

CONTENTS

<i>Foreword</i>	<i>page xiii</i>
<i>Acknowledgements</i>	<i>xv</i>
<i>Table of international law</i>	<i>xvi</i>
<i>Table of national law</i>	<i>xviii</i>
<i>Table of international cases</i>	<i>xxviii</i>
<i>Table of national cases</i>	<i>xxxiii</i>

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 I The genesis of the prohibition of religious hatred constituting incitement in international law 15

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

3.2.2.3	Genuine research and other protected public discourse	55
3.2.2.4	National legislative potential	56
3.3	Concluding Remarks	62
PART II Preliminary matters		65
4	The mandatory nature of Article 20(2) ICCPR	67
4.1	Introduction	67
4.2	Textual analysis	67
4.3	<i>Travaux préparatoires</i>	70
4.4	Reservations	72
4.5	Human Rights Committee	74
4.6	Comparative law	77
4.7	Concluding remarks	79
5	Article 20(2) ICCPR: prohibition per se or also a human right?	80
5.1	Introduction	80
5.2	Textual analysis	81
5.3	<i>Travaux préparatoires</i>	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
6	Comparative international perspectives: CERD and the European Court of Human Rights on the ‘right to be free from incitement’	122
6.1	Introduction	122
6.2	A general introduction to Article 4 ICERD	122
6.3	Article 4 ICERD and religious hatred constituting incitement	130
6.3.1	The place of religion in the ICERD	130
6.3.2	Article 4 complaints concerning religious hatred	132
6.4	The right to be protected against racist hate propaganda	135
6.4.1	Legal standing under Article 4 ICERD for racist hate speech victims	135
6.4.2	The duty of effective investigation into Article 4-related complaints	137

6.4.3	Beyond ‘effective investigation’: a duty to convict hate speech offenders?	141
6.4.4	The freedom from racist incitement	143
6.5	The ECHR’s lack of an incitement clause	145
6.6	The European Court of Human Rights’ atypical extreme speech 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
6.7	An emerging freedom from incitement?	156
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 <i>actus reus</i> of ‘advocacy of religious hatred constituting incitement’: threshold, definitions and concepts	163
7.1	Introduction	163
7.2	Alternative definitions and concepts	164
7.3	The triangle of incitement: reflections on the key terms of Article 20(2)	168
7.3.1	‘Advocacy’	169
7.3.2	‘Hatred’	172
7.3.3	‘Religious’	175
7.3.4	‘Incitement’	180
7.3.5	Proscribed results: ‘discrimination’, ‘hostility’ or ‘violence’	186
7.4	Concluding remarks	191
8	National incitement law checklist	192
8.1	Introduction	192
8.2	Low-threshold speech offences	192
8.2.1	No blasphemy, religious defamation or religious insult laws	193
8.2.2	No ‘hate speech’ or ‘incitement to hatred’ laws	195
8.3	Additional areas of concern	200
8.3.1	The public nature of incitement	200
8.3.2	Taking religion-based incitement seriously	201
8.3.3	Proscribed results	202
8.4	Concluding remarks	203

PART IV	Judging incitement	205
9	Intent	207
9.1	Introduction	207
9.2	<i>Travaux préparatoires</i>	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 Human Rights' extreme speech jurisprudence	252
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	270
10.7	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	<i>Faurisson</i> 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
	<i>Bibliography</i>	374
	<i>Index</i>	384