in its General recommendation No. 35 emphasized that "[u]nder the terms of article 4 (c) regarding public authorities or public institutions, racist expressions emanating from such authorities or institutions are regarded by the Committee as of particular concern, especially statements attributed to high-ranking officials"[252]. There is a number of examples in the case law, where the person's official position was important for the case outcome. The politicians are the most obvious group of persons who usually express some statements in their official position. Thus, in the case Erbakan v Turkey, where the applicant was a former Prime Minister of Turkey and the leader of the major political party, the ECtHR noted that "[…] combating all forms of intolerance was an integral part of human rights protection and that it was crucially important that in their speeches politicians should avoid making comments likely to foster such intolerance".[253] In the case, Le Pen v France the ECtHR states that "[…] hate speech by politicians may cause more damage than that of ordinary citizens".[254] The political parties can represent and defend their views in public, even though it could be insulting, shocking or disturbing for the part of the population, although they should refrain from "[…] using words or attitudes vexatious or humiliating, because such behavior may generate among the public reactions incompatible with a peaceful social climate and undermine

[248] Ibid
[249] Clooney, Amal; Webb, Philippa. "The Right to Insult in International Law." Columbia Human Rights Law Review 48, 2 (2017): 1-55. http://hrlr.law.columbia.edu/hrlr/the-right-to-insult-in-international-law/
[250] ARTICLE 19, *Prohibiting incitement to discrimination, hostility or violence*. Free World Centre, London, 2012, https://www.article19.org/data/files/medialibrary/3548/ARTICLE-19-policy-on-prohibition-to-incitement.pdf
[251] "International Convention on the Elimination of All Forms of Racial Discrimination. UN General Assembly. 21 December 1965, United Nations, Treaty Series, vol. 660, p. 195". UN. Accessed 04 April 2020. https://www.refworld.org/docid/3ae6b3940.html
[252]"General recommendation No. 35: Combating racist hate speech, 26 September 2013, CERD/C/GC/35". UN CERD. Accessed 04 April 2020. https://www.refworld.org/docid/53f457db4.html
[253] "Press release on the case of Erbakan v Turkey, App. No. 59405/00, 06 July 2006". ECtHR. Accessed 04 April 2020. http://hudoc.echr.coe.int/eng-press?i=003-1728198-1812055
[254] "Le Pen v. France, App. No. 18788/09, 20 April 2010, cited from: Clooney, Amal; Webb, Philippa. "The Right to Insult in International Law." Columbia Human Rights Law Review 48, 2 (2017): 1-55. http://hrlr.law.columbia.edu/hrlr/the-right-to-insult-in-international-law/

confidence in democratic institutions". [255] Except for politicians, the example of the official position with authority over the audience and have a special status in the society could be a school teacher. The HRC in the case Malcolm Ross v Canada, where the school teacher was dismissed from his position for the articles and statements directed against the persons of the Jewish faith and "[…] as a public school teacher, was in a position to exert influence on young persons who did not yet possess the knowledge or judgment to place views and beliefs into a proper context", ruled that people are his position should "[…] exercising of the right to freedom of expression carries with it special duties and responsibilities" which have "[…] particular relevance within the school system, especially with regard to the teaching of young students".[256] The ECtHR upheld this direction in the case Seurot v France where the school teacher of history and geography was dismissed from school for the article with the racist statements about the North Africans which he wrote and published in the internal newspaper of the school. The Court stated that "[t]he specific duties and responsibilities incumbent on teachers, who symbolised authority in the eyes of their pupils, also applied with regard to their related activities in the school in which they taught".[257]

The next issue to be established is the level of the speaker's authority or influence over the audience as well as his/her charisma[258], which has particular importance during the communication with the public. This category may include different public figures, f. e. comedians and journalists, as well as abovementioned teachers who have a particular influence on their pupils. The influence of the journalists and media on the society evidenced in the Nahimana case, where radio broadcasting became one of the most important means of the dissemination of public incitements for hatred and genocide. Also, in the case Jersild v Denmark the ECtHR stated that it is important for the press to balance the bounds set for the protection of the rights of others and the importance of providing information and ideas of the public interest.[259] In the case Surek v Turkey (No. 1), the ECtHR emphasized on the role of the owner of the media resource who "[…]had the power to shape the editorial direction of the review. For that reason, he was vicariously subject to the "duties and responsibilities" which the review's editorial and journalistic staff undertake in the collection and dissemination of information to the public and which assume even greater importance in

[255] "Case of Féret v. Belgium, App No. 15615/07, 16 July 2009" cited from: ARTICLE 19, *Prohibiting incitement to discrimination, hostility or violence*. Free World Centre, London, 2012, https://www.article19.org/data/files/medialibrary/3548/ARTICLE-19-policy-on-prohibition-to-incitement.pdf
[256] "Malcolm Ross v. Canada, Communication No. 736/1997, U.N. Doc. CCPR/C/70/D/736/1997 (2000)". UN HRC. Accessed 04 April 2020. http://hrlibrary.umn.edu/undocs/736-1997.html
[257] "Case of Seurot v France, App No. 57383/00, 18 May 2004 (Information note No. 64 on the case-law of the Court, May 2004)". ECtHR. Accessed 04 April 2020. https://echr.coe.int/Documents/CLIN_2004_05_64_ENG_863565.pdf
[258] ARTICLE 19, *Prohibiting incitement to discrimination, hostility or violence*. Free World Centre, London, 2012, https://www.article19.org/data/files/medialibrary/3548/ARTICLE-19-policy-on-prohibition-to-incitement.pdf
[259] "Case of Jersild v Denmark, App. No. 15890/89, 23 September 1994". ECtHR. Accessed 04 April 2020. http://hudoc.echr.coe.int/eng?i=001-57891

situations of conflict and tension".[260] At the same time, the development of the technologies creates a challenge with respect to the journalists and their special status, since any person with the computer, smartphone and access to the Internet could become a journalist who can share their opinions and statements on social media and other web sites. That opinion is reflected in the General comment No. 34 where the HRC states that "[j]ournalism is a function shared by a wide range of actors, including professional full-time reporters and analysts, as well as bloggers and others who engage in forms of selfpublication in print, on the internet or elsewhere".[261] The further same attitude was expressed during the twentieth session of the UN Human Rights Council that "[a] definition of journalists includes all media workers and support staff, as well as community media workers and so-called "citizen journalists" when they momentarily play that role".[262] At the same time, the ECtHR provides the status of a public figure to the persons which definitely have some influence or level of authority over the audience, which potentially could be used by such public figures for inciting hatred. The definition of the public figure can be found in the Resolution of the Parliamentary Assembly of the Council of Europe on the right to privacy where its stated that "[p]ublic figures are persons holding public office and/or using public resources and, more broadly speaking, all those who play a role in public life, whether in politics, the economy, the arts, the social sphere, sport or in any other domain".[263] Thus, the ECtHR in the case Von Hannover v Germany established the status of the public figure for the member of the royal family stated that "[…] nonetheless, that irrespective of the question whether and to what extent the first applicant assumes official functions on behalf of the Principality of Monaco, it cannot be claimed that the applicants, who are undeniably very well known, are ordinary private individuals. They must, on the contrary, be regarded as public figures".[264] Similarly, based on Resolution 1165, the ECtHR established that the actor of the famous TV series is "[…] sufficiently well known to qualify as a public figure".[265]

[260] "Case of Surek v Turkey, App No. 26682/95, 08 July 1999". ECtHR. Accessed 04 April 2020. http://hudoc.echr.coe.int/eng?i=001-58279
[261] "General comment no. 34, Article 19, Freedoms of opinion and expression. UN Human Rights Committee (HRC), 12 September 2011, CCPR/C/GC/34". UN HRC. Accessed 04 April 2020. https://www.refworld.org/docid/4ed34b562.html
[262] "Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, Frank La Rue, 4 June 2012, A/HRC/20/17". UN HRC. Accessed 05 April 2020. https://www.ohchr.org/Documents/HRBodies/HRCouncil/RegularSession/Session20/A-HRC-20-17_en.pdf
[263] "Resolution 1165 on the right to privacy, 26 June 1998". Parliamentary Assembly of the Council of Europe. Accessed 05 April 2020. https://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=16641&lang%20=en
[264] "Case of Von Hannover v Germany (No. 2), App No. 40660/08, 60641/08, 07 February 2012". ECtHR. Accessed 05 April 2020. http://hudoc.echr.coe.int/fre?i=001-109029
[265] "Case of Alex Springer AG v Germany, App No. 39954/08, 07 February 2012". ECtHR. Accessed 05 April 2020. http://hudoc.echr.coe.int/fre?i=001-109034

While assessing the personality of the speaker it is important to establish whether he or she made the statement or communication in an official capacity,[266] f. e. whether the speaker empowered to represent some authorities and made statements from its behalf or whether it have some certain functions in an organisation. As it was noted above the ICERD directly prohibits for the public authorities and institutions of all levels of hierarchy to promote or incite racial discrimination. Thus, the CERD in the case of TBB v Germany implies Article 4 (a) of the ICERD, the general prohibition to incite hatred instead of the specific provision of Article 4 (c) with regard to the person who was the former finance senator of Berlin and the member of the German Central Bank for the interview in the journal, which contained the ideas of racial superiority, negative characterization of the Turkish population and incitements to racial discrimination, partially because "[…] the context of the interview shows that Mr. Sarrazin expressed his personal views rather than giving any official or semi-official view".[267] It is also important while assessing the person of the speaker to pay attention on "[…] the degree of vulnerability and fear of the various communities, including those targeted by the speaker; and whether the audience is characterised by excessive respect for authority, as factors of this kind would make an audience more vulnerable to incitement".[268]

2.3.2 The Intent of the Speaker

The next important element of the subjective side of the public incitement to hatred is the intent of the speaker. It is mentioned above that the Article 20 (2) of the ICCPR directly provides an intent requirement with the word "advocacy", while the Article 4 of the ICERD includes a provision requiring incitement instead of intent. Also, in the General recommendation No. 35, the CERD states that "[s]tates parties should take into account, as important elements in the incitement offences, […], the intention of the speaker, and the imminent risk or likelihood that the conduct desired or intended by the speaker will result from the speech in question".[269] So, it seems that an intent requirement should be assessed while analysing the cases on public incitement to hatred. At the same time, it is difficult to prove the intent of the person without the direct confession about

[266] ARTICLE 19, Prohibiting incitement to discrimination, hostility or violence. Free World Centre, London, 2012, https://www.article19.org/data/files/medialibrary/3548/ARTICLE-19-policy-on-prohibition-to-incitement.pdf
[267] "TBB–Turkish Union in Berlin/Brandenburg v. Germany, Communication No. 48/2010, UN Doc. CERD/C/82/D/48/2010, (Apr. 4, 2013)". UN CERD. Accessed 05 April 2020. http://www.worldcourts.com/cerd/eng/decisions/2013.02.26_TBB_v_Germany.pdf
[268] Susan Benesh, *Dangerous Speech: A Proposal To Tackle Violence*, 2011, cited from: ARTICLE 19, Prohibiting incitement to discrimination, hostility or violence. Free World Centre, London, 2012, https://www.article19.org/data/files/medialibrary/3548/ARTICLE-19-policy-on-prohibition-to-incitement.pdf
[269] "General recommendation No. 35: Combating racist hate speech, 26 September 2013, CERD/C/GC/35". UN CERD. Accessed 04 April 2020. https://www.refworld.org/docid/53f457db4.html

the inner state of mind during the commission of the act. With that regard, courts and other authorities have to make their own investigation on the presence of intent in the person's actions, unless they receive the guilty plea or other clear evidence. The ARTICLE 19 offers the next forms of intent "[v]olition (purposely striving) to engage in advocacy to hatred*(direct intent)*; volition (purposely striving) to target a protected group on the basis of prohibitive grounds as such*(direct intent)*; having knowledge of the consequences of his/her action and knowing that the consequences will occur or might occur in the ordinary course of events*(indirect, oblique intent)*."[270] The ECtHR states that "[…] an important factor in the Court's evaluation will be whether the item in question, when considered as a whole, appeared from an objective point of view to have had as its purpose the propagation of racist views and ideas"[271], which demonstrates the need to analyse all circumstances of the case to prove the presence of some form of intent. Based on the abovementioned, subjective and objective tests may be used to determine the presence of intent and its form, direct or indirect (oblique).[272] The subjective test is conducted from the defendant's perspective, or in a case of public incitement to hatred from the speakers perspective. It consists in the proving beyond a reasonable doubt an aim, purpose or desire ("volition or purposely striving") of the speaker to incite hatred or that a speaker foresight or "have knowledge" about the possible consequences of the incitement which corresponds with the position of the ARTICLE 19. The objective test is conducted from the perspective of the reasonable, ordinary person and whether such person could foresight the degree of probability of the result occurring, in other words, whether the ordinary person can be incited to hatred with a certain form of expression. It shows that tests analyse the situation from different points of view, and their application in the cases of public incitements to hatred will provide more information for the decision-makers.

There are some factors that may be considered for imputation of the intent of the speaker (direct or indirect), which may be used while conducting the abovementioned tests, such as the language used by the speaker, objectives which the speaker pursued, and the scale and repetition of the communication.[273] The language used by the speaker is one of the most reliable sources for the assessment of the intent. Thus, in the Nahimana case, ICTR refers to the wording of communication made by the person in establishing the intent to genocide. The statements used in that case usually were clear and explicit, such as calls for the extermination of *Inyenzi,* persons of

[270] ARTICLE 19, Prohibiting incitement to discrimination, hostility or violence. Free World Centre, London, 2012, https://www.article19.org/data/files/medialibrary/3548/ARTICLE-19-policy-on-prohibition-to-incitement.pdf
[271] "Case of Jersild v Denmark, App. No. 15890/89, 23 September 1994". ECtHR. Accessed 05 April 2020. http://hudoc.echr.coe.int/eng?i=001-57891
[272] "Mens Rea: Intention, Recklessness, Negligence and Gross Negligence". Blackwells. Accessed 04 May 2020. https://blackwells.co.uk/extracts/9780199228287_loveless.pdf
[273] ARTICLE 19, Prohibiting incitement to discrimination, hostility or violence. Free World Centre, London, 2012, https://www.article19.org/data/files/medialibrary/3548/ARTICLE-19-policy-on-prohibition-to-incitement.pdf

Tutsi ethnic minority, mentioning the war between ethnic groups, recommendations of types of weapons for the killing and stating that the media has the same role as bullets in a war.[274] Also, the Tribunal based on existed case law states that the language could be used as an indicator of the intent as well as the fact of knowledge about the continuous genocide while making statements which call to violence.[275] The ECRI GPR No. 15 provides examples of the language which can be understood as evidence of the intent, such as "[…] an unambiguous call by the person using hate speech for others to commit the relevant acts or it might be inferred from the strength of the language used and other relevant circumstances, such as the previous conduct of the speaker" and emphasized on the difficulty to establish the intent in situations "[…]where remarks are ostensibly concerned with supposed facts or coded language is being used".[276] With that regard, the ECtHR in the case Incal v Turkey emphasized the need for the careful consideration of not only the wording of leafets but also other factors "[…] it 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".[277]

The other factor which should be assessed while imputation the intent of the speaker is the objectives which the speaker pursued. There is a number of cases where the ECtHR emphasized the particular importance of the aims which the author followed while making a statement, which was considered by the national authorities as an incitement to hatred. The first case on freedom of expression which was brought to ECtHR is one of the most important cases on the matter of the speaker's objectives. In the case of Jersild v Denmark, where the journalist was convicted for the including to his programme the racist statements of the members of the right-wing organisation, which was sentenced for that statements as well, the Court disagreed with the position of the State based on several facts such as "[t]he punishment of a journalist for assisting in the dissemination of statements made by another person in an interview would seriously hamper the contribution of the press to discussion of matters of public interest", "[…] the purpose of the applicant in compiling the broadcast in question was not racist" and "[…]it clearly sought - by means of an interview - to expose, analyse and explain this particular group of youths, limited and frustrated by their social situation, with criminal records and violent attitudes, thus dealing with specific

[274] "The Prosecutor v. Ferdinand Nahimana, Jean-Bosco Barayagwiza, Hassan Ngeze (Judgement and Sentence), ICTR-99-52-T, 3 December 2003". International Criminal Tribunal for Rwanda (ICTR). Accessed 05 April 2020. https://www.refworld.org/cgi-bin/texis/vtx/rwmain?docid=404468bc2

[275] Ibid

[276] "ECRI General Policy Recommendation N°15 on Combating Hate Speech (08 December 2015)". Council of Europe, ECRI. Accessed 05 April 2020. https://rm.coe.int/ecri-general-policy-recommendation-no-15-on-combating-hate-speech/16808b5b01

[277] "Case of Incal v Turkey, App. No. 22678/93, 9 June 1998". ECtHR. Accessed 05 April 2020. http://hudoc.echr.coe.int/fre?i=001-58197

aspects of a matter that already then was of great public concern".[278] Thus, this case takes an approach that without the intent to incite hatred, the person can not be responsible for the statements with inciting content. In the case of Lehindeux v France the ECtHR stated that the applicants who supported the "double game" theory regarding the role of the head of the Vichy government "[does not] attempted to deny or revise what they themselves referred to in their publication as "Nazi atrocities and persecutions" or "German omnipotence and barbarism"" and were intended "[…] to create a shift in public opinion which, in their view, would increase support for a decision to reopen the case".[279] Additionally, the Cort in the case of Aksu v Turkey where the academic research and two dictionaries included the word "Gypsy" and mentioned the engagement of some of them in criminal activities, such as "[…] pick-pocketing, stealing and selling narcotics" does not find an incitement to hatred since "[…] the author emphasised in clear terms that his intention was to shed light on the unknown world of the Roma community in Turkey, who had been ostracised and targeted by vilifying remarks based mainly on a prejudice [and] in the absence of any evidence justifying the conclusion that the author's statements were insincere".[280] Contrary, the HRC found an intent to incite hatred, based on the aim of the person in the case Faurisson v France where the author was convicted for the publication of the book which denies the Holocaust. The Committee agreed with the arguments of the State that "[…] the denial of the Holocaust by authors who qualify themselves as revisionists could only be qualified as an expression of racism and the principal vehicle of anti-semitism" and based on the fact that author accused the Jewish historians in creating the myth of Holocaust while silencing that historians of other nations have written about that events, the HRC established the intent to promote anti-Semitism rather than to contribute to the historical debate.[281] Similarly, in the case of Garaudy v France, the ECtHR stated that "[t]he aim and the result of that approach are completely different, the real purpose being to rehabilitate the National-Socialist regime and, as a consequence, accuse the victims themselves of falsifying history", and the Court declares the application inadmissible based on the Article 17 of the ECHR, because "[d]enying crimes against humanity is therefore one of the most serious forms of racial defamation of Jews and of incitement

[278] "Case of Jersild v Denmark, App. No. 15890/89, 23 September 1994". ECtHR. Accessed 05 April 2020. http://hudoc.echr.coe.int/eng?i=001-57891
[279] "Case of Lehindeux and Isorni v France, App. No. 24662/94, 23 September 1998". ECtHR. Accessed 05 April 2020. http://hudoc.echr.coe.int/eng?i=001-58245
[280] "Case of Aksu v Turkey, App No. 4149/04 and 41029/04, 15 March 2012". ECtHR. Accessed 05 April 2020. https://www.legal-tools.org/doc/d4f13a/pdf/
[281] "Robert Faurisson v. France, Communication No. 550/1993, U.N. Doc. CCPR/C/58/D/550/1993 (1996)". UN HRC. Accessed 05 April 2020. http://hrlibrary.umn.edu/undocs/html/VWS55058.htm

to hatred of them [and] such acts are incompatible with democracy and human rights because they infringe the rights of others".[282]

The intent to incite hatred can be demonstrated by the scale and repetition of the communication, so "[…] if the speaker repeated the communication over time or on several occasions, it might be more likely that there was an intention to incite a certain action".[283] The practice of the ECtHR does not have a case where the intent would be established solely on the ground of repetition of communication, at the same time the relevant conditions could be found in the case Feret v Belgium where the leaflets which were distributed during the electoral campaign presented the immigrant communities as criminally-minded and exploiting the benefits from living in Belgium could create "[…] the inevitable risk of arousing, particularly among less knowledgeable members of the public, feelings of distrust, rejection or even hatred towards foreigners"[284], having in mind that such material was distributed during the elections, it is reasonable to suppose that it was made intentionally to gain political advantage by inciting hatred against the immigrant communities.

At the same time there are few alarming cases where the ECtHR does not assess the intent requirement and declares the case inadmissible under the Article 17 of the ECHR, f. e. in the abovementioned case of Feret v Belgium or in the case of Norwood v the United Kingdom, where the applicant demonstrated from his window the large poster "with a photograph of the Twin Towers in flame, the words "Islam out of Britain – Protect the British People" and a symbol of a crescent and star in a prohibition sign"[285]. The Court stated that "[s]uch a general, vehement attack against a religious group, linking the group as a whole with a grave act of terrorism, is incompatible with the values proclaimed and guaranteed by the Convention [and] constituted an act within the meaning of Article 17, which did not, therefore, enjoy the protection of Articles 10 or 14"[286], without any assessment of the intent of the person. One can argue that in such a situation the intent to incite hatred is obvious by the nature of an act, but such practice of the Court can lead to arbitrariness, which limits the rights of the applicant on the reviewing their cases and protection of their rights. Given that, it is necessary for the judicial bodies to assess the intent requirement as a part of the examination of the case, even though it is declared inadmissible since it demonstrates the clear step-by-step assessment and provides more understanding of the methods which is used

[282] "Case of Garaudy v France, App. No. 65831/01, 26 June 2003". ECtHR. Accessed 06 April 2020. http://hudoc.echr.coe.int/eng?i=001-23829
[283] ARTICLE 19, Prohibiting incitement to discrimination, hostility or violence. Free World Centre, London, 2012, https://www.article19.org/data/files/medialibrary/3548/ARTICLE-19-policy-on-prohibition-to-incitement.pdf
[284] "Press release on the Case of Feret v Belgium, App No. 15615/07, 16 June 2009". ECtHR. Accessed 06 April 2020. http://hudoc.echr.coe.int/eng-press?i=003-2800730-3069797
[285] "Case of Norwood v the United Kingdom, App. No. 23131/03, 16 September 2004". ECtHR. Accessed 27 February 2020. http://hudoc.echr.coe.int/eng?i=001-67632
[286] Ibid

by authorities for determining the intent as well as other elements of the public incitement to hatred.

2.4 The Impact of Causation on the Sanctioning for the Public Incitement to Hatred

The causation of the public incitement to hatred is a controversial and highly discussed phenomenon. ICERD in two of the four provisions of the Article 4 does not require any result, which means that the statements should be prohibited because it based on racial superiority or hatred, even though it does not lead to any consequences. The other two provisions of the Article 4 of the ICERD and the Article 20 (2) of the ICCPR requires the incitement to some result, such as discrimination, hostility, violence or hatred, so some link between the incitement and proscribed result should be present. Additionally, the Camden Principles defines an incitement as "statements about national, racial or religious groups which create an imminent risk of discrimination, hostility or violence against persons belonging to those groups."[287] The UN HRC in the Rabat Plan of Action states that "[i]ncitement, by definition, is an inchoate crime. The action advocated through incitement speech does not have to be committed for said speech to amount to a crime. Nevertheless, some degree of risk of harm must be identified."[288] So, it requires courts "[…] to determine that there was a reasonable probability that the speech would succeed in inciting actual action against the target group, recognizing that such causation should be rather direct."[289] The UN CERD emphasizes that "[…] States parties should take into account, as important elements in the incitement offences […] the imminent risk or likelihood that the conduct desired or intended by the speaker will result from the speech in question".[290] Given that it is difficult to find a real purpose of the causation, but having in mind the recognition of the incitement as an inchoate crime, it is clear that it has no relevance in the establishing the fact of the incitement as such.

The establishment of causality in the cases of the public incitement to hatred has particular importance from the perspective of the freedom of expression and its limitations.[291] With that regard the UN HRC emphasizes that "[w]hen a State party invokes a legitimate ground for restriction of freedom of expression, it must demonstrate in specific and individualized fashion the

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[287] ARTICLE 19, The Camden Principles on Freedom of Expression and Equality. Free World Centre, London, 2009, https://www.article19.org/data/files/pdfs/standards/the-camden-principles-on-freedom-of-expression-and-equality.pdf

[288] "Rabat Plan of Action on the prohibition of advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence, 5 October 2012". OHCHR. Accessed 07 April 2020. https://www.ohchr.org/Documents/Issues/Opinion/SeminarRabat/Rabat_draft_outcome.pdf

[289] Ibid

[290] "General recommendation No. 35: Combating racist hate speech, 26 September 2013, CERD/C/GC/35". UN CERD. Accessed 07 April 2020. https://www.refworld.org/docid/53f457db4.html

[291] Toby Mendel, *Study on International Standarts Relating to Incitement to Genocide or Racial Hatred* (Toby Mendel, 2006), http://www.concernedhistorians.org/to/239.pdf

precise nature of the threat, and the necessity and proportionality of the specific action taken, in particular by establishing a direct and immediate connection between the expression and the threat."[292] Thus, the statements which are not capable of causing the proscribed result, mainly to incite hatred, should not be restricted, because it will not help to prevent that result, so the limitation is not effective.[293] At the same time, if there is a possibility that the statement creates the risk of the proscribed result or the causal link can be found between the statement and the proscribed result, restrictions of that form of expression can be justified.[294] So, the likelihood to cause proscribed result serves as the threshold in determining which form of expression may be restricted and to what extent. Additionally, another issue related with the restriction of freedom of expression is the possible abuses based on the absence of the requirement of a sufficiently close link between the statement and the result, so the requirement of the close link serves as the prevention from abuses in cases other than inciting genocide or hatred.[295]

Concerning the results of the incitement, the analysis of different provision shows that incitement has two different types of results. The first result of incitement is a creation "[…] 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".[296] Having a particular list of crimes provided in the criminal law it would be easy to establish a connection between a committed crime and an incitement to its commitment.[297] However, it is almost impossible to prove the causation in the situation where the incited crime does not occur, in such cases there is a need to prove the likelihood of happening of the proscribed result, instead of the state of mind of the incited audience.[298] The second result of incitement is "[…] 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. […] 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."[299] As a solution to that problem, it is reasonable to assess the likelihood of creating a hatred state of mind within the audience.

The second type of result constitutes the major part of the cases on the public incitement to hatred which is brought before the international and regional human rights courts and the judicial

[292] "General comment no. 34, Article 19, Freedoms of opinion and expression, 12 September 2011, CCPR/C/GC/34". UN HRC. Accessed 07 April 2020. https://www.refworld.org/docid/4ed34b562.html
[293] Toby Mendel, *Study on International Standarts Relating to Incitement to Genocide or Racial Hatred* (Toby Mendel, 2006), http://www.concernedhistorians.org/to/239.pdf
[294] Ibid
[295] Ibid
[296] Ibid
[297] Ibid
[298] Ibid
[299] Ibid

practice on that matter is controversial because in some cases the courts rely on the causation element and in other cases the courts establish the fact of public incitement to hatred without referring to the causation. Thus, in the case of A.W.P. v Denmark the UN HRC declared the application inadmissible because "[…] the author has failed to establish that those specific statements had specific consequences for him or that the specific consequences of the statements were imminent and would personally affect him."[300], similar wording was used in the case Andersen v Denmark[301]. The ECtHR in the case of Erbakan v Turkey found that there was a breach of the right to freedom of expression partially based its decision on the fact that "[…] it had not been established that at the time of his prosecution the speech in question had given rise to, or been likely to give rise to, a "present risk" and an "imminent danger"", so the "[…] the criminal proceedings instituted against a politician four years and five months after the alleged comments had been made had not been reasonably proportionate to the legitimate aims pursued".[302] The UN HRC in the case Ross v Canada agreed with the arguments of the Supreme Court of Canada on the necessity of the removal of the teacher, stating that "[…] it was reasonable to anticipate that there was a causal link between the expressions of the author and the «poisoned school environment» experienced by Jewish children in the School district"[303] Also, in the case Faurisson v France the UN HRC uses causality for the assessing the necessity of the imposed sanctions, mainly "[s]ince the statements made by the author, read in their full context, were of nature as to raise or strengthen anti-semitic feelings, the restriction served the respect of the Jewish community to live free from fear of an atmosphere of anti-semitism."[304] Toby Mendel notes 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."[305] Given that, abovementioned cases illustrated that judiciary bodies use the causality for establishing the necessity of imposed limitations on the authors of an incitement.

At the same time, the ECtHR declares the number of cases as inadmissible because of the impact of statements, even though there were almost no reasoning provided to evidence the alleged results. There are two Articles which is used by the Court in these cases such as Article 14 of the

[300] "A.W.P v. Denmark, Communication No. 1879/2009, U.N. Doc. CCPR/C/109/D/1879/2009 (2013)". UN HRC. Accessed 07 April 2020. https://juris.ohchr.org/Search/Details/1678
[301] "Anredsen v. Denmark, Communication No. 1868/2009, U.N. Doc. CCPR/C/99/D/1868/2009 (2010)". UN HRC. Accessed 07 April 2020. http://www.worldcourts.com/hrc/eng/decisions/2010.07.26_Andersen_v_Denmark.pdf
[302] "Press release on the case of Erbakan v Turkey, App. No. 59405/00, 06 July 2006". ECtHR. Accessed 07 April 2020. http://hudoc.echr.coe.int/eng-press?i=003-1728198-1812055
[303] "Malcolm Ross v. Canada, Communication No. 736/1997, U.N. Doc. CCPR/C/70/D/736/1997 (2000)". UN HRC. Accessed 07 April 2020. http://hrlibrary.umn.edu/undocs/736-1997.html
[304] "Robert Faurisson v. France, Communication No. 550/1993, U.N. Doc. CCPR/C/58/D/550/1993 (1996)". UN HRC. Accessed 07 April 2020. http://hrlibrary.umn.edu/undocs/html/VWS55058.htm
[305] Toby Mendel, Study on International Standarts Relating to Incitement to Genocide or Racial Hatred (Toby Mendel, 2006), http://www.concernedhistorians.org/to/239.pdf

ECHR, which guarantees the enjoyment of the rights set out in the Convention without discrimination, or Article 17 of the ECHR, which prohibits the use of rights in a way which is aimed at restriction or elimination of the rights of other people. As a result of the application of abovementioned articles, the Court states that the statements made by applicants is likely to undermine other rights, in particular equality, raise anti-Semitism or be contrary to the objectives of the Convention such as peace and justice. Thus, in the case of Garaudy v France the ECtHR recognizes measures imposed on the applicant as "necessary in a democratic society" noted that "[t]he denial or rewriting of this type of historical fact [Holocaust] undermines the values on which the fight against racism and anti-Semitism are based and constitutes a serious threat to public order. Such acts are incompatible with democracy and human rights because they infringe the rights of others."[306]. Similarly, the ECtHR does not assess the causation in the case Norwood v the United Kingdom, which is declared as inadmissible based on the Article 17, stating that "[…] The poster in question in the present case contained a photograph of the Twin Towers in flame, the words "Islam out of Britain – Protect the British People" and a symbol of a crescent and star in a prohibition sign. The Court notes and agrees with the assessment made by the domestic courts, namely that the words and images on the poster amounted to a public expression of attack on all Muslims in the United Kingdom."[307]

The ARTICLE 19 provides the list of questions which may be used to assess the probability or risk of discrimination, hostility or violence on a case-by-case basis. This recommendation includes questions such as "[w]as the speech understood by its audience to be a call to acts of discrimination, violence or hostility?", "[w]as the speaker able to influence the audience?", "[d]id the audience have the means to resort to the advocated action and commit acts of discrimination, violence or hostility?", "[h]ad the targeted victim group suffered or recently been the target of discrimination, violence or hostility?".[308] Also, they note that the possibility of harm should be imminent, and at the same time does not suggest any particular time limits, since imminence should be established on a case-by-case basis, so the speaker could be held responsible if the time between the speech and intended acts is reasonable.[309]

Given that, it is necessary to clearly define a place of causation in the issue of public incitement to hatred. Having in mind, an agreement among the international organisations and scholars on the inchoate character of the crime of incitement and the abovementioned practice of

[306] "Case of Garaudy v France, App. No. 65831/01, 26 June 2003". ECtHR. Accessed 07 April 2020. http://hudoc.echr.coe.int/eng?i=001-23829
[307] "Case of Norwood v the United Kingdom, App. No. 23131/03, 16 September 2004". ECtHR. Accessed 207 April 2020. http://hudoc.echr.coe.int/eng?i=001-67632
[308] ARTICLE 19, Prohibiting incitement to discrimination, hostility or violence. Free World Centre, London, 2012, https://www.article19.org/data/files/medialibrary/3548/ARTICLE-19-policy-on-prohibition-to-incitement.pdf
[309] Ibid

the judiciary bodies, which assess the causation only with respect to the necessity and proportionality of the imposed sanctions, it is reasonable to state that the causation has no relevance for the establishment of the fact of incitement, but is essential for the evaluating of necessity and proportionality of limitations imposed on the author of the incitement. So, based on the causation authorities should decide the level of the incitement's danger to the society and consequently impose proportionate measures on its author.

2.5 Summary on Chapter

To sum up, the incitement to hatred is a confusing phenomenon which is differently embodied in international instruments. Even though the discussion has similar legal matters, mainly Article 20 (2) of the ICCPR and Article 4 of the ICERD, it has different outcomes. Thus, there are few concepts of understanding the elements of the incitement to hatred. The Camden Principles embodies an approach influenced by the structure of an offence in common law countries and supported by some scholars. It singles out, as elements of the incitement to hatred, intent, incitement and causal link, which could be interpreted as *the Mens rea*, *the Actus Reus* and the Causation of the offence of the incitement to hatred.[310] The second approach was developed later, as a result of numbers of workshops organised by the Office of the High Commissioner on Human Rights, which findings were embodied in the Rabat Plan of Action. It offers a six-part threshold test, which aimed to help to establish whether the act of expression constitutes incitement to hatred and consequently requires certain limitations or should be tolerated based on freedom of expression. This concept includes six elements such as context, speaker, intent, content and form, the extent of the speech act and likelihood, including imminence. It is more detailed than the previous concept, but at the same time more complicated because of the number of elements which should be found to establish an incitement to hatred.[311] The third concept, which is described by Wibke K. Timmermann has five elements of the incitement to hatred. It includes a targeted group based on some ground, such as race, religion or nationality; describing such group as a threat to the security or wellbeing of the other group; advocation of limitation of the rights and freedom of the targeted group; public character of the incitement and context in which such speech occurs.[312]

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[310] ARTICLE 19, *The Camden Principles on Freedom of Expression and Equality.* (Free World Centre, London: 2009), https://www.article19.org/data/files/pdfs/standards/the-camden-principles-on-freedom-of-expression-and-equality.pdf

[311] "Rabat Plan of Action on the prohibition of advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence, 5 October 2012". OHCHR. Accessed 24 March 2020. https://www.ohchr.org/Documents/Issues/Opinion/SeminarRabat/Rabat_draft_outcome.pdf

[312] Wibke K. Timmermann, *Incitement in International Law* (New York: Routledge, 2015), 17-18

All these concepts have advantages and disadvantages. Some of them lack the description and could miss important elements while others are too complicated and difficult in its implementation into national legislation.

Having in mind the number of concepts and their elements, as well as the diverse and confusing practice of the judicial bodies and different approaches taken by States to regulate the issue of public incitement to hatred, it is necessary to create a detailed and at the same time comprehensive way of assessing a public incitement to hatred, which saves the classical structure of an offence and combines it with the advanced and detailed elements from the recent researches. This work offers a structure which includes an objective side and a subjective side. Also, it provides an analysis of the list of grounds for incitement as well as establishes the relevance of the causation for the public incitement to hatred. This structure is detailed with the elements developed by scholars and international organisations, illustrated by results of years of the court practice and remains open to interpretation in the light of future challenges as a living instrument.

The separate element of the public incitement to hatred which requires revision is the list of the grounds of incitement, since the international instruments were drafted and adopted more than 50 years ago and the grounds in these documents do not correspond with the present challenges. These documents could be read as living instruments which would broaden the scope of the application, but the application and interpretation of that instruments depend on the consideration of a State. Thus, it seems more reasonable to extend the list of grounds internationally and supplement the existed ones with the ground such as gender, ethnicity, sexual orientation, disability, culture or political opinion and other grounds, which provides the space for the grounds which could appear in future.

The objective side of the public incitement to hatred, which includes a form and content of incitement, an extent and magnitude with which the inciting form of expression is disseminated and a context in which the incitement occurs. The incitement to have power and to reach its aim, whether it are hatred, discrimination or more severe consequences should be communicated to someone else. Thus it needs to have some form of expression. The expression is "[…] speech and publications in any form, including through the use of electronic media, as well as their dissemination and storage", which could take the form of text, gestures, video, pictures, etc.[313] Furthermore, some forms of expression are more protected than other and require careful consideration because of their nature, topics and impact on the public discussion and at the same time could be used for the dissemination of hatred. These categories include artistic expression,

[313] "ECRI General Policy Recommendation N°15 on Combating Hate Speech (08 December 2015)". Council of Europe, ECRI. Accessed 02 April 2020. https://rm.coe.int/ecri-general-policy-recommendation-no-15-on-combating-hate-speech/16808b5b01

public interest disclosure, religious expression, academic disclosure and research and statements of facts and value judgements.[314] The form of an expression is not able to incite anyone, without the content which it carries. There are certain elements which should be present in the content of the expression to incite hatred, such as what was said, who was targeted (the audience), who was targeted (the potential victims of discrimination violence and hostility), how it was said (tone).[315] The content may include the negative stereotypisation of the targeted group, f. e. describing them as insects or non-humans, characterization them as a threat to the audience in economic, demographical, cultural or other spheres, a proposition of a radical solution for that problem, which may include deprivation of rights or even physical elimination.[316] The other form of incitement is the denying, trivialization or justification of the crimes of genocide, crimes against humanity and war crimes[317], which could be found in both political statements and academical writing.

The extent and magnitude of the incitement to hatred is the next element of the objective side. It has three main elements which should be assessed to establish the fact of public incitement and includes the public nature of the speech, means of its dissemination and its magnitude.[318] It is important that an expression has a public form, so is directed and accessible to the uncertain number of people. The means of dissemination may constitute a demonstration of paintings or banners, public communications, television and radio broadcasting, using the Internet or other forms of communication. The magnitude depends on means of dissemination and includes the repetition of communication, its extent and coverage of the audience.

The context of the expression is one of the most significant and most complicated elements of the public incitement to hatred. Its importance derives from the fact that the meaning of speech depends on the context, so in one context the speech constitutes incitement to hatred and in other it would be a regular statement, f. e. "[…] the phrase "go to work," used as code for killing during the Rwandan genocide, or the word "inyenzi" (Kinyarwanda for "cockroach"), used to refer to Tutsi or even to non-Tutsi who sympathized with Tutsi".[319] Despite the practice of international judicial bodies, it is still difficult to differentiate particular contextual factors, which could be used as the objective elements for the assessment of a context in a relevant case. Although, there are

[314] ARTICLE 19, *Prohibiting incitement to discrimination, hostility or violence*. Free World Centre, London, 2012, https://www.article19.org/data/files/medialibrary/3548/ARTICLE-19-policy-on-prohibition-to-incitement.pdf
[315] Ibid
[316] Wibke K. Timmermann, *Incitement in International Law* (New York: Routledge, 2015), 18
[317] "ECRI General Policy Recommendation N°15 on Combating Hate Speech (08 December 2015)". Council of Europe, ECRI. Accessed 02 April 2020. https://rm.coe.int/ecri-general-policy-recommendation-no-15-on-combating-hate-speech/16808b5b01
[318] ARTICLE 19, *Prohibiting incitement to discrimination, hostility or violence*. Free World Centre, London, 2012, https://www.article19.org/data/files/medialibrary/3548/ARTICLE-19-policy-on-prohibition-to-incitement.pdf
[319] Susan Benesh "*Dangerous Speech: A Proposal to Tackle Violence*", 2011, cited from: ARTICLE 19, *Prohibiting incitement to discrimination, hostility or violence*. Free World Centre, London, 2012, https://www.article19.org/data/files/medialibrary/3548/ARTICLE-19-policy-on-prohibition-to-incitement.pdf

some directions which may be used for examination, f. e. an existence of conflicts, an existence and history of institutionalized discrimination, a history of clashes and conflicts, a legal framework and a media landscape.[320] Also, it is relevant to get acquainted with the relevant case law on that matter, especially with the cases in which the context was the key factor in establishing the presence or absence of the incitement to hatred. Given that, the context can depend on time, geography, recent to the case events, history of particular nation or region, level of pluralism and other factors, so the courts and other judicial authorities should carefully assess this element and separate relevant factors for a particular case.

The subjective side of the public incitement to hatred includes two elements such as the speaker and the intent. The personality of the speaker is important for assessing the public incitement to hatred since it has a direct influence on the effectiveness of the statement of communication in inciting hatred. While analysing the identity of the speaker, it is significant to consider the official position of the speaker, the level of the authority or influence over the audience and whether he or she acts in an official capacity or as a private person.[321] There are some categories of speakers which according to the abovementioned features should be assessed carefully, such as politicians and members of political parties, public officials or persons of similar status, f. e. teachers, religious leaders, celebrities, sportsmen, members of the royal families, journalists and other public figures, since they have authority over the audience or influence because of their status within the society. It is also relevant to pay attention to the relations between the speaker and the audience, which could be characterized by the fear, respect, dependence and also has an impact on the effectiveness of the incitement.[322]

The second element of the subjective side of the public incitement to hatred is the intent of the speaker. This element is quite controversial since even in the international conventions, there is no unanimity on that matter. Thus, the Article 20 (2) of the ICCPR has a requirement of "advocacy" which is understood as an intent, while only two out of four acts prohibited by the Article 4 of the ICERD described as an incitement, which does not provide a clarity whether it requires of the intent of the person or not. At the same time, the vast majority of international organisations and scholars believes that an intent element should be examined while assessing the speech or communication on the matter of incitement.[323] The intent in such cases can be characterized by the "[v]olition (purposely striving) to engage in advocacy to hatred*(direct intent)*; volition (purposely striving) to target a protected group on the basis of prohibitive grounds as

[320] ARTICLE 19, *Prohibiting incitement to discrimination, hostility or violence*. Free World Centre, London, 2012, https://www.article19.org/data/files/medialibrary/3548/ARTICLE-19-policy-on-prohibition-to-incitement.pdf
[321] ARTICLE 19, Prohibiting incitement to discrimination, hostility or violence. Free World Centre, London, 2012, https://www.article19.org/data/files/medialibrary/3548/ARTICLE-19-policy-on-prohibition-to-incitement.pdf
[322] Ibid
[323] Ibid

such*(direct intent)*; having knowledge of the consequences of his/her action and knowing that the consequences will occur or might occur in the ordinary course of events*(indirect intent)*".[324] The complexity of that element relates to the difficulty of proving the intent of a speaker since the state of mind of that person is unknown without confession of the subject and since the intent may have a direct and indirect form. The subjective and objective tests are going to help to impute the intent of the speaker. The subjective test focused on the analysing a situation from the speaker's perspective, his or her aims, purposes or objectives as well as the knowledge and foresight of the possible consequences of their expressions. The objective test is conducted from the perspective of an ordinary person and whether an expression can create hatred feelings in their minds and is used by the ECHR. Thus, these tests clarify different aspects of the intent, so it is recommended to use both of them to provide more grounded decisions in the cases of public incitement to hatred.

There are several factors which can evidence the person's intent to incite hatred from an objective point of view, such as the language used by speaker, objectives which the speaker pursue and the scale of repetition of the communication.[325] Thus, in the Nahimana case, it is obvious from the language of the speaker, who calls for the extermination of Tutsi and suggested weapons for that, that he intended to incite hatred.[326] The objectives pursued by the author can exclude from restrictions and sanctions author's statements which based on its content constitutes incitement to hatred. Thus, if the communication with inciting content is aimed to contribute to public debates or constitutes the matter of the public interest, it is not regarded as an incitement to hatred. Such an approach demonstrated by the ECtHR in the number of cases f.e. Jersild v Denmark, Incal v Turkey and Aksu v Turkey. At the same time, the objectives of the speaker help to differentiate communications which pretend to contribute to public discussion or academic research, but actually have the aim to incite hatred, f.e. in the case of Faurisson v France and Garaudy v France, where the revisionist and anti-Semitic ideas were presented as an academical work. The scale and repetition of the communication are also important since the repetition of inciting statements can demonstrate that a speaker has a real intent to incite hatred. Furthermore, given the fact that sometimes the judicial bodies do not establish the intent of the speaker and make decisions based on the nature of the statement, it is important to change that practice in favor of obligatory assessment of the intent, which would provide more examples of the determination of the intent and create a ground for the consistent understanding of that element.

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[324] Ibid
[325] Ibid
[326] "The Prosecutor v. Ferdinand Nahimana, Jean-Bosco Barayagwiza, Hassan Ngeze (Judgement and Sentence), ICTR-99-52-T, 3 December 2003". International Criminal Tribunal for Rwanda (ICTR). Accessed 05 April 2020. https://www.refworld.org/cgi-bin/texis/vtx/rwmain?docid=404468bc2

The relation of the causation to the public incitement to hatred is controversial and ambiguous, since some provisions of the international and regional instruments require the causation or imminent risk of the discrimination, hostility or violence, while other provisions declare an incitement as an inchoate act, without the need to prove the causal link. Among those provisions, which requires causation, there are two groups based on results which are caused. The first one results in the creation "[…] 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", while the second requires only the creation "[…]among those engaged, a state of mind which is characterised by hatred, even though no particular action based on that hatred is envisaged."[327] The second group constitutes the vast majority of cases on the public incitement to hatred, which was brought before the international and regional human rights judicial bodies. It should be noted that in the case law, the causation was assessed by the authorities for establishing the necessity and proportionality of the imposed sanctions. Having in mind, an inchoate nature of the incitement and the existed case law, it seems reasonable to state that, the causation is relevant for the establishment of the severity of measures imposed on the speaker, but not for defining the fact of incitement as such.

[327] Toby Mendel, Study on International Standarts Relating to Incitement to Genocide or Racial Hatred (Toby Mendel, 2006), http://www.concernedhistorians.org/to/239.pdf

CONCLUSIONS AND RECOMMENDATIONS

The consequences of the public incitement to hatred, such as armed conflicts and genocides, e.g. Holocaust and Rwandan Genocide, which occurred in the twentieth century, illustrates the need to prohibit that phenomenon on the International level. The analysis of the existing legal regulation, judicial practice on the international and regional level as well as the relevant academical works of the scholars, illustrates the absence of an understanding of the public incitement to hatred, which is created by the different requirements of the international instruments and embodied in confusing and sometimes contradictory case law as well as different concepts of the incitement to hatred proposed by the academics. Having in mind, globalization and economical, migrational and cultural challenges which it causes, the development of informational technologies and the likelihood of future crises, it is reasonable to study the phenomenon of public incitement to hatred in International law and to introduce a unified approach to establishing public incitement to hatred as well as revise its grounds and the impact of the causation. The result of this research adapts the understanding of the public incitement to hatred to the current and future challenges and is embodied in the next conclusions and recommendations.

1. The analysis of existed international legal instruments shows that they provide only three grounds which may be used for incitement, such as race, religion and nationality. That list was relevant fifty years ago when the respective international instruments were adopted, but does not reflect the diversity of the currently existing groups which rights is recognized and should be protected. Thus, it is recommended to extend the list of inciting grouds in national legal insruments with the categories such as gender, ethnicity, sexual orientation, disability, culture and political opinion. It is also recommended to include words “and other grounds” at the end of that list, to provide a possibility to protect from incitement other groups in future.

2. There are different structures, and elements of public incitement to hatred offered by international organisations and scholars, all of them have their own advantages and disadvantages. After the analysis, the author offers an approach which unifies, conforms and uses the best concepts and elements from existed approaches of establishing the public incitement to hatred. The offered approach has a structure, similar to the offence in criminal law, which includes objective and subjective sides of the incitement and which is recommended to apply for establishing the fact of the public incitement to hatred.

3. The objective side of the public incitement to hatred consists of four elements, which is relevant for establishing the presence of the incitement, such as the form and content of expression, its extent and magnitude and the context in which an expression takes place. There are different forms in which the inciting expression can be embodied, such as text, picture, audio,

video, communication, etc. The content of the incitement should include the mentioning of the targeted group, its negative stereotypisation or describing them as a threat or may contain denying or trivialization of crimes against humanity or war crimes. Although, careful consideration is required for artistic expression, public interest disclosure, religious expression, academic disclosure and research and statements of facts and value judgements, because of its significance to the freedom of expression. The extent and magnitude are relevant while establishing the public character of the incitement, which may be established based on means of dissemination of expression, a number of its repetitions and covered audience. While examining the context, it is essential to assess the time, geography, recent to the case events, history of particular nation or region, level of pluralism, social and legal structure, history of previous conflicts and other factors which may influence the meaning of the expression. It is recommended to evaluate abovementioned elements while establishing the fact of incitement and provide by the authorities a clear assessment of such elements in the decisions on public incitement to hatred.

4. The subjective side of public incitement to hatred includes two elements, such as the speaker and the intent. Speaker is a person who incites hatred and to establish the effectiveness and danger of the incitement it is necessary to evaluate the official position of the speaker, the level of the authority or influence over the audience, whether he or she acts in an official capacity or as a private person, the status of the speaker in the society, the relation with the audience, etc. The intent is an essential part of the incitement to hatred. International instruments and the case law illustrate the necessity of the intention to incite hatred for establishing the public incitement to hatred. It is difficult to prove the intent without a confession of the speaker, although, without such a confession, it can be imputed by using subjective and objective tests. The subjective test is conducted from the speaker's perspective and could establish direct and indirect intent of the speaker. The objective test is used by the ECHR and is conducted from the perspective of an ordinary person and reflects the possibility of expression to rise hatred. There are some factors that may be useful while analysing the intent, such as the language used by the speaker, objectives which the speaker pursue and the scale of repetition of the communication. Thus, it is recommended to assess the personality and the position of the speaker carefully and to conduct both subjective and objective tests to impute the direct or indirect intent without confession of the speaker. Also, it is recommended while making the abovementioned tests to pay attention to the language used by a speaker, his or her objectives, and a number of repetitions of expression.

5. The role of the causation of the incitement in qualification of the public incitement to hatred has different understandings in the international instruments, case law and academic works. At the same time, there is an agreement that the incitement is an inchoate crime, thus it is committed by the fact of its existence despite consequences which it caused. Although, the analysis

of the case law of international judicial bodies reveals a role and impact of the causation on the public incitement to hatred. It has importance for determining the proportionality of measures imposed by a State on the speaker with regard to the incitement. Thus, it is recommended to understand causation as a criterion for assessing the severity of sanctions or other limitations imposed on the person for the fact of incitement, which would be established based on the offered elements of the objective and subjective sides. Also, it is necessary to provide clear reasoning of the impact of causation on the implied restrictions in the decisions of the authorities.

6. Having in mind contradictions and lack of examples of understanding of certain elements in the case law it is recommended for the international judiciary bodies and the national authorities, while assessing the public incitement to hatred according to offered in this work structure, to provide a clear distinction between the elements as well as illustrating them with the factual circumstances of a case. It will provide more coherent and comprehensive examples of the application and understanding of the norms on public incitement to hatred, which would guarantee the exchange of opinions and consistency in the execution of the prohibition of public incitement to hatred.

LIST OF BIBLIOGRAPHY

Books:

1. ARTICLE 19, London and Human Rights Centre *Striking a Balance: Hate Speech, Freedom of Expression and Non-Discrimination.* Edited by Sandra Coliver. University of Essex, 1992.
2. ARTICLE 19, *Prohibiting incitement to discrimination, hostility or violence*. Free World Centre, London, 2012, https://www.article19.org/data/files/medialibrary/3548/ARTICLE-19-policy-on-prohibition-to-incitement.pdf
3. ARTICLE 19, *The Camden Principles on Freedom of Expression and Equality.* Free World Centre, London, 2009, https://www.article19.org/data/files/pdfs/standards/the-camden-principles-on-freedom-of-expression-and-equality.pdf
4. Council of Europe. *The Conscience of Europe: 50 Years of the European Court of Human Rights.* Council of Europe, London, 2010 https://www.echr.coe.int/Documents/Anni_Book_Chapter01_ENG.pdf
5. Mendel, Toby. *Study on International Standarts Relating to Incitement to Genocide or Racial Hatred.* Toby Mendel, 2006 http://www.concernedhistorians.org/to/239.pdf
6. Nowak, Manfred. *U.N. Covenant on Civil and Political Rights: CCPR Commentary.* N.P. Engel: 2005
7. Timmermann, Wibke K. *Incitement in International Law.* New York: Routledge, 2015
8. Verkhovsky, Alexandr. *Criminal Law on Hate Crime, Incitement to Hatred and Hate Speech in OSCE Participating States*. SOVA Center, Hague, 2016 https://www.sova-center.ru/files/books/osce-laws-eng-16.pdf

Journal articles:

9. Clooney, Amal; Webb, Philippa. "The Right to Insult in International Law." *Columbia Human Rights Law Review* 48, 2 (2017): 1-55. http://hrlr.law.columbia.edu/hrlr/the-right-to-insult-in-international-law/
10. Toby Mendel. "Hate Speech Rules Under International Law". Centre for Law and Democracy. Accessed 23 March 2020. http://www.law-democracy.org/wp-content/uploads/2010/07/10.02.hate-speech.Macedonia-book.pdf

Websites:

11. "Cambridge Dictionary". Cambridge University Press. Accessed 25 March 2020. https://dictionary.cambridge.org/

12. “Information for Internally displaced persons. Ministry of Social Policy of Ukraine” Accessed 28 February 2020. https://www.msp.gov.ua/timeline/Vnutrishno-peremishcheni-osobi.html
13. “International Convention on the Elimination of All Forms of Racial Discrimination. UN General Assembly. 21 December 1965, United Nations, Treaty Series, vol. 660, p. 195”. UN. Accessed 24 February 2020. https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-2&chapter=4&clang=_en
14. “International Covenant on Civil and Political Rights. Chapter IV. Human Rights, 16 December 1966”. UN Treaty Collection. Accessed 21 February 2020. https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-4&chapter=4&clang=_en
15. “Mens Rea: Intention, Recklessness, Negligence and Gross Negligence”. Blackwells. Accessed 04 May 2020. https://blackwells.co.uk/extracts/9780199228287_loveless.pdf
16. “Universal Declaration of Human Rights at 70: 30 Articles on 30 Articles - Article 19”. Office of the United Nations High Commissioner for Human Rights. Accessed 05 February 2020. https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=23944&LangID=E
17. Christopher N.J. Roberts. “William H. Fitzpatrick’s Editorials on Human Rights (1949)”. Quellen zur Geschichte der Menschenrechte. Accessed 17 February 2020. https://www.geschichte-menschenrechte.de/schluesseltexte/william-h-fitzpatricks-editorials-on-human-rights-1949/
18. David Keane. “The Innocence of Satirists: Will Caricatures of the Prophet Mohammad Change the ECHR Approach to Hate Speech?”. EJIL:Talk! Blog of the European Journal of International Law. Accessed 28 March 2020. https://www.ejiltalk.org/the-innocence-of-satirists-will-caricatures-of-the-prophet-mohammad-change-the-echr-approach-to-hate-speech/
19. Peter Danchin. “The Universal Declaration on Human Rights. Article 19”. Peter Danchin. Accessed 05 February 2020. http://ccnmtl.columbia.edu/projects/mmt/udhr/article_19.html

Legal documents:

20. “A.W.P v. Denmark, Communication No. 1879/2009, U.N. Doc. CCPR/C/109/D/1879/2009 (2013)”. UN HRC. Accessed 22 February 2020. https://juris.ohchr.org/Search/Details/1678

21. “Additional Protocol to the Convention on cybercrime, concerning the criminalisation of acts of a racist and xenophobic nature committed through computer systems (28 January 2003)” Council of Europe. Accessed 27 February 2020. https://www.coe.int/en/web/conventions/full-list/-/conventions/rms/090000168008160f
22. “Anredsen v. Denmark, Communication No. 1868/2009, U.N. Doc. CCPR/C/99/D/1868/2009 (2010)”. UN HRC. Accessed 05 April 2020. http://www.worldcourts.com/hrc/eng/decisions/2010.07.26_Andersen_v_Denmark.pdf
23. “Case of Aksu v Turkey, App No. 4149/04 and 41029/04, 15 March 2012”. ECtHR. Accessed 28 March 2020. https://www.legal-tools.org/doc/d4f13a/pdf/
24. “Case of Alex Springer AG v Germany, App No. 39954/08, 07 February 2012”. ECtHR. Accessed 05 April 2020. http://hudoc.echr.coe.int/fre?i=001-109034
25. “Case of B.H., M.W., H.P. and G.K. v Austria, App No. 12774/87, 12 October 1989”. ECtHR. Accessed 31 March 2020. http://echr.ketse.com/doc/12774.87-en-19891012/view/
26. “Case of Garaudy v France, App. No. 65831/01, 26 June 2003”. ECtHR. Accessed 27 February 2020. http://hudoc.echr.coe.int/eng?i=001-23829
27. “Case of Gunduz v Turkey, App. No. 35071/97, 04 December 2003”. ECtHR. Accessed 27 February 2020. http://hudoc.echr.coe.int/eng?i=001-61522
28. “Case of Handyside v the United Kingdom, App. No. 5493/72, 07 December 1976”. ECtHR. Accessed 27 February 2020. http://hudoc.echr.coe.int/eng?i=001-57499
29. “Case of Incal v Turkey, App. No. 22678/93, 9 June 1998”. ECtHR. Accessed 27 February 2020. http://hudoc.echr.coe.int/fre?i=001-58197
30. “Case of Jersild v Denmark, App. No. 15890/89, 23 September 1994”. ECtHR. Accessed 27 February 2020. http://hudoc.echr.coe.int/eng?i=001-57891
31. “Case of Klein v Slovakia, App No. 72208/01, 31 October 2006”. ECtHR. Accessed 28 March 2020. http://www.bailii.org/eu/cases/ECHR/2006/909.html
32. “Case of Lehindeux and Isorni v France, App. No. 24662/94, 23 September 1998”. ECtHR. Accessed 27 February 2020. http://hudoc.echr.coe.int/eng?i=001-58245
33. “Case of Lingens v Austria, App No. 9815/82, 08 July 1986”. ECtHR. Accessed 29 March 2020. http://hudoc.echr.coe.int/eng?i=001-57523
34. “Case of M’Bala M’Bala v. France, App No. 25239/13, 10 November 2015”. ECtHR. Accessed 27 March 2020. http://hudoc.echr.coe.int/eng-press?i=003-5219244-6470067
35. “Case of Norwood v the United Kingdom, App. No. 23131/03, 16 September 2004”. ECtHR. Accessed 27 February 2020. http://hudoc.echr.coe.int/eng?i=001-67632

36. “Case of Otto-Perminger-Institut v Austria, App. No. 13470/87, 20 September 2020”. ECtHR. Accessed 27 February 2020. http://hudoc.echr.coe.int/eng?i=001-57897
37. “Case of Pedersen and Baadsgaard v. Denmark, App. No. 49017/99, 19 June 2006”. ECtHR. Accessed 27 February 2020. http://hudoc.echr.coe.int/eng?i=001-67818
38. “Case of Perincek v Turkey (Grand Chamber’s Judgement), App No. 27510/08, 15 October 2015”. ECtHR. Accessed 31 March 2020. http://hudoc.echr.coe.int/eng?i=001-158235
39. “Case of Refah v Turkey (Grand Chamber’s Judgement), App Nos. 41340/98, 41342/98, 41343/98 and 41344/98, 13 February 2003”. ECtHR. Accessed 31 March 2020. http://hudoc.echr.coe.int/eng?i=001-60936
40. “Case of Seurot v France App No. 57383/00, 18 May 2004 (Information note No. 64 on the case-law of the Court, May 2004)”. ECtHR. Accessed 04 April 2020. https://echr.coe.int/Documents/CLIN_2004_05_64_ENG_863565.pdf
41. “Case of Surek v Turkey, App No. 26682/95, 08 July 1999”. ECtHR. Accessed 04 April 2020. http://hudoc.echr.coe.int/eng?i=001-58279
42. “Case of Thorgeir Thorgeirson v. Iceland, App. No. 13778/88, 25 June 1992”. ECtHR. Accessed 27 February 2020. http://hudoc.echr.coe.int/eng?i=001-57795
43. “Case of Vereinigung Bildender Kunstler v. Austria, App No. 68354/01, 25 January 2007”. ECtHR. Accessed 27 March 2020. http://hudoc.echr.coe.int/fre?i=001-79213
44. “Case of Von Hannover v Germany (No. 2), App No. 40660/08, 60641/08, 07 February 2012”. ECtHR. Accessed 05 April 2020. http://hudoc.echr.coe.int/fre?i=001-109029
45. “Case of Zana v Turkey, App No. 18954/91, 25 November 1997”. ECtHR. Accessed 01 April 2020. https://www.legislationline.org/documents/id/9047
46. “CCPR General Comment No. 11: Article 20 Prohibition of Propaganda for War and Inciting National, Racial or Religious Hatred, UN Human Rights Committee (HRC), 29 July 1983”. UN HRC. Accessed 20 February 2020. https://www.refworld.org/docid/453883f811.html
47. “CCPR General Comment No. 24: Issues Relating to Reservations Made upon Ratification or Accession to the Covenant or the Optional Protocols thereto, or in Relation to Declarations under Article 41 of the Covenant, UN Human Rights Committee (HRC), 4 November 1994, CCPR/C/21/Rev.1/Add.6”. UN HRC. Accessed 21 February 2020. https://www.refworld.org/docid/453883fc11.html
48. “Commission on Human Rights, Drafting Committee, 2nd Session, Summary Record of the 28th Meeting, 11 May 1948, UN Doc E/CN.4/AC.1/SR.28”. UN. Accessed 19 February 2020. https://undocs.org/E/CN.4/AC.1/SR.28

49. “Commission on Human Rights, Fifth Session, Summary Record of the 123rd Meeting, 10 June 1949, UN Doc E/CN.4/SR.123”. UN. Accessed 19 February 2020. http://hr-travaux.law.virginia.edu/document/iccpr/ecn4sr123/nid-1820
50. “Commission on Human Rights, Ninth Session, Item 3 of the agenda, 7 May 1953, UN Doc E/CN.4/L.269”. UN. Accessed 20 February 2020. https://www.ohchr.org/Documents/Issues/Expression/ICCPR/E.CN.4.L.269.pdf
51. “Commission on Human Rights, Ninth Session, Summary Record of the 379th Meeting, 3 May 1953, UN Doc E/CN.4/SR.379”. UN. Accessed 20 February 2020. https://digitallibrary.un.org/record/1483669?ln=ru
52. “Commission on Human Rights, Sixth Session, Summary Record of the 174th Meeting, 28 April 1950, UN Doc E/CN.4/SR.174”. UN. Accessed 19 February 2020. http://hr-travaux.law.virginia.edu/document/iccpr/ecn4sr174/nid-1741
53. “Committee on the Elimination of Racial Discrimination, General Recommendation 15, Measures to eradicate incitement to or acts of discrimination (Forty-second session, 1993), U.N. Doc. A/48/18 at 114 (1994)”. UN CERD. Accessed 23 February 2020. http://hrlibrary.umn.edu/gencomm/genrxv.htm
54. “ECRI General Policy Recommendation N°15 on Combating Hate Speech (08 December 2015)”. Council of Europe, ECRI. Accessed 27 February 2020. https://rm.coe.int/ecri-general-policy-recommendation-no-15-on-combating-hate-speech/16808b5b01
55. “ECRI General Policy Recommendation N°6 on Combating the dissemination of racist, xenophobic and antisemitic materiel via the internet (15 December 2000)”. Council of Europe, ECRI. Accessed 26 February 2020. https://rm.coe.int/ecri-general-policy-recommendation-no-6-on-combating-the-dissemination/16808b5a8d
56. “ECRI General Policy Recommendation N°7 (revised) on national legislation to combat racism and racial discrimination (adopted: 13 December 2002; revised: 07 December 2017)”. Council of Europe, ECRI. Accessed 26 February 2020. https://rm.coe.int/ecri-general-policy-recommendation-no-7-revised-on-national-legislatio/16808b5aae
57. “ECRI Report on Ukraine (fifth monitoring cycle), 19 September 2017”. Council of Europe, ECRI. Accessed 28 February 2020. https://rm.coe.int/fifth-report-on-ukraine/16808b5ca8
58. “European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14, 4 November 1950”. Council of Europe, ETS 5. Accessed 27 February 2020. https://www.coe.int/en/web/conventions/full-list/-/conventions/rms/0900001680063765

59. “Gelle v. Denmark, Comm. 34/2004, U.N. Doc. A/61/18, at 124 (2006)”. UN CERD. Accessed 25 February 2020. http://www.worldcourts.com/cerd/eng/decisions/2006.03.06_Gelle_v_Denmark.htm
60. “General comment no. 34, Article 19, Freedoms of opinion and expression. UN Human Rights Committee (HRC), 12 September 2011, CCPR/C/GC/34”. UN HRC. Accessed 21 February 2020. https://www.refworld.org/docid/4ed34b562.html
61. “General recommendation No. 35: Combating racist hate speech, 26 September 2013, CERD/C/GC/35”. UN CERD. Accessed 04 April 2020. https://www.refworld.org/docid/53f457db4.html
62. “International Convention on the Elimination of All Forms of Racial Discrimination. UN General Assembly. 21 December 1965, United Nations, Treaty Series, vol. 660, p. 195”. UN. Accessed 23 February 2020. https://www.refworld.org/docid/3ae6b3940.html
63. “International Covenant on Civil and Political Rights, UN General Assembly, 16 December 1966”. UN General Assembly. Accessed 20 February 2020. https://www.ohchr.org/en/professionalinterest/pages/ccpr.aspx
64. “International Covenant on Civil and Political Rights. Chapter IV. Human Rights, 16 December 1966”. UN Treaty Collection. Accessed 21 February 2020. https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-4&chapter=4&clang=_en
65. “International Covenant on Civil and Political Rights”. UN. Accessed 19 February 2020. https://www.ohchr.org/en/professionalinterest/pages/ccpr.aspx
66. “J. R. T. and the W. G. Party v. Canada, Communication No. 104/1981, U.N. Doc. CCPR/C/OP/2 at 25 (1984)”. UN HRC. Accessed 21 February 2020. http://hrlibrary.umn.edu/undocs/html/104-1981.htm
67. “Jama v. Denmark, Comm. 41/2008, U.N. Doc. A/64/18, at 123 (2009)”. UN CERD. Accessed 25 February 2020. http://www.worldcourts.com/cerd/eng/decisions/2009.08.21_Jama_v_Denmark.htm
68. “L.K. v. The Netherlands, Communication No. 4/1991, U.N. Doc. A/48/18 at 131 (1993)”. UN CERD. Accessed 25 February 2020. http://hrlibrary.umn.edu/country/decisions/CERD-DLR.htm
69. “Malcolm Ross v. Canada, Communication No. 736/1997, U.N. Doc. CCPR/C/70/D/736/1997 (2000)”. UN HRC. Accessed 22 February 2020. http://hrlibrary.umn.edu/undocs/736-1997.html

70. “Maria Vassilari et al. v. Greece, Communication No. 1570/2007, U.N. Doc. CCPR/C/95/D/1570/2007 (2009)”. UN HRC. Accessed 22 February 2020. https://juris.ohchr.org/Search/Details/1482
71. “Mohamed Rabbae v. Netherlands, Communication No. 2124/2011, U.N. Doc. CCPR/C/117/D/2124/2011 (2017)”. UN HRC. Accessed 22 February 2020. https://juris.ohchr.org/Search/Details/2153
72. “P.S.N. v. Denmark, Comm. 36/2006, U.N. Doc. A/62/18, at 123 (2007)”. UN CERD. Accessed 25 February 2020. http://www.worldcourts.com/cerd/eng/decisions/2007.08.08_PSN_v_Denmark.htm
73. “Press release on the case of Erbakan v Turkey, App. No. 59405/00, 06 July 2006”. ECtHR. Accessed 04 April 2020. http://hudoc.echr.coe.int/eng-press?i=003-1728198-1812055
74. “Press release on the Case of Feret v Belgium, App No. 15615/07, 16 June 2009”. ECtHR. Accessed 29 March 2020. http://hudoc.echr.coe.int/eng-press?i=003-2800730-3069797
75. “Press release on the case of Leroy v France, App No. 36109/03, 02 October 2008”. ECtHR. Accessed 31 March 2020. http://hudoc.echr.coe.int/eng-press?i=003-2501837-2699727
76. “Quereshi v. Denmark, Comm. 33/2003, U.N. Doc. A/60/18, at 142 (2005)”. UN CERD. Accessed 25 February 2020. http://www.worldcourts.com/cerd/eng/decisions/2005.03.09_Quereshi_v_Denmark.htm
77. “Rabat Plan of Action on the prohibition of advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence, 5 October 2012”. OHCHR. Accessed 24 March 2020. https://www.ohchr.org/Documents/Issues/Opinion/SeminarRabat/Rabat_draft_outcome.pdf
78. “Report of the Commission on Human Rights (seventh session) 384 (XIII)”. UN. Accessed 17 February 2020. https://digitallibrary.un.org/record/212373?ln=ru#record-files-collapse-header
79. “Report of the Drafting Committee [on an International Bill of Rights] to the Commission on Human Rights of 21 May 1948”. UN. Accessed 19 February 2020. https://undocs.org/E/CN.4/95
80. “Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, Frank La Rue, 4 June 2012, A/HRC/20/17”. UN HRC. Accessed 05 April 2020.

https://www.ohchr.org/Documents/HRBodies/HRCouncil/RegularSession/Session20/A-HRC-20-17_en.pdf

81. "Resolution 1165 on the right to privacy, 26 June 1998". Parliamentary Assembly of the Council of Europe. Accessed 05 April 2020. https://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=16641&lang%20=en
82. "Resolution of the General Assembly 421 E (V) of 4 December 1950". UN. Accessed 17 February 2020. https://undocs.org/en/A/RES/421(V)
83. "Resolution of the General Assembly 543 (VI) of 5 February 1952". UN. Accessed 17 February 2020. https://undocs.org/en/A/RES/543(VI)
84. "Robert Faurisson v. France, Communication No. 550/1993, U.N. Doc. CCPR/C/58/D/550/1993 (1996)". UN HRC. Accessed 22 February 2020. http://hrlibrary.umn.edu/undocs/html/VWS55058.htm
85. "Stephen Hagan v. Australia, Communication No. 26/2002, U.N. Doc. CERD/C/62/D/26/2002 (2003)". UN CERD. Accessed 29 March 2020. http://hrlibrary.umn.edu/country/decisions/26-2002.html
86. "Study of the United Nations High Commissioner for Human Rights compiling existing legislations and jurisprudence concerning defamation of and contempt for religions, 5 September 2008, A/HRC/9/25" UN Human Rights Council. Accessed 25 March 2020. https://www.refworld.org/docid/48e61dc72.html
87. "TBB–Turkish Union in Berlin/Brandenburg v. Germany, Communication No. 48/2010, UN Doc. CERD/C/82/D/48/2010, (Apr. 4, 2013)". UN CERD. Accessed 25 February 2020. http://www.worldcourts.com/cerd/eng/decisions/2013.02.26_TBB_v_Germany.pdf
88. "The Prosecutor v. Ferdinand Nahimana, Jean-Bosco Barayagwiza, Hassan Ngeze (Judgement and Sentence), ICTR-99-52-T, 3 December 2003". International Criminal Tribunal for Rwanda (ICTR). Accessed 30 March 2020. https://www.refworld.org/cgi-bin/texis/vtx/rwmain?docid=404468bc2
89. "UN General Assembly, Sixteenth Session, Official Records, Third Committee, 23 October 1961, UN Doc A/5000". UN. Accessed 20 February 2020. https://hr-travaux.law.virginia.edu/document/iccpr/a5000/nid-110
90. "United Nations General Assembly, Fifth Session, Summary Record of the 289th Meeting, 19 October 1950, UN Doc A/C.3/SR.289". UN. Accessed 20 February 2020. http://hr-travaux.law.virginia.edu/document/iccpr/ac3sr289/nid-1839
91. "Universal Declaration of Human Rights". UN. Accessed 05 February 2020. https://www.un.org/en/universal-declaration-human-rights/index.html

ABSTRACT

The thesis investigates the issue of the prohibition of incitement to hatred in International law. This issue is covered by a different international instruments, which have different approaches on its understanding. The case law created by the international judicial bodies which is empowered to examine complains on actions of States reflects this situation with an ambiguous and sometimes controversial decisions. Similar situation is observed in the academic field, there are different approaches on the understanding the public incitement to hatred. At the same time, current and future challenges, such as the world crysises, armed conflicts, globalization and migration create conditions in which there is a high possibility of the intolerant discriminative atmosphere in which one group may be incited towards another. The development of information technologies, such as social media and the Internet as such, provide fast and unlimited circulation of information, which also may include incitement to hatred. Due to that facts, it is crucial to create a unified approach on the public incitement to hatred, which covers relevant legislation, judicial practice and the findings of scholars and may be used by the national and international authorities to determine and eliminate different forms of public incitement to hatred.

Keywords: public incitement to hatred, hate speech, freedom of expression.

SUMMARY

The thesis examines the prohibition of incitement to hatred in International law.

The first section analyse the international, regional and national legal instruments which is related to the public incitement to hatred, the history of its drafting and development of relevant norms. The drafting process was influenced by the horrible events of the Second World War, such as Holocaust, which was partially caused by the public incitements to hatred. Based on that, majority of States on the initiative of the socialist States and the USSR agreed to include the prohibition of the public incitement to hatred. At the same time, because of different objectives international instruments have own general or specific wording of that prohibition and consequently different scope of application. Similar situation exists in the practice of the judicial bodies related to particular instruments, which sometimes interpret similar situations in different manner. There are number of attempts among the scholars and international organisations to offer own understanding of the public incitement to hatred. Thus, in a view of future challenges there is a need to create a unified approach which corresponds with the existing international norms, case law and academic findings.

The second section dedicated to the analysis of the existed approaches on understanding the public incitement to hatred, which is provided by the international instruments, practice of international judicial bodies, academics and international organisations. Based on that, the structure of the public incitement to hatred and its elements is offered. The structure of the public incitement to hatred complies with a three parts, objective side, subjective side and causation. The objective side covers the form and content of expression, its extent and magnitude and the context. The form and content is the physical embodiment and the message which is carried by expression. The repetition and means of dissemination of expression is related to the element of the extent and magnitude. The context as one of the most significant and complicated elements includes conditions in which the expression is made, as well as other information which is relevant to establish public incitement to hatred. The subjective side includes the speaker and the intent. The personality of the speaker influences the effectiveness of the incitement, so it is important to establish the level of the authority, social status and official position of the speaker. It is difficult to establish the intent because of its mental character, but it is possible to evidence its presence by assessing the wording of the expression, its repetition and context in which it is made. The causation relates with the creation of hostile toward the targeted group a state of mind among the audience. Also it suggests to clearly establish abovementioned elements, while examining each particular case on public incitement to hatred to provide for it more examples and details.

HONESTY DECLARATION

08/05/2020

Hrebinka

I, Oleksandr Lazorenko, student of

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confirm that the Master thesis titled

“Prohibition of Incitement to Hatred in International Law”:

1. Is carried out independently and honestly;
2. Was not presented and defended in another educational institution in Lithuania or abroad;
3. Was written in respect of the academic integrity and after becoming acquainted with methodological guidelines for thesis preparation.

I am informed of the fact that student can be expelled from the University for the breach of the fair competition principle, plagiarism, corresponding to the breach of the academic ethics.

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