Forewordpage xiiiAcknowledgementsxvTable of international lawxviTable of national lawxviiiTable of international casesxxviiiTable of national casesxxviii

- 1 Introduction 1
 - 1.1 Background 1
 - 1.2 Our liberal dilemma embedded in wider international developments
 6
 - 1.3 Outline 10
 - 1.4 A note on methodology 14

PART IThe genesis of the prohibition of religious hatred
constituting incitement in international law15

- 2 Pre-ICCPR developments 17
 - 2.1 Introduction 17
 - 2.2 The Universal Declaration of Human Rights and extreme speech 17
 - 2.3 Historic debates: to tolerate or not to tolerate the

intolerant? 19

- 2.4 Conclusion: the questions unanswered 28
- 3 The drafting of Article 20(2) ICCPR 31
 - 3.1 Introduction 31
 - 3.2 The drafters' views: renewed historic debates 34
 - 3.2.1 The different proposals 34
 - 3.2.2 Key thematic debates 48
 - 3.2.2.1 All feared abuse 49
 - 3.2.2.2 The Cold War in the drafting chambers 51

vii

Genuine research and other protected public 3.2.2.3 discourse 55 3.2.2.4 National legislative potential 56 **Concluding Remarks** 3.3 62

PART II Preliminary matters 65

- The mandatory nature of Article 20(2) ICCPR 67 4
 - Introduction 67 4.1
 - Textual analysis 4.2 67
 - Travaux préparatoires 70 4.3
 - Reservations 72 4.4
 - Human Rights Committee 74 4.5
 - 4.6 Comparative law 77

- - 4.7 Concluding remarks 79
- Article 20(2) ICCPR: prohibition per se or also a 5 human right? 80
 - Introduction 80 5.1
 - 5.2 Textual analysis 81
 - Travaux préparatoires 5.3 82
 - 5.4 Human Rights Committee 85
 - 5.4.1 General Comments 85
 - 5.4.2 Concluding Observations 86
 - 5.4.3 Views in individual communications 88
 - 5.4.4 The pending Wilders case 113
 - 5.5 Concluding remarks 120
- Comparative international perspectives: CERD and the 6 European Court of Human Rights on the 'right to be free from incitement' 122
 - 6.1 Introduction 122

 - A general introduction to Article 4 ICERD 122 6.2
 - Article 4 ICERD and religious hatred constituting 6.3 incitement 130
 - The place of religion in the ICERD 130 6.3.1
 - 6.3.2 Article 4 complaints concerning religious hatred 132
 - The right to be protected against racist hate propaganda 135 6.4
 - Legal standing under Article 4 ICERD for racist hate 6.4.1 speech victims 135
 - The duty of effective investigation into Article 4-related 6.4.2 complaints 137

- Beyond 'effective investigation': a duty to convict hate 6.4.3 speech offenders? 141
- 6.4.4 The freedom from racist incitement 143
- The ECHR's lack of an incitement clause 145 6.5
- The European Court of Human Rights' atypical extreme speech 6.6 jurisprudence 147
 - 6.6.1 The guillotine approach 149
 - 6.6.2 Indirect abuse of rights application 152
 - 6.6.3 Judgments on the merits of Article 10 complaints 153
- An emerging freedom from incitement? 156 6.7
- 6.8 Concluding remarks 158

- **PART III** Legislative obligations: defining the scope of the offence of 'advocacy of religious hatred that constitutes incitement' 161
- 7 The actus reus of 'advocacy of religious hatred constituting incitement': threshold, definitions and concepts 163
 - Introduction 7.1 163
 - 7.2 Alternative definitions and concepts 164
 - The triangle of incitement: reflections on the key terms of 7.3 Article 20(2)168
 - 7.3.1 'Advocacy' 169
 - 7.3.2 'Hatred' 172
 - 7.3.3 'Religious' 175
 - 7.3.4 'Incitement' 180
 - Proscribed results: 'discrimination', 'hostility' or 7.3.5 'violence' 186
 - Concluding remarks 191 7.4
- National incitement law checklist 192 8
 - Introduction 192 8.1
 - 8.2 Low-threshold speech offences 192
 - No blasphemy, religious defamation or religious 8.2.1 insult laws 193
 - 8.2.2 No 'hate speech' or 'incitement to hatred' laws 195
 - 8.3 Additional areas of concern 200
 - The public nature of incitement 200 8.3.1
 - Taking religion-based incitement seriously 201 8.3.2
 - Proscribed results 202 8.3.3
 - 8.4 Concluding remarks 203

PART IV Judging incitement 205

- 9 Intent 207
 - 9.1 Introduction 207
 - 9.2 Travaux préparatoires 208
 - 9.3 Textual analysis, independent experts and scholarly teachings 209
 - 9.4 The Human Rights Committee 216
 - 9.5 CERD and intent 221
 - 9.6 The European Court of Human Rights and intent 224
 - 9.7 State practice 233
 - 9.8 Concluding remarks 237
- 10 The context of religious hatred 239

10.1 Introduction 239

10.2 Context factors 242

10.3 Context considerations in Human Rights Committee jurisprudence 246

- 10.4 Context considerations in CERD's Article 4 jurisprudence 251
- 10.5 Context considerations in the European Court of HumanRights' extreme speech jurisprudence252
 - 10.5.1 Examples of content being all-decisive 253
 - 10.5.2 Examples of context tipping the balance 258
 - 10.5.2.1 Socio-historical, economic and political context, including the position of the target group in society 258
 - 10.5.2.2 Role and position of the speaker 260
 - 10.5.2.3 Extent/reach and 'setting' of the speech 262

10.5.2.4 Likelihood of harm 265

10.6 Context-dependent risk assessments in state practice 27010.7 Concluding remarks 277

- 11 Holocaust denial and glorification of religious violence
 279
 - 11.1 Introduction 279
 - 11.2 Examples of memory laws 280
 - 11.3 The Human Rights Committee and Holocaust denial 285
 - 11.3.1 Early case law 285
 - 11.3.2 Faurisson overruled 287
 - 11.4 CERD and memory laws 290

- 11.5 The Council of Europe and memory laws 291
 - 11.5.1 Instruments against Holocaust denial 291
 - 11.5.2 The European Court of Human Rights and Holocaust denial 293
 - 11.5.2.1 Holocaust denial as an abuse of rights 294
 - 11.5.2.2 Moderate risk assessment 297
 - 11.5.2.3 No legal defence of 'truth' 298
 - 11.5.2.4 Non-public denial as punishable speech 301
- 11.6 Glorification of religious violence or terrorism 303
- 11.7 Concluding remarks 312

PART V Aggravating factors and sanctions 315

- 12 Organized hatred 317
 - 12.1 Introduction 317
 - 12.2 Organized hatred under the ICCPR 318
 - 12.3 Organized hatred under the ICERD 322
 - 12.4 Organized hatred under the European Convention on Human Rights 327
 - 12.5 State practice 330
 - 12.6 Concluding remarks 332
- 13 Sanctions 334
 - 13.1 Introduction 334
 - 13.2 Types of penalties permitted 335
 - 13.3 Comparative state practice 343
 - 13.3.1 Prison sentences 343
 - 13.3.2 Other penalties 346
 - 13.3.3 Aggravating factors 347
 - 13.4 Proportionality in incitement case law 348
 - 13.4.1 The Human Rights Committee on proportionate sanctions 349
 - 13.4.2 CERD on proportionate sanctions 351
 - 13.4.3 The European Court of Human Rights on proportionate sanctions 353
 - 13.4.3.1 Prison terms 354
 - 13.4.3.2 Fines 358
 - 13.4.3.3 Seizures and confiscations, including prior restraint 360

13.4.3.4 Dismissals and alternative penalties 362 13.4.3.5 Remedies for wrongful hate speech convictions 364

13.5 Concluding remarks 365

PART VI Conclusion 367

14 Conclusion 369

> Bibliography 374 Index 384