CHAPTER VII

HATE SPEECH AND THE AMERICAN CONVENTION ON HUMAN RIGHTS[1]

A. Introduction: Purpose and context of the report

1. Hate speech, or speech designed to intimidate, oppress or incite hatred or violence against a person or group based on their race, religion, nationality, gender, sexual orientation, disability or other group characteristic, knows no boundaries of time or place. From Nazi Germany to the Ku Klux Klan in the United States to Bosnia in the 1990s to the 1994 genocide in Rwanda, hate speech has been deployed to harass, persecute and justify the deprivation of human rights, and at its most extreme, to rationalize murder. In the wake of the German Holocaust, and with the rise of the Internet and other modern media helping to facilitate the dissemination of hate speech, many governments and inter-governmental bodies have attempted to limit the harmful effects of this type of expression. These efforts, however, naturally collide with the right to freedom of expression guaranteed by numerous treaties, national constitutions and domestic laws.

2. In the Americas, the American Convention on Human Rights provides for a broad measure of freedom of expression under Article 13 by guaranteeing the right to "seek, receive and impart information and ideas of all kinds" through any medium.[2] Article 13 protects this freedom by banning prior censorship and indirect restrictions and by allowing for subsequent imposition of liability in only a small, finite set of exceptions, such as those designed to protect national security, public order and the rights and reputations of others. The Inter-American Commission on Human Rights and the Inter-American Court of Human Rights have further refined this freedom through their jurisprudence of recent decades.

3. This broad mantle of freedom of expression, however, is not absolute. The American Convention–like many international and regional covenants–declares hate speech to be outside the protections of Article 13 and it requires States parties to outlaw this form of expression. Paragraph 5 of Article 13 provides:

> Any propaganda for war and any advocacy of national, racial, or religious hatred that constitute incitements to lawless violence or to any other similar action against any person or group of persons on any grounds including those of race, color, religion, language, or national origin shall be considered offenses punishable by law.[3]

4. The Special Rapporteur for Freedom of Expression of the Inter-American Commission on Human Rights at the Organization of American States has also made declarations on this area of expression. In a joint statement with the United Nations' Special Rapporteur on Freedom of Opinion and Expression and the Organization for Security and Cooperation in Europe (OSCE) Representative on Freedom of the Media, the Special

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[1] This chapter was made possible through the research and first drafting of Susan Schneider, a second year law student at George Washington University. She was an intern at the Office of the Special Rapporteur for Freedom of Expression during 2004. The Office thanks her for her contributions.

[2] American Convention on Human Rights [hereinafter American Convention], in BASIC DOCUMENTS PERTAINING TO HUMAN RIGHTS IN THE INTER-AMERICAN SYSTEM, OEA/Ser.L/V/I.4 rev. 9 (Jan. 31, 2003) [hereinafter BASIC DOCUMENTS], Article 13.1, 13.2.

[3] *Id.,* Article 13.5.

Rapporteur recognized that expression that incites or promotes "racial hatred, discrimination, violence and intolerance" is harmful, and that crimes against humanity are often accompanied or preceded by these forms of expression. The Joint Statement noted that laws governing hate speech, given their interference with freedom of expression, should be "provided by law, serve a legitimate aim as set out international law and be necessary to achieve that aim." It further noted that hate speech, in accordance with international and regional law, should, at a minimum conform to the following guidelines:

- no one should be penalised for statements which are true;
- no one should be penalized for the dissemination of hate speech unless it has been shown that they did so with the intention of inciting discrimination, hostility or violence;
- the right of journalists to decide how best to communicate information and ideas to the public should be respected, particularly when they are reporting on racism and intolerance
- no one should be subject to prior censorship; and
- any imposition of sanctions by courts should be in strict conformity with the principle of proportionality[4]

5. The basic outlines of hate speech under Article 13(5), unlike the similar provisions found in international treaties and domestic law, have yet to be interpreted or developed in depth by the Inter-American Court or Inter-American Commission. Given the lack of Inter-American jurisprudence on this area of freedom of expression, the Special Rapporteur for Freedom of Expression endeavors to explore its possible confines through a study of comparative case law from the United Nations Human Rights Committee and the European Court of Human Rights. As with other comparative case law studies, the Special Rapporteur for Freedom of Expression considers these systems' extensive jurisprudence on the right to freedom of expression as valuable sources that can illuminate the interpretation of this right in the Inter-American system.

6. The Special Rapporteur for Freedom of Expression also aims to encourage comparative case law studies in compliance with the mandate of the Heads of State and Government conferred at the Third Summit of the Americas held in Quebec, Canada, in April 2001. During the Summit, the Heads of State and Government ratified the mandate of the Special Rapporteur for Freedom of Expression, and further held that the States "will support the work of the Inter-American System of Human Rights in the area of freedom of expression, and through the Special Rapporteur for Freedom of Expression of the IACHR, will proceed to disseminate comparative case law studies, and will further endeavor to ensure that national laws on freedom of expression are consistent with international legal obligations.

B. Hate speech under the framework of United Nations

1. International treaties and conventions

[4] Joint statement on racism and the media, by the UN Special Rapporteur in Freedom of Opinion and Expression, the OSCE Representative on Freedom of the Media, and the OAS Special Rapporteur on Freedom of Expression, February 27, 2001, available in the http://www.article19.org/docimages/951.htm.

7. In the realm of international law, like in the Inter-American system, freedom of expression enjoys broad protection. Article 19 of the Universal Declaration on Human Rights provides that "[e]veryone has the right to freedom of opinion and expression," which includes the right to hold opinions without interference and the right to seek, impart and receive information regardless of the medium. These rights have been defined in greater detail by international and regional treaties,[5] such as the Rome Statute of the International Criminal Court[6] and the International Covenant on Civil and Political Rights (ICCPR).

8. The ICCPR, which opened for signature in 1966 and which has been in force since 1976, closely mirrors the text of Article 13 of the American Convention by guaranteeing the right to freedom of expression via any medium.[7] At the same time, the ICCPR–like the American Convention–provides room for restrictions on freedom of expression. Article 19 notes that freedom of expression "carries with it special duties and responsibilities" and thus is subject to restrictions, such as those necessary to respect others' rights or reputation or to protect national security, morals or public order.[8] Like the American Convention, the ICCPR also provides for restrictions on freedom of expression by prohibiting war propaganda and the advocacy of national, racial or religious hatred. But where the American Convention provides for a ban on advocacy of these hatreds when they incite lawless violence "or any other similar action," Article 20 of the ICCPR goes beyond violence: it prohibits such hatred when it constitutes incitement to "discrimination, hostility or violence."[9] The United Nations Human Rights Committee noted in its General Comments that advocacy of these kinds of hatred falls under Article 20 whether the aims are "internal or external to the State concerned."[10]

9. The International Convention on the Elimination of all Forms of Racial Discrimination (CERD), in its efforts to halt racial hatred, provides further scope for restrictions on freedom of expression.[11] Article 4 requires signatories to condemn propaganda and groups that are based on "ideas or theories of superiority of one race or group of persons of one colour or ethnic origin, or which attempt to justify or promote racial hatred and discrimination in any form."[12] The CERD further requires parties to make, *inter alia,* "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" punishable by law.[13]

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[5] Prosecutor v.Nahimana,Barayagwiz and Ngeze, Judgment and Sentence, ICTR-99-52-T, para. 983 (ICTR Trial Chamber, Dec. 3, 2003).

[6] Article 6 of the Rome Statute of the International Criminal Court provides that any act – including one that causes serious mental harm – "with intent to destroy, in whole or in part, a national, ethnical, racial or religious group" constitutes genocide, and thus falls under the jurisdiction of the ICC. Rome Statute for the International Criminal Court, U.N. Doc. A/Conf. 183/9, July 17, 1998.

[7] International Covenant on Civil and Political Rights, GA Res. 2200A (XXI), 21 UN GAOR (Supp. No 16), UN doc. A/6316 (1966), 999 U.N.T.S. 171.

[8] *Ibid.,* Article 19.

[9] *Ibid.,* Article 20.

[10] General Comments, U.N. GAOR Hum. Rts. Comm., U.N. Doc. CCPR/C/21/Rev.1 (1989)

[11] International Convention on the Elimination of All Forms of Racial Discrimination, Dec. 21, 1965, GA Res. 2106 A(XX), 660 U.N.T.S. 195 (entered into force Jan. 4, 1969).

[12] *Ibid.,* Article 4.

[13] *Ibid.*

10. Restrictions on hate-motivated speech have also been upheld by the United Nations Human Rights Committee in its jurisprudence on Articles 19 and 20 of the ICCPR. In a number of cases, the Committee, which provides non-binding views on the implementation of the ICCPR, has upheld limitations on hate speech when it was deemed necessary to meet the goal of protecting the rights and reputations of others.

11. In *Ross v Canada,* for example, the U.N. Human Rights Committee ruled that the publication of anti-Jewish views could fall within the scope of the ICCPR's ban on advocacy of national, racial and religious hatred that constitutes incitement to discrimination, hostility or violence.[14] The petitioner, Malcolm Ross, was a teacher in Canada for 15 years, during which time he published books and made public statements denigrating the Jewish faith and heritage.[15]

12. A parent from Ross' school district filed a complaint against the School Board alleging that it condoned Ross' anti-Semitic views by failing to take action against him, and thus discriminated against Jewish students.[16] After an evaluation by a Board of Inquiry, Ross was removed from the classroom and assigned a non-teaching position.[17] Ross appealed the decision, but the Supreme Court ultimately ruled to uphold the Board of Inquiry's finding of discrimination by the school board.[18] Ross filed a complaint with the U.N. Human Rights Committee, alleging that the denial of his right to express his religious views violated Article 19 of the ICCPR.[19]

13. In its considerations of the merits of the case, the Committee noted that there were three issues requiring analysis.[20] First, the Committee had to consider whether Ross' freedom of expression was in fact restricted by his removal from his job.[21] The Committee said that because the loss of a teaching post was a "significant detriment" and the loss in this case was the result of the expression of Ross' views, the act was in fact a restriction under Article 19.[22]

14. The second issue was whether the restrictions on Ross' right to freedom of expression met the conditions set out in paragraph 3 of Article 19: that it was provided by law and that it aimed to respect the rights and reputation of others or protect national security, public order or public health or morals.[23] The Committee took its cues from the Supreme Court on the

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[14] Views of the Human Rights Committee, U.N. GAOR Hum. Rts Comm., 70th Sess., U.N. Doc. CCPR/C/70/D/736/1997 (2000).

[15] *Ibid.,* para. 2.1, 4.2.

[16] *Ibid.,* para 2.3.

[17] *Ibid.,* para. 4.1-4.3.

[18] *Ibid.,* para. 4.6-4.8.

[19] *Ibid.,* para. 5.1.

[20] *Ibid.,*para. 11.1-11.6.

[21] *Ibid.,* para. 11.1.

[22] *Ibid.*

[23] *Ibid.,* para. 11.2.

question of an adequate legal framework for the charges against Ross, noting that the Court found sufficient basis in domestic law to sustain the order to remove Ross from his job.[24] With respect to the issue of the restrictions' aims, the Committee concluded that they were designed to protect the rights and reputations of those of the Jewish faith, "including the right to have an education in the public school system free from bias, prejudice and intolerance."[25]

15. The final question in *Ross v. Canada* was whether the restrictions on Ross' freedom of expression were necessary to protect the right or reputations of those of the Jewish faith.[26] The Committee noted that under Article 19 of the ICCPR, the right to freedom of expression carries special duties and responsibilities, and this was especially pertinent in the context of a school system with young students.[27] Given that the Supreme Court had found it reasonable to expect a causal link between the authors' anti-Jewish publications and "the poisoned school environment" felt by Jewish students in the district, the Committee ruled that Ross' removal from his job could be considered a necessary restriction.[28]

16. In *Faurisson v France,* the Committee also ratified restrictions on freedom of expression connected to hate speech. Robert Faurisson, a professor of literature, was prosecuted under France's "Gayssot Act," which amended an 1881 Freedom of Press Law and made it a crime to contest the existence of certain crimes against humanity under which Nazi leaders were convicted by the International Military Tribunal at Nuremberg.[29] In a magazine interview, Faurisson expressed his belief that the gas chambers used to exterminate Jews in Nazi concentration camps during World War II were "a myth."[30] The Court of Appeal of Paris (Eleventh Chamber) upheld the conviction, prompting Faurisson to file a petition with the Committee contending that the "Gayssot Act" inhibited his right to freedom of expression.[31]

17. The Committee addressed the same three issues as in *Ross v. Canada*: whether it was provided by law, whether it targeted one of the aims laid out in paragraph 3 of Article 19 and whether it was necessary to achieve a legitimate purpose.[32] With respect to the first issue, the Committee said the restriction on Faurisson's freedom of expression was clearly provided for by the "Gayssot Act" of July 13, 1990.[33] The Committee also noted that his conviction "did not encroach upon his right to hold and express an opinion in general" but was based instead on the violation of the rights and reputations of others, so it satisfied the requirements of paragraph 3.[34]

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[24] *Ibid.,* para. 11.4.

[25] *Ibid.,* para. 11.5.

[26] *Ibid.,* para 11.6.

[27] *Ibid.*

[28] *Ibid.*

[29] Views of the Human Rights Committee, U.N. GAOR Hum. Rts Comm., 58th Sess., U.N. Doc. CCPR/C/58/D/550/1990 (1996), para. 2.1-2.3.

[30] *Ibid.,* para. 2.6.

[31] *Ibid.,* para. 2.7, 3.1.

[32] *Ibid.,* para. 9.4.

[33] *Ibid.,* para. 9.5.

[34] *Ibid.,* para. 9.6.

18. Regarding the third issue–whether the restriction was necessary – the Committee highlighted France's arguments that the Gayssot Act was designed to fight racism and anti-Semitism and that the denial of the Holocaust was the "principle vehicle for anti-[S]emitism."[35] The Committee said that in light of the absence of arguments undermining France's position, it was satisfied that the restriction on freedom of expression was necessary, and thus there was no violation of Article 19.[36]

19. Finally, in *J.R.T. and the W.G. Party v. Canada* the Committee considered the case of a Canadian who used tape-recorded messages to warn callers of the dangers of "international finance and international Jewry leading the world into wars, unemployment and inflation and the collapse of world values and principles."[37] J.R.T.'s petition contested the termination of his telephone service under the Canadian Human Rights Act of 1978, which made it a "discriminatory practice" to use the telephone in a way that might expose others to hatred or contempt on the basis of, *inter alia,* race, national or ethnic origin and religion.[38] The Committee declared the petition to be inadmissible because the opinions that J.R.T. wanted to disseminate by telephone "clearly constitute the advocacy of racial or religious hatred which Canada has an obligation under Article 20(2) of the [ICCPR] to prohibit.[39]

[35] *Ibid.,* para. 9.7.

[36] *Ibid.,* para. 10.

[37] J.R.T. and the W.G. Party v. Canada, Communication No. 104/1981, U.N. Doc. Supp. No. 40 (A/38/40-) at 231 (1983), para. 2.1.

[38] *Ibid.,* para 2.2.

[39] *Ibid.* para. 8.

C. The International Criminal Tribunal for Rwanda (ICTR) and the International Military Tribunal at Nuremberg

20. At its most extreme, hate speech can be used as a weapon to incite, promote or further the extermination of a group of people, as was seen in both Nazi Germany and in the 1994 genocide in Rwanda. Both atrocities prompted the creations of international tribunals to prosecute those responsible, and these prosecutions included direct rulings on the crime of "incitement to genocide." While this heinous crime is an egregious and infrequent form of the hate speech more commonly targeted by international conventions and domestic law, the decisions of the two tribunals on incitement to genocide can be valuable in guiding decisions about the more standard types of hate speech.

21. The International Military Tribunal at Nuremberg was the result of a 1945 agreement between the United Kingdom, the United States, France and the Soviet Union aimed at prosecuting war criminals for crimes against peace, war crimes and crimes against humanity.[40] One case heard by the Tribunal was that of Julius Streicher, a strident supporter of the Nazis who called for the annihilation of the Jewish race and incited Germans to persecute Jews through speeches and Articles.[41] Streicher, for example, called someone of Jewish origin a "parasite, an enemy, an evil-doer, a disseminator of diseases who must be destroyed in the interest of mankind."[42] While Streicher denied having knowledge of mass executions of Jews, the Tribunal ruled that Streicher's incitements to murder and extermination clearly constituted "persecution on political and racial grounds in connection with war crimes" as defined by the Tribunal's Charter, and were thus crimes against humanity.[43] Streicher was sentenced to death.[44]

22. Fifty years later, the International Criminal Tribunal for Rwanda was established by a U.N. Security Council Resolution of 1994 in the wake of a variety of reports showing that genocide and other "systematic, widespread and flagrant violations" of international humanitarian law were committed in Rwanda.[45] The Statute for this Tribunal empowered it to prosecute those who committed genocide, which covered killing, infliction of serious bodily or mental harm and other acts "committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group."[46] Within the category of genocide-related crimes, the Statute specifically establishes that "direct and public incitement to commit genocide" as a punishable offense.[47]

23. The ICTR weighed this crime in the 2003 decision of *The Prosecutor v. Ferdinand Nahimana, Jean-Bosco Barayagwiza and Hassan Ngeze*. Nahimana was charged with a series of crimes, including "direct and public incitement to genocide," for broadcasts

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[40] Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis Powers and Charter of the International Military Tribunal, Aug. 8, 1945, 59 Stat. 1544, 82 U.N.T.S. 279.

[41] The Avalon Project, Judgment: Streicher. Available at www.yale.edu/lawweb/avalon/imt/proc/judstrei.htm

[42] *Ibid.*

[43] *Ibid.*

[44] Prosecutor v.Nahimana, Barayagwiza and Ngeze, ICTR-99-52-T, para. 981.

[45] U.N. SCOR, 49th Sess., U.N. Doc. S/RES/955 (1994).

[46] *Ibid.,* art. 2.

[47] *Ibid.*

made on a Rwandan radio station known as RTLM, which called on listeners to take against action the enemy and which later became known as "Radio Machete."[48] Barayagwiza was also charged with various crimes, including incitement to genocide, in connection with activities at the RTLM radio station and of his political party, the *Coalition pour la Defense de la Republique* (CDR), which promoted the killing of Tutsi civilians.[49] Ngeze was likewise charged with crimes that included incitement to genocide for publications made in the newspaper *Kangura*, whose writings were underpinned by ethnic hatred, fearmongering and calls to violence against the Tutsis.[50] The Tribunal ultimately found that all three men acted with the "intent to destroy, in whole or in part, the Tutsi ethnic group."[51] Additionally, because Nahimana was responsible for programming at RTLM, it found him guilty of direct and public incitement to genocide.[52] Barayagwiza, as one of the main founders of CDR, and Ngeze, who was founder, owner and editor of *Kangura,* were also found guilty of the same.[53]

24. In its analysis of the publications and broadcasts made by the defendants, the ICTR evaluated the speech and its context, and then drew a line between "discussion of ethnic consciousness" on one hand and "promotion of ethnic hatred" on the other, a distinction that could be applied to future cases.[54] The decision is also pivotal because it held members of the media responsible for more than just their expression – it made them accountable for the effect of their speech, namely the genocide that resulted.[55] The Tribunal thus deemed the perpetrators of incitement to genocide as guilty as if they had committed genocide themselves.[56]

D. Hate speech under the European Convention on Human Rights

25. The European Convention for the Protection of Human Rights and Fundamental Freedoms, designed to lay out a framework for the enforcement of rights set out in the Universal Declaration of Human Rights, provides for the right to freedom of expression, as well as its limits. Under Article 10, the European Convention stipulates that freedom of expression includes the right to hold opinions, to receive and impart information and ideas "without interference by public authority," although it notes that these freedoms carry "duties and responsibilities."[57] The Article then provides a broad list of possible limits to freedom of expression:

> [These freedoms] may be subject to such formalities, conditions, restrictions, or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of

[48] Prosecutor v. Hanimana, Barayagwiza and Ngeze, ICTR-99-52-T, para.5, 18, 1031.

[49] *Ibid.*, para. 6, 9, 1035.

[50] *Ibid.*, para. 7, 10, 1036.

[51] *Ibid.,* para 969.

[52] *Ibid.*, para. 1033.

[53] *Ibid.,* para. 1035, 1038.

[54] Catharine A. MacKinnon, International Decision: Prosecutor v. Nahimana, Barayagwiza and Ngeze, 98 A.J.I.L. 325 at 329.

[55] *Ibid.*

[56] *Ibid.*

[57] European Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950 (ETS No. 5), 213 U.N.T.S. 222. Article 10.

> 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.[58]

26. The European Convention, therefore, is similar to the ICCPR in its provisions for freedom of expression, but it does not address advocacy of national, religious or racial hatred that incites discrimination, hostility or violence. But the European Court of Human Rights' jurisprudence has analyzed extensively the theme of hate speech based on the intersection of Article 10 of the European Convention and domestic laws banning these forms of incitement.[59] In these decisions, the Court has utilized the standards of Article 10(2) to determine when restrictions on freedom of expression are justified: an interference with freedom of expression violates Article 10 unless it is "prescribed by law," is designed to carry out at least one of the aims laid out in Article 10(2) and is "necessary in a democratic society." The Court has repeatedly defined "necessary" as a "pressing social need" and has evaluated interferences based on whether they are "proportionate to the legitimate aims pursued."

27. In *Jersild v. Denmark*, the European Court found that laws targeting hate speech had been applied too broadly in the case of a journalistic program on racist youths.[60] Jens Olaf Jersild was a journalist with a Danish television and radio network who interviewed three members of the youth group "Greenjackets" for a television news program.[61] During the interview the three youths made derogatory statements about immigrants and ethnic groups in Denmark, calling some of the groups "animals."[62] Jersild was charged with aiding and abetting the youths in their violation of a Danish law prohibiting threats, insults or degradation against a group of people based on their race, color, national or ethnic origin or belief.[63] In his complaint to the European system, Jersild claimed that his conviction for this crime violated Article 10 of the European Convention.[64] The Court noted that Danish law did provide for the crime for which Jersild was charged, and that the interference had the legitimate aim of protecting the reputation or rights of others as laid out in Article 10(2).[65] With respect to the final element of Article 10(2) – whether the measures were necessary in a democratic society – the Court emphasized two points as background. First, it noted that it was "particularly conscious" of the importance of fighting racial discrimination.[66] It also emphasized that Denmark's obligations under Article 10 had to be interpreted "so as to be reconcilable" with its obligations under the CERD.[67] At the same time, however, the Court noted that a critical consideration was whether the expression, when viewed as a whole, "appeared from an objective point of view to have had as its purpose the propagation of racist views and ideas." It concluded that the program did not appear to have such an intent, as shown by the program's introduction, and was designed instead to expose a

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[58] *Ibid.*

[59] *See* Prosecutor v. Hanimana, Barayagwiza and Ngeze, ICTR-99-52-T, para. 991.

[60] Eur. Ct. H.R., Jersild v. Denmark, Judgment of 22 August 1994, Application No. 15890/89.

[61] *Ibid.,* para 10.

[62] *Ibid.*, para. 12.

[63] *Ibid.,* para. 12.

[64] *Ibid.,* para. 25.

[65] *Ibid.,* para. 27.

[66] *Ibid.,* para. 30.

[67] *Ibid.,* para. 30.

particular group of youths and their lives.[68] As a result of this, the Court ruled that the government's justifications for Jersild's conviction did not establish that the interference with freedom of expression was "necessary in a democratic society."[69]

28. In *Incal v. Turkey*, the European Court upheld a citizen's right to criticize the government when it fell short of inciting violence, hostility or hatred. Ibrahim Incal was a Turkish lawyer and a one-time member of the executive committee of the People's Labour Party (the HEP).[70] In 1992 the executive committee drafted a leaflet to distribute in the city of Izmir criticizing the actions of local authorities, whom the HEP accused of attempting to drive the Kurds out of the cities.[71] It called on "Kurdish and Turkish democratic patriots to assume their responsibilities" and oppose this so-called war against the proletariat.[72] The HEP executive committee asked the authorities for permission to distribute the leaflet, but the National Security Court enjoined the distribution and later convicted Incal and eight other HEP committee members for attempting to incite hatred and hostility through racist words.[73] Incal later filed a petition within the European system alleging, *inter alia,* that his criminal conviction violated his right to freedom of expression as guaranteed by Article 10 of the European Convention.[74] The Court again weighed whether this interference with freedom of expression met the provisions of Article 10(2): that it is "prescribed by law," that it is designed to carry out at least one of the aims laid out in Article 10(2) and that it is "necessary in a democratic society."[75] The participants all agreed that the interference was prescribed by the Criminal Code and the Press Act, so it was therefore prescribed by law.[76] Although the parties did not present arguments on the aim of the law, so the Court assumed the goal was to prevent disorder, a legitimate aim under Article 10. The Court found, however, that the final requirement–that the law was necessary in a democratic society–was not satisfied. The Court noted that Article 10.

> is applicable not only to 'information' or 'ideas' that are favourably received or regardedas inoffensive or as a matter of indifference, but also to those that offend, shock or disturb; such are the demands of pluralism, tolerance and broadmindedness without which there is no 'democratic society.'[77]

29. In light of these principles and the context of the leaflet, the Court found that the appeals to Kurds and others could be seen as urging the population to "band together to raise certain political demands." But while the meaning of "neighborhood committees" was unclear, the Court found that the appeals could not be viewed as "incitement to the use of violence, hostility or hatred between citizens."[78] The Court also noted that the limits of criticism directed at

[68] *Ibid.,* para. 33.

[69] *Ibid.,* para. 37.

[70] Eur. Ct. H.R., Case of Incal v. Turkey, Judgment of June 9, 1998, Application No. 22678/93.

[71] *Ibid.,* para. 10.

[72] *Ibid.,* para. 10.

[73] *Ibid.,* para. 11, 12.

[74] *Ibid.,* para. 38.

[75] *Ibid.,* para. 40.

[76] *Ibid.,* para. 41.

[77] *Ibid.,* para. 46.

[78] *Ibid.*, para. 50.

the government are wider than those targeting private citizens. It concluded that Incal's conviction was disproportionate to the government's purported aim, and thus unnecessary in a democratic society.[79]

30. The European Court made a similar finding in *Sürek and Özdemir v. Turkey,* a case involving a Turkish publication that had published an informative interview with a leader of an illegal political group, the Kurdistan Workers' Party (PKK).[80] Kamil Tekin Sürek was a major shareholder and Yücel Özdemir the editor-in-chief of *Haberde Yorumda Gerçek*, a weekly review.[81] In the wake of the interview, in which the PKK leader vowed to continue waging war against the Turkish state as long the state resisted the will of the Kurds, Turkish authorities charged Sürek and Özdemir with dissemination of separatist propaganda and terrorist views, a violation of the Prevention of Terrorism Act of 1991.[82] The European Court, in its review of the applicants' claim that their freedom of expression was violated, applied the Article 10(2) criteria to find that the violations were prescribed by law and they had the legitimate aim of maintaining national security and public order.[83] With respect to the third requirement–that the measures be "necessary in a democratic society"–the Court noted that this requires there to be a "pressing social need," and this element was missing in the case at hand.[84] The Court first reiterated that Article 10(2) provides little room for restrictions on political speech or debate on questions of public interest.[85] It then noted that the interview in question could not be seen to incite violence or hatred, and instead they had a "newsworthy content which allowed the public both to have an insight into the psychology of those who are the driving force behind the opposition to official policy in south-east Turkey," and could not be seen to incite violence or hatred.[86] The Court ruled, therefore, concluded that the Turkish authorities' reasons for the applicants' conviction was not sufficient to justify the interference with freedom of expression.[87]

31. In *Arslan v. Turkey,* the Court again found that criticism of the government falling short of incitement to violence and hatred could not be justifiably restricted. Günay Arslan, a Turkish citizen, wrote a book entitled *History in Mourning: 33 Bullets,* which discussed Turkey's oppression of the Kurds.[88] Arslan was convicted of disseminating separatist propaganda by intending to incite those of Kurdish descent to rebel against the state.[89] In the Court's review of the case, it found that Arslan's conviction under The Prevention of Terrorism Act met the Article 10(2) requirement that the interference with freedom of expression be prescribed by law.[90] The Court also found that because of the "sensitivity of the security situation" in southeast Turkey,

[79] *Ibid.,* para. 59.

[80] Eur. Ct. H.R., Case of Sürek and Özdemir v. Turkey, Judgment of July 8, 1999, Application No. 23927/94, 24277/94.

[81] *Ibid.,* para. 8.

[82] *Ibid.,* para. 10, 12, 23.

[83] *Ibid.,* para. 47, 51.

[84] *Ibid.,* para. 60.

[85] *Ibid.,* para. 60.

[86] *Ibid.,* para. 61.

[87] *Ibid.,* para. 61.

[88] Eur. Ct. H.R., Case of Arslan v. Turkey, Judgment of July 8, 1999, Application No. 23462/94, para. 10.

[89] *Ibid.,* para. 19.

[90] *Ibid.,* para. 37.

the government had the legitimate aims of protecting national security and territorial integrity and preventing disorder in its restrictions of freedom of expression.[91] Regarding the requirement that the restriction be necessary in a democratic society, the Court noted that book was a literary historical narrative, and while it was not a neutral depiction of facts, the book's intended criticism of the Turkish authorities fell within the realm of political speech and questions of public interest, areas where there is little room for restriction under Article 10.[92] Ultimately the Court found that the book contained a "hostile tone" and "acerbic passages," but it did not incite to violence or armed resistance.[93] That, along with the severe prison term of one year and eight months, led the Court to conclude that the conviction was "disproportionate to the aims pursued and accordingly not 'necessary in a democratic society.'"[94]

32. The European Court has also ruled to uphold restrictions on freedom of expression based on national security concerns. In *Zana v. Turkey,* for example, the Court found that a former government official's freedom of expression could be limited when likely to aggravate a tense security situation. Mehdi Zana, a former mayor of the Turkish town of Diyarkabir, told journalists from prison that he supported the "national liberation movement" of the Kurdistan Workers' Party (PKK) but did not support massacres.[95] He then added that "'[a]nyone can make mistakes, and the PKK kill women and children by mistake.'"[96] Turkey's National Security Court sentenced Zana to prison for violating the Criminal Code's ban on public incitement of hatred and hostility and its prohibition against belonging to armed groups or organizations.[97] The Court, applying the standards of Article 10(2) in its review of the case, found that the limitation on Zana's freedom of expression was prescribed by law[98] and that the restrictions were legitimate since they could be justified on national security and public safety grounds in light of the "serious disturbances" taking place in southeast Turkey.[99] The Court then looked to the content of Zana's statements to determine if it was necessary in a democratic society.[100] It noted that Zana's statements were contradictory and vague, but that they also "coinceded with murderous attacks carried out by the PKK on civilians in south-east Turkey."[101] Because Zana was the former mayor of Diyarkabir, his support of the PKK could be viewed "as likely to exacerbate an already explosive situation" in the region, leading the Court to conclude that Zana's conviction was the result of a "pressing social need" and proportionate to a legitimate aim.[102]

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[91] *Ibid.,* para. 40.

[92] *Ibid.,* para. 45, 46.

[93] *Ibid.,* para. 48.

[94] *Ibid.,* para. 50.

[95] Eur. Ct. H.R., Case of Zana v. Turkey, Judgment of Nov. 25, 1997, Application No. 18954/91, para. 12.

[96] *Ibid.,* para 12.

[97] *Ibid.,* para. 27, 31.

[98] *Ibid.,* para. 37.

[99] *Ibid.,* para 41.

[100] *Ibid.*, para. 56.

[101] *Ibid.,* para. 59.

[102] *Ibid.,* para. 61, 62.

33. In *Sürek v Turkey (No. 1)*, meanwhile, the Court again found that limitations on hate speech and the "glorification of violence" did not run afoul of Article 10. The applicant was the major shareholder in a company that owned a Turkish weekly review, which published letters to the editor decrying the Turkish authorities' actions in the troubled southeast of Turkey and calling the authorities a "murder gang."[103] Sürek was convicted of disseminating separatist propaganda[104] and filed a complaint with the European Court. The Court found that the restriction on freedom of expression was "prescribed by law" under the Prevention of Terrorism Act 1991[105] and noted that the government's restrictions of freedom of expression were legitimate given that they could be said to be in pursuit of national security and territorial integrity in a volatile region.[106] With respect to the question of whether the interference was "necessary in a democratic society," the Court noted that the letters had the clear aim of stigmatizing the other side by using phrases like "the Fascist Turkish army" and "the TC murder gang" along with words like "massacres" and "slaughter."[107] It also noted that the letters were published against a backdrop of a serious security situation in southeast Turkey, the site of violence disturbances and emergency rule.[108] Given this context, the Court viewed the letters as "capable of inciting to further violence in the region by instilling a deep-seated and irrational hatred against those depicted as responsible for the alleged atrocities."[109] The Court also highlighted that one of the letters identified people by name, thus exposing them to possible violence. It also noted that while interference is not allowed for information that merely shocks or offends, this case exceeded that standard because it involved hate speech and a "glorification of violence."[110] Finally, the Court remarked that while the applicant did not associate himself with the views of the letter writers, he did provide them with "an outlet for stirring up violence and hatred."[111] As a shareholder, the applicant had influence over the publication's content, and thus was subject to the "duties and responsibilities" laid out in Article 10.[112] As a result, the Court found that the penalties could be reasonably viewed as an answer to a pressing social need and thus in proportion to the legitimate aims pursued.[113]

E. Application of international and comparative principles to the American Convention

1. Background principles for interpreting the American Convention

34. While the jurisprudence of other legal systems can provide valuable guidance for the interpretation of the American Convention, and it has been frequently cited by the Inter-

[103] Eur. Ct. H.R., Case of Sürek v Turkey (No. 1), Judgment of July 8, 1999, Application No. 26682/95, para. 11.

[104] *Ibid.,* para. 14, 15.

[105] *Ibid.,* para. 48.

[106] *Ibid.,* para. 52.

[107] *Ibid.,* para. 62.

[108] *Ibid.,* para. 62.

[109] *Ibid.,* para. 62.

[110] *Ibid.,* para. 62.

[111] *Ibid.,* para. 63.

[112] *Ibid.,* para. 63.

[113] *Ibid.,* para. 63, 65.

American Commission and the Inter-American Court, it is important to underscore the limits of this approach. The application of legal principles from the United Nations and the European Union to an analysis of the American Convention should not be allowed to chip away at the core freedoms guaranteed by the Convention. This has particular relevance in the case of the ICCPR, which has been ratified by some 30 nations in the Americas. The Inter-American Court has noted the following with respect to the simultaneous application of international treaties:

> It is true, of course, that it is frequently useful . . . to compare the American Convention with the provisions of other international instruments in order to stress certain aspects concerning the manner in which a certain right has been formulated, but that approach should never be used to read into the Convention restrictions that are not grounded in its text. This is true even if these restrictions exist in another international treaty.[114]

35. The Inter-American Court went on to say that if both the American Convention and another international treaty are applicable, "the rule most favorable to the individual must prevail."[115] The Court further noted that because the American Convention stipulates that its provisions should not have a "restrictive effect" on rights laid out in other international instruments, "it makes even less sense to invoke restrictions contained in those other international instruments, but which are not found in the Convention, to limit the exercise of the rights and freedoms that the latter recognizes."[116]

36. Article 13 as a whole also contains concrete provisions governing restrictions on expression, and such provisions take precedence over the conclusions drawn from the jurisprudence of other legal systems when evaluating paragraph 5's ban on "advocacy of national, racial or religious hatred that constitute incitement to violence." The Inter-American Court in the *Case of the Last Temptation of Christ*, for example, noted that paragraph 4 "establishes an exception to prior censorship, since it allows it in the case of public entertainment, but only in order to regulate access for the moral protection of children and adolescents," so for "all other cases, any preventive measure implies the impairment of freedom of thought and expression."[117] This means that restrictions on freedom of expression can be made only through subsequent imposition of sanctions for those guilty of abusing this freedom, and the subsequent liability must meet four requirements, according to the Inter-American Court:

a) the existence of previously established grounds for liability;
b) the express and precise definition of these grounds by law;
c) the legitimacy of the ends sought to be achieved
d) a showing that these grounds of liability are "necessary to ensure" the aforementioned ends[118]

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[114] I/A Court H.R., Advisory Opinion OC-5/85, Compulsory Membership in an Association Prescribed by law for the Practice of Journalism (Articles 13 and 29 of the American Convention on Human Rights), Nov. 13, 1985, Ser. A Nº 5 [hereinafter Advisory Opinion OC-5/85], para. 51.

[115] *Ibid.,* para. 52.

[116] *Ibid.*

[117] I/A Court of H.R., Case of the Last Temptation of Christ (Olmedo Bustos *et al.* v. Chile), Judgment of February 5, 2001, para. 70.

[118] Advisory Opinion OC-5/85, para. 39.

37. It would appear at first glance that the ban on censorship would extend to hate speech in the same way it covers the restrictions on freedom of expression laid out in paragraph 2. But because there is a discrepancy between the English and Spanish language versions of the text of Article 13, the issue requires further analysis.

38. In English, as noted previously, the text of paragraph 5 provides that hate speech "shall be considered as offenses punishable by law,"[119] which implies that hate speech can be regulated through the subsequent imposition of liability. In Spanish, however, the same paragraph provides that hate speech "*estará prohibida por la ley,*"[120] which suggests that hate speech–given that it must be "prohibited"–can be regulated through censorship. The Inter-American Commission, citing a decision from the Inter-American Court, has noted that linguistic differences must be resolved through the various means of interpretation available in international law, including the general and supplementary rules of interpretation that are expressed in Articles 31 and 32 of the Vienna Convention of the Law of Treaties.[121] A full examination of the text of Article 13, therefore, can help to shed light on the exact meaning of paragraph 5. In the Spanish version of the American Convention, paragraph 4 of Article 13 states that public entertainments may be subject to law by prior censorship only for the moral protection of children, "*sin perjuicio de lo establecido en el inciso 2."*[122] This reference to paragraph 2 is similar to the English text, which says "notwithstanding the provisions of paragraph 2,[123] and both imply that paragraph 4 was meant to be an exception to paragraph 2. Since paragraph 5 makes no similar exception to paragraph 2 in either Spanish or English, it follows that hate speech is governed by paragraph 2's imposition of subsequent liability. This view is further supported by the Inter-American Court's emphatic view that censorship is *only* allowed for the purposes stated in paragraph 4. As noted above, the Court, in its decision in the *Case of the Last Temptation of Christ*, noted that all preventive measures except those provided for in paragraph 4 constitute an impairment of free expression.[124] The Court made no reference, either explicit or implicit, to hate speech and paragraph 5 as grounds for possible censorship, underscoring that hate speech should be regulated like the other areas of expression provided for in paragraph 2.

39. Two Articles of the American Convention also define the "context" in which Article 13 restrictions must be interpreted.[125] Article 29 notes that no provision of the Convention shall be interpreted as "precluding other rights or guarantees that are inherent in the human personality or derived from representative democracy as a form of government" or "excluding or limiting the effect that the American Declaration of the Rights and Duties of Man and other international acts of the same nature may have."[126] Article 32, meanwhile, notes that "the rights

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[119] American Convention, Article 13, paragraph 5.

[120] *Convención Americana sobre Derechos Humanos*, en *DOCUMENTOS BÁSICOS EN MATERIA DE DRECHOS HUMANOS EN EL SISTEMA INTERAMERICANO*, OAS/Ser.L/V/I.4, rev. 10 (*31 de enero 2004*), art. 13.

[121] See Report Nº 92/03, Elias Santana *et al.* (Venezuela), Annual Report of the IACHR 2003, para. 77, *citing* I/A Court, "Other Treaties" Subject to the Consultative Jurisdiction of the Court (Art. 64 of the American Convention on Human Rights), Advisory Opinion OC-1/82, Sept. 24, 1982 (Ser. A) Nº 1 (1982), para. 33. The report notes that Article 32 of the Vienna Convention establishes that "recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of Article 31, or to determine the meaning when the interpretation according to Article 31: (a) leaves the meaning ambiguous or obscure; or (b) leads to a result which is manifestly absurd or unreasonable."[121] Article 33.4 of that Convention specifies that "when a comparison of the authentic texts discloses a difference of meaning which the application of Articles 31 and 32 does not remove, the meaning which best reconciles the texts, having regard to the object and purpose of the treaty, shall be adopted."

[122] Inter-American Convention on Human Rights, Article 13.

[123] American Convention, Article 13.

[124] Case of the Last Temptation of Christ, para 70.

[125] Advisory Opinion OC-5/85, para. 42.

[126] American Convention, Article 29.

or each person are limited by the rights of others, by the security of all, and by the just demands of the general welfare, in a democratic society."[127] The Inter-American Court has further noted that Article 29's reference to the American Declaration implicates Article XXVIII of the Declaration, which states that "[t]he rights of man are limited by the rights of others, by the security of all, and by the just demands of the general welfare and the advancement of democracy."[128] The Court has interpreted this to require that the "just demands of democracy" guide the interpretation of the Convention.[129] In light of the principles taken from Article 29, the Inter-American Court has concluded that the necessity and legality of restrictions imposed on freedom of expression depend on a demonstration that 'the restrictions are required by a compelling government interest" that the means taken are the least restrictive of the options available, and that the restriction is "proportionate and closely tailored to the accomplishment" of a legitimate government objective.[130]

F. U.N. and European approach

40. For the purposes of comparing U.N. and European Union treaties and conventions with the American Convention, a number of basic principles on incitement to discrimination and violence can be culled from the jurisprudence of the United Nations and the European Court. These principles were outlined by the International Criminal Tribunal for Rwanda in the case of *Prosecutor v. Nahimana, et. al.*

41. One central principle is purpose. The ICTR noted that when the purpose behind a material's transmission was of a "bona fide" nature–used for historical research or to convey news or information, for example–it was not found to constitute incitement.[131] In analyzing intent, the tribunals of the European and the U.N. have looked to the actual language used by the media. In *Faurisson,*for example, the U.N. Human Rights viewed the author's use of the phrase "magic gas chamber" as an indicator that his comments were motivated by anti-Semitism instead of the search for historical truth.[132] In *Jersild*, the journalist's efforts to distance himself from the comments of the racist youths helped lead the European Court to determine the purpose was to provide news, not spread racist views.[133] Additionally, the ICTR noted that the European Court of Human Rights, in its decisions on Turkish cases dealing with expression and national security, has drawn a line between language that explains the reasons behind terrorist activities and language that promotes such activities, and here again the language itself is important to determine where the expression falls.[134] This idea was demonstrated by *Sürek (No. 1),* in which a newspaper was held responsible for publishing letters from its readers containing volatile language because the Court found that it helped fuel "bloody revenge by stirring up base emotions and hardening already embedded prejudices."[135]

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[127] *Ibid.,* Article 32.

[128] American Declaration of the Rights and Duties of Man, in BASIC DOCUMENTS, Article XXVIII.

[129] Advisory Opinion OC-5/85, para 44.

[130] *Ibid.,* para. 46.

[131] Prosecutor v. Nahimana, Barayagwiza and Ngeze, ICTR-99-52-T, para 1001.

[132] *Ibid.*

[133] *Ibid.*

[134] *Ibid.,* para 1002.

[135] *Ibid.*

42. Second, the context of the expression at issue is also important when considering the validity of restrictions on this expression. The ICTR noted, for example, that context was vital in the decision of the European Court in the *Zana* case–because the former mayor of a Turkish city made comments about massacres at a time when massacres were taking place, the European Court took the view that the statement was "likely to exacerbate an already explosive situation."[136] The European Court has also factored in contexts such as the role of political expression or criticism of the government, in which there is room for more protection, and the issue of national security, in which the Court has said there is a "wider margin of apreciation" for authorities to restrict freedom of expression.[137]

43. Finally, the ICTR pointed to causation as an important principle. The ICTR noted that international jurisprudence has not required specific causation connecting "the expression at issue with the demonstration of a direct effect."[138] In the *Streicher* case from Nazi Germany, for example, the publication of anti-Jewish statements was not alleged to have had ties to "any particular violence."[139] In the Turkish cases considered by the European Court, meanwhile, the expressions at issue were not stated to be causes of particular violence. Instead, the ICTR noted that the "question considered is what the likely impact might be, recognizing that causation in this context might be relatively indirect."[140]

44. With respect to the American Convention, these principles can serve as guideposts in demarcating how far Article 13(5)'s ban on hate speech extends. But it is important to note that the Inter-American Court regards the American Convention's freedom of expression provisions as more "generous" than their counterparts under the European Convention and the ICCPR. The court has said that a comparison of the three shows "that the guarantees contained in the American Convention regarding freedom of expression were designed to be more generous and to reduce to a bare minimum restrictions impeding the free circulation of ideas."[141] This idea can be seen, for example, by specifically comparing Article 13 of the American Convention and Article 10 of the European Convention: while Article 13 contains a specific list of exceptions to the general principles established in the first paragraph of the Article, Article 10 is more general, and does not contain Article 13's almost complete ban on censorship.

45. As a result, the U.N. and European jurisprudence should be used not as limitations on freedom of expression, but as minimum standards.[142] In this sense, the principles of intent, context and causation could prove to be useful guideposts for interpreting Article 13(5) and ensuring that it is not applied too broadly. The Inter-American system could, for example, utilize the "bona fide" distinction used in the U.N. and E.U. jurisprudence that protects hate

[136] *Ibid.,* para. 1005.

[137] Prosecutor v. Nahimana, Barayagwiza and Ngeze, ICTR-99-52-T, para 1006.

[138] *Ibid.,* para. 1007.

[139] *Ibid.*

[140] *Ibid.*

[141] Advisory Opinion OC-5/85, para 50.

[142] Annual Report of the Inter-American Commission on Human Rights 2003, OEA/Ser.L/V/II.118, doc. 70, rev. 2, Dec. 29, 2003, at 99.

propaganda when its purpose is for historical research or the dissemination of news and information. The European Court's distinction between language that explains terrorism as opposed to language that promotes terrorism could also be applied to the Inter-American system. Context is also an important consideration in any general analysis of speech, given that the same phrase can have two meanings against two different backdrops–what might be benign during tranquil times, for example, may take on the qualities of incitement if the context of a civil war. Finally, the causation element may also prove useful: like its European Union and U.N. counterparts, the Inter-American system could find merit in the argument that a direct link between the speech and ensuing violence is unnecessary to justify limits on speech, given that the harmful effects can be delayed or indirect.

46. At the same time, however, the American Convention diverges from the European Convention and the ICCPR on a key point, and this difference limits the application of the jurisprudence from the U.N. and the E.U. The text of Article 13(5) discusses hate propaganda that constitutes "incitement to lawless violence or to any other similar action," suggesting that violence is a requirement for any restrictions. The European Convention and the ICCPR, meanwhile, do not have such a narrowly drawn requirement. The ICCPR outlaws speech that incites to "discrimination, hostility or violence," thus covering a range of speech that falls short of violence. The European Convention, meanwhile, allows for conditions and restrictions that are "necessary in a democratic society" and lists several ends that justify these restrictions, including national security, territorial integrity and public safety. The greater reach of the ICCPR and the European Convention demonstrate these two systems' willingness to justify restrictions on speech that do not fit into the American Convention's narrow category of "incitement to lawless violence." It follows that while the jurisprudence of the U.N. and the EU can be helpful with the definition of "incitement" and "violence," not all of the U.N.-and EU-backed restrictions on expression would fall under Article 13(5) of the American Convention. Some of the relevant EU and U.N. decisions restricting speech on national security grounds may be justified under Article 13(2) of the American Convention, which allows for restrictions based on national security and the maintenance of public order.