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The Human Right to Freedom of Expression in the Contemporary World

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ABSTRACT

1. Obiettivo

Lo scopo di questa tesi è di analizzare il diritto umano alla libertà di espressione alla luce delle sfide che il mondo globalizzato pone, concentrandosi sulla necessità sempre più pressante di dovervi porre dei limiti. Lo scopo ultimo di questa tesi è capire se e come tali limiti vadano posti e come la comunità internazionale nel ruolo dell'Organizzazione delle Nazioni Unite e delle specifiche aree regionali, rispettivamente il Consiglio d'Europa, l'Organizzazione degli Stati Americani, l'Unione Africana e la Lega Araba li abbiano disciplinati e applicati.

2. Metodo

Nella stesura di questa tesi si è voluto partire dalla definizione del concetto di 'diritti umani', nello specifico dall'analisi delle nozioni che vi stanno alla base e che ne hanno determinato la formazione. Tra di esse la religione, la tradizione politica e la scienza. Dignità e uguaglianza sono altri due elementi necessari per definire in modo ampio il concetto di "diritti umani". L'idea di dignità sta alla base di tutti i documenti, giuridicamente vincolanti e non, che disciplinano i diritti umani e consiste nel riconoscere che ogni individuo possiede un eguale e connaturato status morale, il quale deve essere rispettato dagli altri essere umani e dalle istituzioni. L'uguaglianza, invece, è congenita all'essere umano ed è legata ad un altro valore fondamentale, ossia quello della non-discriminazione. Quest'ultima postula che i diritti umani devono essere garantiti ad ogni singolo individuo. In virtù di ciò, si può affermare che alla base di ogni forma di libertà vi sia lo status di non esser vittima di qualsiasi forma discriminazione e di poter godere del diritto di uguaglianza.

Dopo aver fatto una breve introduzione sulla nozione di diritti umani, verrà proposta una panoramica storica sulla loro evoluzione, facendo particolare attenzione alle tappe importanti per la libertà di espressione. Chiaramente la grande svolta per il riconoscimento dei diritti umani è avvenuta nel XVIII secolo durante l'Illuminismo, la Rivoluzione Francese e Americana. Tuttavia questo è stato il culmine di un processo iniziato molto tempo prima. Il primo segno di diritti riconosciuti si ha nel 1215 con la Magna Carta, quando per la prima volta i sudditi riuscirono a far firmare un documento

al Re con il quale vennero garantiti loro dei diritti che non potevano più essere contestati. Per intraprendere il secondo passo ci volle qualche secolo. Sempre in Inghilterra nel 1689 venne adottato il Bill of Rights, che diede la facoltà di espressione ai membri del Parlamento. Nel continente, invece, verso la fine del 1700 si infiammò il clima rivoluzionario che portò alla Rivoluzione Francese e il 26 luglio 1789 alla Dichiarazione dei Diritti dell'Uomo e del Cittadino. Questo innovativo documento sui diritti dell'uomo apportò importanti novità come la separazione dei poteri, il riconoscimento di diritti naturali innati in ogni uomo che vanno rispettati e ristretti solo dalla legge e solo in certe circostanze. La Dichiarazione elenca questi diritti e al numero 11 pone un preludio di libertà di espressione. Un'altra importante rivoluzione è quella Americana che ha portato all'adozione della Costituzione. Il primo articolo del Bill of Rights è il Primo Emendamento ed è importante in quanto dal 1789 regola la libertà di parola negli Stati Uniti.

Dopo la panoramica storica si inizierà a calarsi nel vivo la tesi, in quanto analizzerò i più importanti documenti internazionali e regionali che disciplinano la libertà di espressione e le conseguenti giurisprudenze.

Il primo documento decisivo verso il riconoscimento dei diritti umani è stato creato nel 1948 con l'adozione della Dichiarazione Universale dei Diritti Umani in cui, all'articolo 19, viene disciplinata la libertà di espressione. Durante i lavori preparatori venne a lungo dibattuta la questione se inserire o meno delle restrizioni a tale libertà, giungendo però a un esito negativo. Ciò nonostante, dato il contesto storico di totale deprivazione di diritti dal quale la comunità internazionale usciva, si è scelto di dare spazio solo ai diritti. Nonostante il suo importante valore, la Dichiarazione ha carattere non vincolante. Sorse quindi la necessità di rendere gli Stati membri dell'ONU vincolati dai diritti umani. Fu proprio in tale occasione che vennero adottati i Patti Civili e Politici del 1966, quali trattati internazionali che vincolarono lo Stato a rispettare i diritti da essi garantiti. Di rilievo è anche il Primo Protocollo Opzionale, che prevede la possibilità che i singoli facciano ricorso al Comitato dei Diritti Umani contro lo Stato che non ha rispettato un diritto disciplinato dal Patto. Nel Patto la libertà di opinione ed espressione è regolata dall'articolo 19, che afferma che ogni diritto implica anche responsabilità e, se necessario, limiti. Infatti viene dato ampio uso alla possibilità di cercare, ricevere e condividere informazioni di qualsiasi genere, compreso quello

artistico, attraverso qualsiasi mezzo. Tuttavia, per essere considerate legali, tali forme di espressione devono rispettare i diritti e la reputazione altrui e non minacciare la sicurezza nazionale, l'ordine pubblico, la sanità e la morale pubblica. In caso contrario possono essere sottoposte a restrizioni ma queste ultime solo se sono necessarie e previste dalla legge. Bisogna aggiungere inoltre che questo articolo appartiene alla categoria di norme che possono essere necessariamente soggette a restrizioni in base all'articolo 20, che prevede il divieto di fare propaganda di guerra, di odio nazionale, razziale, religioso, incitamento alla discriminazione, all'ostilità o alla violenza. Dopo aver introdotto la norma, verranno inseriti degli esempi di giurisprudenza, per approfondire come nelle diverse circostanze le restrizioni vengano adottate secondo tre criteri: 'essere necessarie', 'essere prescritte dalla legge' e 'avere uno scopo legittimo'.

Dopo il Patto sui Diritti Civili e Politici, degno di nota per la libertà di espressione è la Convenzione Internazionale sull'Eliminazione di Ogni Forma di Discriminazione Razziale, il cui testo è stato elaborato ancor prima del Patto, nel 1965. Il concetto di 'discriminazione' nel corso degli anni è andato perfezionandosi e ampliandosi. La libertà di parola viene disciplinata in più punti della Convenzione. Degni di nota sono due articoli: l'articolo 4 e l'articolo 5. Per quanto riguarda l'articolo 4, esso afferma che gli Stati membri devono condannare ogni forma di propaganda, idee di organizzazioni e attività che prevedano la superiorità di una razza, etnia, religione atte a giustificare forme di odio razziale e ogni tipo di discriminazione. Sono obbligati inoltre a provvedere all'eliminazione di tali forme per debellare ogni radice di incitamento o qualsiasi forma di atto discriminatorio. Secondo l'articolo 5, invece, gli Stati si impegnano a eliminare ogni forma di discriminazione razziale e a garantire a tutti i cittadini i diritti civili e politici, in particolare il diritto alla libertà di espressione.

L'ultimo trattato internazionale a essere analizzato sarà la Convenzione sui diritti dell'infanzia, del 1989. La Convenzione conferisce un'ampia protezione alla libertà di informazione ed espressione, che si snocciola in due articoli. L'articolo 12 afferma che lo Stato deve prestare attenzione alle esigenze e alle opinioni che il bambino è in grado di esprimere. L'articolo 13 fa invece riferimento alla libertà di espressione, sostenendo che il bambino deve avere la libertà di cercare, ricevere e condividere informazioni e opinioni, indipendentemente dal mezzo di comunicazione

utilizzato e dalle frontiere. Anche in questa Convenzione, l'esercizio del diritto a oggetto della tesi può essere sottoposto a limiti, solo se 'necessari' e in accordo con la legge, per rispettare i diritti e le reputazioni degli altri individui e per la protezione della sicurezza nazionale, dell'ordine pubblico, della sanità e della morale pubblica. Come si può osservare, anche in questo caso le limitazioni alla libertà di espressione sono ammesse solo in base a tre condizioni: devono essere previste dalla legge, devono avere uno scopo preciso e devono essere ritenute necessarie per garantire tali interessi.

Dopo aver analizzato le norme create dalla comunità internazionale, passerò a quelle adottate dalle diverse organizzazioni regionali, seguendo il seguente ordine: Consiglio d'Europa, Unione degli Stati Americani, Unione Africana e Lega Araba.

Il primo caso a essere analizzato è quello del Consiglio d'Europa. La Convenzione Europea dei Diritti dell'Uomo ha ampliato il sistema di salvaguardia dei diritti umani, la CEDU infatti è considerata il più progredito sistema di protezione di diritti umani. La Convenzione permette che vengano poste delle restrizioni agli articoli 9, 10 e 11, reputate necessarie per salvaguardare i valori fondamentali di ogni società democratica, tra cui la sicurezza nazionale e pubblica, la prevenzione da ogni crimine, la protezione della sanità e della morale pubblica di ogni cittadino. Molte domande sono sorte circa la definizione di ciò che è 'necessario in una società democratica', come criterio per l'apposizione di limiti. La Convenzione rammenta di cercare sempre il giusto bilanciamento tra diritti dei singoli e interesse comune e, nell'articolo 15, afferma che in ogni situazione di emergenza lo Stato può scavalcare i doveri dettati dalla Convenzione. Bisogna però sottolineare che questa possibilità data allo Stato non deve essere considerata come una possibile scorciatoia per violare i diritti umani.

L'articolo 10, che disciplina la libertà di espressione, è più ampio rispetto alle norme precedentemente analizzate, perché comprende il diritto di possedere delle idee, di ricevere e condividere informazioni, senza alcuna interferenza da parte delle istituzioni e dello Stato, indipendentemente dai confini. Inoltre, il medesimo articolo non vieta agli Stati di richiedere autorizzazioni alle imprese radiofoniche, cinematografiche o televisive. Oltre a ciò, pone anche le 'formalità, condizioni, restrizioni o sanzioni', che devono essere 'previste dalla legge' e 'necessarie in una

società democratica' per proteggere gli interessi della sicurezza nazionale, l'integrità territoriale, la sicurezza pubblica per prevenire forme di criminalità, la salvaguardia della morale pubblica e della sanità, per evitare che fuoriescano informazioni riservate e confidenziali e per garantire l'autorità e l'imparzialità del potere giudiziario. Per capire come vengano valutati 'formalità, condizioni, restrizioni o sanzioni' dalla Corte Europea dei Diritti dell'Uomo, provvederò a illustrare i molteplici casi tratti della sua giurisprudenza.

La seconda area geografica a essere analizzata è quella americana e nello specifico l'Organizzazione degli Stati Americani. La Convenzione Americana dei Diritti Umani fu adottata nel 1969 e all'articolo 13 disciplina la libertà di espressione. È un articolo piuttosto lungo che prevede che ognuno abbia libertà di pensiero e parola e che possa cercare, ricevere e condividere le proprie opinioni e informazioni in qualsiasi forma e attraverso qualsiasi mezzo, indipendentemente dai confini geografici. Postula inoltre che non si debba imporre una censura preventiva, ma che possa essere motivo di responsabilità successiva, qualora risulti necessario per garantire il rispetto e la reputazione altrui e la protezione della sicurezza nazionale, dell'ordine pubblico, della sanità e della morale. Rispetto alle norme presentate finora, l'articolo 13 aggiunge che il diritto alla libertà d'espressione non deve essere limitato in modi indiretti, come l'abuso del potere da parte del governo o ogni altro mezzo che possa impedire la libera circolazione di informazioni. Aggiunge inoltre che, nonostante le restrizioni previamente menzionate, gli spettacoli pubblici possono essere censurati dagli Stati o l'accesso al pubblico può essere regolato a causa del loro contenuto, al fine di proteggere i minori. Infine, l'articolo chiude con il divieto di propaganda di guerra e incitamento all'odio nazionale, razziale o religioso che conduce all'incitamento alla violenza e considera tali atti come reati. La Corte Inter-Americana ha sottolineato il doppio aspetto di questo articolo, in quanto prima afferma che non ci debbano essere limiti arbitrari alla libertà di espressione e che ogni individuo può godere della condivisione delle idee e informazioni della società, mentre poi asserisce che ogni tipo di restrizione debba sottostare a uno scopo legittimo secondo i valori delle società democratiche. Come la Corte individui il giusto bilanciamento tra libertà e restrizione sarà oggetto dell'analisi della giurisprudenza della Corte stessa, che seguirà quella dell'articolo.

Tra gli Stati dell'Organizzazione Americana ce n'è uno che ha sviluppato una particolare normativa e giurisprudenza nell'ambito della libertà di espressione, ossia gli Stati Uniti d'America. La loro Costituzione risale ancora al 1787, il cui Primo Emendamento garantisce la libertà di parola. Esso prevede che il Congresso non possa attuare alcuna legge che imponga una religione di Stato, o che impedisca il libero culto, o che limiti la libertà di parola o di stampa, o il diritto delle persone di riunirsi pacificamente e di rivolgersi al governo per la risoluzione di torti subiti. La Costituzione Americana è l'unica in cui si faccia espressamente riferimento alla 'libertà di parola' invece che a quella di 'espressione'. In termini generali, la prima infatti è considerata come una parte del grande insieme della seconda. Il Governo afferma che nel caso in cui possa rivelarsi necessario dover porre dei limiti alla libertà di espressione, lo si debba fare con precise giustificazioni, aggiungendo che queste ultime possano essere imposte solo dal Governo e non da privati. Inoltre la Corte Suprema Americana afferma che il grado di protezione della libertà di parola dipende dalla circostanza e dal contesto in cui viene pronunciata. Infatti, evidenziando categorie più o meno protette, tra le ultime ha individuato l'incitamento ad azioni illegali, alla violenza e all'oscenità.

Terza e penultima area a essere analizzata è quella dell'Unione Africana. La Carta Africana sui Diritti Umani e dei Popoli è stata adottata nel 1981 ed è basata su la Carta Europea e Inter-Americana. Il documento africano regola la libertà di espressione all'articolo 9 secondo il quale ogni uomo ha il diritto di ricevere informazioni e di esprimere la propria opinione nel rispetto delle leggi. Oltre a distinguersi per la sua brevità con rispetto agli altri articoli, si distingue per il fatto di non prevedere clausole alla restrizione, come la nozione di necessità ed essere legittimo per uno scopo preciso. La giurisprudenza della Corte Africana non è molto ampia, quindi mi concentrerò su alcuni casi per delineare come la Corte definisca il limite tra ciò che può essere detto e non.

Per concludere l'analisi regionale sulle norme che disciplinano i limiti alla libertà di espressione presenterò la Lega Araba, la cui Carta Araba dei Diritti dell'Uomo è stata adottata nel 2004. In questo documento la libertà di espressione è disciplinata dall'articolo 32, il quale afferma che la Carta garantisce il diritto di informazione e la libertà di opinione ed espressione, come anche il diritto di cercare, ricevere e condividere informazioni e idee attraverso ogni qualsiasi mezzo, indipendentemente

dai confini geografici. La Carta aggiunge che i suddetti diritti devono essere esercitati seguendo i valori fondamentali della società araba e devono essere sottoposti a restrizioni solo per garantire la protezione e il rispetto dei diritti e della reputazione altrui, ma anche della sicurezza nazionale, dell'ordine pubblico, della sanità e della morale pubblica. Nonostante l'attuale situazione molto critica degli Stati arabi, la società civile sta tentando di rafforzare la protezione dei diritti umani e di migliorare le capacità dei sistemi di monitoraggio della Lega.

Dopo questa prima parte in cui vengono delucidate le norme dei meccanismi di difesa dei diritti umani, relative alla libertà di espressione e ai suoi limiti, ho deciso di focalizzare il mio intervento su un particolare aspetto della libertà di espressione, rilevante e sotteso a molte dinamiche della comunità internazionale: il c.d. hate speech, ossia l'incitamento all'odio. Lo scopo di questa terza parte è di capire dove giaccia il confine tra la libertà di espressione e i limiti imposti dall'incitamento all'odio.

Inizierò studiando il dibattito sulla sua definizione, in quanto non ne è stata ancora trovata una universalmente condivisa. Dalle ricerche che ho condotto risulta infatti che sia difficile ottenere un'unica definizione condivisa, in quanto ciò che rende un'espressione offensiva è strettamente legato ai valori di un individuo e quindi alla cultura e alla società. Se ne deduce, quindi, che ogni società ha un concetto differente di ciò che sia offensivo. Proprio in virtù di ciò è difficile sia trovare un metro di definizione sia rintracciare un metodo di giudizio comune. Nonostante la nozione di incitamento all'odio implichi una relatività di fondo, ci sono delle caratteristiche condivise. Si considera "hate speech" ogni espressione offensiva, ogni commento ingiurioso, ogni incitamento alla violenza e ogni provocazione oltraggiosa contro un individuo o un gruppo di individui accomunati dalle stesse origini o dagli stessi tratti culturali e religiosi. È l'espressione verbale, scritta o visiva che si trova alla base di ogni forma di violenza nella sua forma più ampia e può portare a insulti, minacce, bullismo, discriminazione razziale, di genere, verso gli immigrati e anche alla persecuzione individuale e collettiva. Infine, è una forma di espressione pericolosa che ferisce l'interlocutore verbalmente ma può anche andare oltre e scatenare veri atti di violenza.

L'hate speech sta progredendo molto negli ultimi anni e con esso anche i tentativi di disciplinarlo. Mi sono avvalsa di diversi studi e ricerche, tra cui il più recente e dettagliato è un rapporto dell'UNESCO, volto a definire ed estrapolare soluzioni sociologiche da affiancare a quelle giuridiche.

Un elemento importante che terrei a rimarcare è il Piano d'Azione di Rabat, che ha visto la partecipazione di esperti di tutto il mondo per trovare il modo di individuare e debellare le forme di hate speech. Il Piano prevede un test per individuare se un discorso contenga o meno a sua volta discorsi di incitamento all'odio, in quale quantità e come poterlo identificare. Tale test è diviso in sette parametri, quali rispettivamente: il contesto, l'autore del discorso, lo scopo, la forma e il contenuto, l'entità del discorso e la sua imminenza.

La questione dell'hate speech si aggrava notevolmente se analizzata nel panorama del mondo contemporaneo, dove il fattore Internet ha una pesante incidenza. Infatti, discorsi di incitamento all'odio si trovano nei social network, nei canali di reclutamento di gruppi terroristi, nelle forme di propaganda politica, in molti articoli, video e materiali che circolano in rete. Il fenomeno dunque è molto radicato ed estremamente attuale. Da qui la mia decisione di dedicare la seconda e ultima parte di questa tesi allo studio di come venga definita la differenza tra libertà di espressione e l'hate speech.

Anche in questo caso ho analizzato la questione da un doppio punto di vista - internazionale e regionale- prendendo in considerazione la quasi-giurisprudenza del Comitato dei Diritti Umani e la giurisprudenza della Corte Europea sui Diritti dell'Uomo e della Corte Supreme Americana. Purtroppo la Corte Inter-Americana e Africana non hanno ancora sviluppato alcuna giurisprudenza al riguardo.

Come anticipato pocanzi, il Comitato dei Diritti Umani può accogliere i ricorsi dei singoli per violazioni di diritti da parte dello Stato; tuttavia, non avendo valore giudiziario, emette solo opinioni e non sentenze vincolanti lo Stato. Di conseguenza, in caso di possibilità di scelta, gli individui preferiscono adire la Corte Europea dei Diritti dell'Uomo. Di quest'ultima, infatti, norme e giurisprudenza offrono una tutela maggiore per la salvaguardia dei diritti umani. Quando la Corte è chiamata a giudicare casi concernenti l'hate speech, essa adotta un metodo costituito da due parametri: il primo si basa sull'articolo 17 e non prevede la protezione della Convenzione quando la

forma di espressione porta messaggi di odio o rischia di minare i principi fondamentali alla base del trattato; il secondo si basa invece sul paragrafo 2 del capitolo 10 che pone limiti alla protezione, poiché anche se il discorso è ingiurioso non risulta ledere le basi della Convenzione stessa.

Infine, la Corte Suprema Americana è il massimo organo giudiziario americano e si pronuncia in circostanze di rilevanza costituzionale, quindi anche sul diritto alla libertà di parola in quanto sancito dal Primo Emendamento. Facendo un paragone tra gli andamenti delle aree geografiche, quella Americana appare più aperta e tollerante rispetto a quella Europea.

3. Conclusioni

Infine, per concludere, lo scopo di questa tesi era sin dall'inizio quello di scoprire il ruolo della libertà di espressione nell'era contemporanea, analizzandola dal punto di vista dei suoi limiti. Le ricerche che ho condotto hanno delineato un profilo della libertà di espressione sempre più limitato. In particolar modo ho centrato il fulcro dell'analisi su una particolare forma di espressione, l'hate speech. Ebbene, alla fine di questo lavoro, ho scoperto non solo che talvolta sia necessario limitare anche il diritto umano alla libertà di espressione, ma che anzi ciò diventi persino necessario quando tale diritto sfocia in istigazione alla violenza.

INTRODUCTION

There is a slightly difference between ‘freedom of speech’ and ‘freedom of expression’. As the former shows the right to share opinions and ideas without fearing censorship, persecution or conviction, the latter has a broader meaning as it includes seeking, receiving and imparting information and ideas. Despite their difference, as most of the times happens, in this dissertation as well the two terms will be used as synonyms.

The 10th December 1948 has been an historic day for human rights recognition, as on that day the first document aimed at protecting human rights was adopted by the United Nations General Assembly. Respectively, the Universal Declaration of Human Rights¹ sprung from the atrocities of the Second World War with the purpose of safeguarding those rights valued essentials to guarantee a dignifying life to every human being.

However, human rights codification process is the last stage of the long history of freedom of expression. In fact, the first to claim for his freedom of expression to be respected was Socrates, 2000 years ago in Ancient Greece. However, the first written form of rights did not appear before the 1215 with the Magna Charta², which did not specifically provided freedom of expression, still it was the first document that obliges the King to respect civil rights. This document opened the path to the adoption of the British Bill of Rights³ in 1689. This Bill guaranteed freedom of speech to the Parliament Members. The Bill greatly influenced the Declaration of the Rights of the Man⁴, the important rights instrument that was adopted in France in 1789. It sprung from the French Revolution and extended freedom of speech to all citizens. Two years later another important document was adopted, the United States Constitution, with the

¹ Universal Declaration on Human rights, 1948. Available at <http://www.un.org/en/documents/udhr/>, last accessed on 27.10.2015.

² Magna Cartha Liberatum, 1215. Available at <http://www.ilpost.it/2015/06/15/magna-carta/#>, last accessed on 01.10.2015.

³ British Bill of Rights, 1688. Available at <http://www.legislation.gov.uk/aep/WillandMarSess2/1/2/introduction>, last accessed on 01.02.2016.

⁴ Declaration of the Rights of the Man and Citizens, 1789. Available at http://avalon.law.yale.edu/18th_century/rightsof.asp, last accessed on 09.12.2015.

Bill of Rights and the First Amendment that has regulated free speech in the Union until today.⁵

Among the human and inherent rights that every individual holds, the one that strikes my curiosity is stated in article 19 of the Universal Declaration, freedom of opinion and expression. I find it particularly relevant, especially due to the issues that are at the core of nowadays international and domestic debate, hence this will be the focus of my dissertation.

I will begin my dissertation with an historical overview, to understand the notion of human rights and the reason why they have achieved such a relevant position in the world shaping policies. To do so, I will analyze documents of human rights experts, but, most importantly, human rights law. The Universal Declaration was only the first document, many others followed and deepened the concept of human rights.

In fact, the first was the International Covenant on Civil and Political Rights⁶, a pact adopted to make legally binding the rights of the Declaration, then the International Convention on the Elimination of All Forms of Racial Discrimination⁷ and the Convention on the Rights of the Child⁸. For each Convention I will go through the norms that protect and regulate freedom of expression.

This analysis will underline the right but its restrictions as well. The fact that an inherent human right can, shall and must be limited, deeply challenged me, that is why I decided to particularly focus on freedom of expression limitations.

In order to understand with which kind of criteria legal systems impose constraints to freedom of expression, I will divide the research into two parts, international and regional. In the first, I will try to outline the provisions that United

⁵ United States Constitution. First Amendment, 1787. Available at http://www.usconstitution.net/xconst_Am1.html, last accessed on 07.01.2015.

⁶ International Covenant on Civil and Political Rights. Available at <http://www.ohchr.org/en/professionalinterest/pages/ccpr.aspx>, last accessed on 29.10.2015.

⁷ International Convention on the Elimination of All Forms of Racial Discrimination, 1965. Available at <http://www.ohchr.org/EN/ProfessionalInterest/Pages/CERD.aspx>, last accessed on 11.12.2015.

⁸ The Convention on the Right of the Child, 1989. Available at <http://www.ohchr.org/en/professionalinterest/pages/crc.aspx>, last accessed on 18.12.2015.

Nations in its treaties adopted to limit free speech, while in the second, I will move to the regional level and outline how, according to the Council of Europe⁹, the Organization of American States¹⁰, the African Union¹¹ and the League of Arab States¹² constraints on free speech are necessary to be imposed. I have decided to divide the analysis in this way, because I think it will be interesting to discover how differently societies perceive rights and limitations.

After providing a technical analysis of provisions and norms, I will move to some more practical aspects, in fact I will give examples of every human rights protection system case law, to exemplify how they apply freedom of expression articles in specific circumstances. Hence, I will analyze some of the cases that each authority was asked to evaluate, to better understand how norms on free speech are interpreted in practice.

Focusing my research on such issues of freedom of expression that involve free speech limitations, I have found out an aspect that lies at the nowadays core of the international debate, respectively hate speech. Its characteristics and the forms in which it can appear will be the focus of the second part of this dissertation.

Hate speech any form of injurious form of expression, harmful commentary, violence cry, offensive provocation against an individual or a group of individuals that can share the same origins or ethnic and religious characteristics. It lies under the basis of any form of violence and it has to be intended in its widest form. It can led to menacing, death threats, racial discrimination, migrants discrimination, gender contestation, individual persecution. It is a form of speech that can be extremely harmful and incite or directly led to violence and its degree of strength varies according to the manner in which it is expressed. Hence, the striking capacity of an act, greatly depends on the way in which it is delivered.

Adding this features of hate speech to nowadays virtual and viral world makes the situation even more delicate, as for example, an injurious comment going online

⁹ Council of Europe. Available at <http://www.coe.int/en/>, last accessed on 12.12.2015.

¹⁰ Organization of American States. Available at <http://www.oas.org/en/default.asp>, last accessed on 12.12.2015.

¹¹ African Union. Available at <http://www.au.int/>, last accessed on 12.12.2015.

¹² Arab League. Available at <http://www.al-bab.com/arab/docs/league.htm>, last accessed on 12.12.2015.

can stay there forever, creating an enormous deal of damages. Even from this brief example it is possible to understand how deep and how far a form of speech can go and hurt.

Having discovered the magnitude of hate speech and how it affects the effective individual enjoyment of the right to freedom of expression, I have decided to focus the second part of this work on examining how international mechanisms of human rights have balanced the relation between freedom of expression and hate speech. Therefore, what it will be interesting to understand is how human rights defence mechanisms outline the difference between freedom of expression and hate speech and which threshold of allowed 'hate speech tolerance' they have.

To do so, I will examine the international and regional jurisprudence. As far as the first is concerned I will verify how United Nations Committees have developed their quasi-jurisprudence on the subject and then I will move to the regional area. In this session I will provide a display of the well developed European Court of Human Rights case law, which is the most advanced human rights mechanism of protection of human rights. Unfortunately, as far as the other regional system are concerned, their jurisprudence in freedom of expression and particularly hate speech ideas do not exist, anyhow, I will provide some examples of how the United States Supreme Court evaluates such cases.

CHAPTER 1

1.0 History of human rights development

1.1 Human rights features

The aim of this chapter is to lay the foundations for this dissertation on the Human Right to Freedom of Expression. This will be done by providing an historical panoramic view on the development of the concept and discipline of human rights.

Before going through the whole historical process, I would like to outline some of the basic concepts of human rights, in order to comprehend issues such as, why they hold characteristics like universality and inviolability or why they have to be protected and preserved and why and in which measure they can be submitted to limitations or restrictions.

According to Shelton, the concept of human rights was influenced by three factors: religion, political tradition and science.

As far as religion is concerned, there is a lowest common denominator in most of religious doctrines, which affirms that human beings are created by a given creator who make them special. Due to this, individuals possess a high moral standing which deserves to be respected. Religious texts do not use the expression 'human rights', but they talk about moral obligations and reliability toward others. For instance, Buddhism sustains respect for all life and to live observing duties and charity; Confucian suggest that it is possible to live in harmony and cooperation when duties and responsibility are respected.¹³ Human rights elements are found in monotheistic religions as well, for example, the Torah writes: the principle that in the eyes of the law all people are equal and that 'justice must be extended to all alike'.¹⁴ The concepts of equality, human dignity and sacredness of life are at the basis of human rights themselves.

Many philosophers, inspired or not by any religious belief, wrote theories about just society and good governance. Ancient Greece gave rise to the concept of natural law, embracing equality before law, in political power, civil rights and suffrage. Cicero, one of the greatest Roman philosophers, wrote that natural law and universal justice

¹³ D. L. SHELTON, *Advanced Introduction to International Human Right Law*, Edward Elgar Publishing Limited, United kingdom, 2014, p. 2-4.

¹⁴ Samuel Belkin, *In His Image: the Jewish Philosophy if Man Expressed in Rabbinc Tradition* 87, Abelard-Schuman, 1960.

oblige all individuals without any restriction. During the Enlightenment, thinkers underlined that every individual is born in a state of equality and holds specific natural rights prior to any governmental law, strengthening that the latter has been created to preserve such rights.

Finally, the approach to science is much more recent, but worth noting. For instance, the Darwinian theory of evolution through natural selection shows that in human beings there are both features of competition and willing to dominate on one side, and on the other altruism and compassion. According to biologists, all these characteristics are at the basis of their discipline. In the end, psychologists believe that human beings have an ability to respond to concepts of rights and duties and this is due to the fact that individuals have some innate moral psychological capacities.

After this preamble on the three important features for the development of the concept of human rights, I consider necessary to focus the attention on two other concepts: dignity and equality.¹⁵

‘Human dignity is one of the most fundamental concepts of international human rights law, appearing in nearly all human rights and applied by human rights bodies regularly’.¹⁶ Human dignity is the recognition that each individual has an equal and inherent moral status; entangled to this there is the notion that human beings deserved that others and institutions respect their status. Dignity is a core value of the international community and it is found in some international law binding and non instruments. Dignity has been as well used by human rights tribunals to develop their jurisprudence.

The second highly important value of human rights is equality. Legal standards underline that it is a shared attitude and inherent in the nature of all individuals.¹⁷ Equality is connected with non-discrimination, as well, as human right provides rights to ‘all persons’, ‘everyone’ and ‘every human being’. For this reason, the right to be free from discrimination and to enjoy equality is defined ‘the most fundamental of the rights of the man and the starting point of all other liberties’.¹⁸

¹⁵ D. L. SHELTON, *Advanced Introduction to International Human Right Law*, Edward Elgar Publishing Limited, United kingdom, 2014, p. 5-6.

¹⁶ *Ibid.*, p.7.

¹⁷ *Ibid.*, p.7-12.

¹⁸ SIR HERSCH LAUTERPACHT, *An International Bill of the Rights of Man*, Columbia University Press, 1945, p. 115.

1.2 Human rights origins

The modern notion of human rights finds its bases in the intellectual movement of the eighteenth century, the Enlightenment, when the American Revolution brought the idea of self-evident rights, which derived from the previous concept of natural rights.¹⁹

The history of human rights and freedom of expression developed together, the first relevant document is the 1215 Magna Charta. This document guaranteed people's protection under the law. It was wrung from the unwilling King John I of England and it is so renowned and powerful because it was the first to legally draw limits to the royal power bounding rulers to the law. The charter is also considered the founding document of the democratic modern state.²⁰

However, this document was premature for European reigns, in fact, the massive change happened during Enlightenment thanks to the American and French revolution and to the two documents that followed.²¹

As far as the French case is concerned, revolutionary people toppled the *Ancien Regime* system and gave birth to the Republic.²² Among the hugest changes that this great historic event brought, there is the codification, on 26th July 1789, of the Declaration of the Rights of Man and Citizens.²³ It lies on the democratic idea of separation of the powers. The Declaration holds a negative definition of liberty, because it claims that someone is empowered to do anything, as long it is not injurious for others. In addition, the document affirmed that natural rights had to be preserved and limited only by the law and in the circumstances in which they would damage other persons.²⁴ It outlined a lists of rights that each Man deserved to see respected, among these, article 11 is a prelude of freedom of expression, namely: 'Free communication of ideas and opinions is one of the most precious human rights; all

¹⁹ B. RAINEY, Human Rights Law Concentrate, Oxford University Press, 2013 p.2.

²⁰ Magna Cartha Liberatum, 1215.

²¹ B. RAINEY, Human Rights Law Concentrate, Oxford University Press, 2013, p. 4.

²² French Revolution, article. 11. Available at <http://www.britannica.com/event/French-Revolution>, last accessed on 20.12.2015.

²³ Declaration of the Rights of the Man and Citizens. Available at http://avalon.law.yale.edu/18th_century/rightsof.asp, last accessed on 09.12.2015.

²⁴ B. RAINEY, Human Rights Law Concentrate, Oxford University Press, 2013, p. 4.

citizens may therefore speak, write and print freely, though they may be required to answer for abusing this right in cases specified by law'.²⁵

The other important revolution, that took place in the second part of 1700 was the American one, which led to the Declaration of Independence of United States on 4th July 1776. The document declared the end of the British colonial domination on the thirteen American colonies, making of them independent States which would belong to a new greater system called, the United States of America. The new born US system outlined the basis of its democracy on the principle of governance by consent.²⁶ Similarly to the French document, it lies on natural law principle, namely²⁷ it states 'We hold the truths to be self-evident, that all men are created equal, that they are endowed by their creator with certain, unalienable rights that among these are life, liberty and pursuit of happiness'.²⁸ Some years later, in 1789, the US Constitution was created, it includes the Bill of Rights, which is composed by the first ten Amendments that protect human rights. The very First Amendment is about freedom of religion, speech and the press and it affirms: 'Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances'.²⁹

All these documents gave shape and put in practice what before was just considered as an idea: natural rights, guaranteeing to all individuals the protection of the law. From this period on, all constitutional documents had as leitmotiv the safeguard of natural rights.³⁰

Carrying on with the historical background of the origins of human rights, at the beginning of the nineteenth century the anti-slavery movement sprang. It achieved the recognition of freedom from slavery as a human right, both at the national and

²⁵ Declaration of the Rights of the Man and Citizens.

²⁶ US Department of State, Office of the Historian, American Revolution, 1776. Available at <https://history.state.gov/milestones/1776-1783/declaration>, last accessed on 09.12.2015.

²⁷ B. RAINEY, Human Rights Law Concentrate, Oxford University Press, 2013, p. 4.

²⁸ US Declaration of Independence, 1776, para. 1. Available at http://www.archives.gov/exhibits/charters/declaration_transcript.html, last accessed on 30.10.2015.

²⁹ First Amendment, 1789. Available at <https://www.nccs.net/amendment-1-freedom-of-religion-speech-and-the-press.php>, last accessed on 09.12.2015.

³⁰ B. RAINEY, Human Rights Law Concentrate, Oxford University Press, 2013, p. 4.

international level.³¹ Furthermore, there was the growth of social movements such as the Trade Unions, which defended the rights of workers and the Suffragettes, groups claiming for women's rights recognition. This century had been very fruitful, as it saw the fostering of the international humanitarian law as well, with the birth of the Red Cross³² and the interest in human rights law reached an international level. After the Great War the League of Nations was founded. Its main goal was to prevent any future war and maintain peace. Despite its ideas, it did not have a powerful impact on nation states decisions as the Second World War broke out, leading to discrimination, abuses and atrocities.³³ After the deadliest conflict in human history, two international tribunals to judge war crimes were established, Nuremberg and Tokyo. They marked huge improvements in the international law framework: individuals, and not only states, were held liable for international crimes against other human beings.³⁴ Furthermore, they introduced two important principles: the concept of crimes against humanity, namely, under article 6 paragraph c of the Nuremberg Statute: 'The Tribunal established by the Agreement referred to in Article 1 hereof for the trial and punishment of the major war criminals of the European Axis countries shall have the power to try and punish persons who, acting in the interests of the European Axis countries, whether as individuals or as members of organizations, committed any of the following crimes. The following acts, or any of them, are crimes coming within the jurisdiction of the Tribunal for which there shall be individual responsibility ... (c) Crimes against humanity: namely, murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, before or during the war; or persecutions on political, racial or religious grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal, whether or not in violation of the domestic law of the country where perpetrated'. The other important principle recognized by the tribunal was the impossibility to justify individual actions as superior order defence, with the consequent removal of individual immunity, as article 7, of the main Statute cites: 'The official position of defendants, whether as Heads of

³¹ Anti slavery movement in the United States. Available at <https://www.nla.gov.au/selected-library-collections/anti-slavery-movement-in-the-united-states>, last accessed on 09.12.2015.

³² B. RAINEY, Human Rights Law Concentrate, Oxford University Press, 2013, p. 4.

³³ US Department of State, Office of the Historian. Available at <https://history.state.gov/milestones/1914-1920/league>, last accessed on 09.12.2015.

³⁴ US Department of State, Office of the Historian. Available at <https://history.state.gov/milestones/1945-1952/nuremberg>, last accessed on 09.12.2015.

State or responsible officials in Government Departments, shall not be considered as freeing them from responsibility or mitigating punishment'.³⁵ The process of human rights advancement did a great step forward with the creation in 1945 of the United Nations Organisation. The atrocities of the Second World War accelerated the process of regulation of human rights, and the conference played a great role in the inclusion of such rights in the UN Charter.³⁶ In its Preamble, contracting States subscribe their will: 'to reaffirm faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women and of nations large and small'.³⁷ Human rights respect is present through all the document, in article 1 paragraph 3 for instance, that states the purposes of United Nations 'to achieve international cooperation in solving international problems of an economic, social, cultural, or humanitarian character, and in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion'³⁸. And more, article 55 paragraph c states: 'the United Nations shall promote universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion'.³⁹ While article 55 is aimed at UN as an organization, article 56 refers to Member States, urging them to cooperate, as cited: 'All Members pledge themselves to take joint and separate action in co-operation with the Organization for the achievement of the purposes set forth in Article 55'.⁴⁰ It is relevant to mention article 68 as well. It gives the Economic and Social Council the power to create 'commissions in economic and social fields and for the promotion of human rights'.⁴¹ One of the first acts of the above-mentioned Council was the establishment of the Commission on Human Rights in February 1946. In fact, even if the Charter more than once deals with human rights topic, their given definition is too broad. There is neither a deep explanation nor a list of them, plus concrete control mechanisms were not created. For this reason, the Commission on Human Rights was in charged with passing a document including the

³⁵ Nuremberg Statute, 1945, articles 6 para. C, 7.

³⁶ F. GOMEZ, K. De FEYTER, *International Protection of Human Rights: Achievements and Challenges*, University of Deusto, Bilbao, 2006 pp. 28-29.

³⁷ UN Charter, 1945, Preamble. Available at <http://www.un.org/en/charter-united-nations/>, last accessed on 10.12.2015.

³⁸ *Ibid.*, at 37, article 1 para. 3.

³⁹ *Ibid.*, at 37, article 55 para. C .

⁴⁰ *Ibid.*, at 37, article 56.

⁴¹ *Ibid.*, at 37, article 68.

most inalienable human rights, hence the Universal Declaration of Human Rights (UDHR)⁴² was approved.⁴³ It is a withstanding document, as it is the first international guide on human rights, written by an international multi-lateral organization with universal character. Moreover, for the 'moral status and legal and political importance it has acquired over the years, the Declaration ranks with the Magna Charta, the French Declaration of the Rights of Man and Citizens, and the American Declaration of Independence, as a milestone in mankind's struggle for freedom and humanity dignity'.⁴⁴ The task undertaken by the Commission was not an easy one. The initial project was too ambitious, as it was composed of three elements: approval of a Declaration, a human right Covenant and a plan of rules to put into practice the aforementioned documents. Nevertheless, the new born international system and its subjects were not mature enough to accept huge limits to their sovereignty power, thus, the three target project was reduced to a single document holding the most relevant human rights. Another issue that needed to be faced was the legal value of the document. The question was whether shape a non-binding declaration of the General Assembly or an International treaty with obligatory clauses. It was decided for a Declaration, non-binding in nature, a manifesto with political characteristics.⁴⁵ In putting on paper the content of the document the cabinet met many difficulties, primarily due to the vast Cold War confrontation which was about to modify international relations in the second part of the XX century. The East-West conflict found fertile field for battle on any ground: ideological, political, social and economic. The two factions were the Socialist bloc headed by Soviet Union on one side and the United States and their Western allies on the other.⁴⁶ According to the formers, individuals are social beings, hence the necessary rights to be assured should just be economic, social and cultural. They considered as well highly important the role of state sovereignty, which cannot be overcome by human rights. By this, they meant that international law was not allowed to interfere in the way such States would have

⁴² Universal Declaration on Human rights, 1948. Available at <http://www.un.org/en/documents/udhr/>, last accessed on 27.10.2015.

⁴³ Ibid., at 36, pp. 30-31.

⁴⁴ T. BUERGENTHAL, *International Human Rights in a Nutshell*, West Publishing Co., Minnesota, 1988, pp.25-26.

⁴⁵ F. GOMEZ, K. De FEYTER, *International Protection of Human Rights: Achievements and Challenges*, University of Deusto, Bilbao, 2006, p.74.

⁴⁶ R. CASSIN, 'La Déclaraiton Universelle' p. 267.

implemented human rights politics, as they were perceived as matters of internal jurisdiction. On the contrary, Western countries highly fostered civil and political rights defence, as these values are the foundations of the classic based democratic societies. This difference in human rights perception sharpened due to the ideological confrontation and human rights became a completely politicized issue. Nevertheless, despite all these tensions, the Declaration was a balanced result of compromising consensus and it was approved on the 10th December 1948 by the General Assembly. The vote obtained 48 in favour, 8 abstentions and none against; even if there were eight abstentions, it still was a great victory for all humanity.⁴⁷ ⁴⁸ The writing and approval of the document was relatively brief, if we take into consideration the long procedures usually necessary to conciliate all Member States requirements.⁴⁹

After this great achievement, there still was an evident problem, the UDHR was a non-binding document, hence it means that its text was merely made of recommendations to UN Member States. For this reason, it was considered necessary to approve treaties with fully legal character. The historical context was still very hostile and the ideological confrontation made achieving this goal difficult. In the end, to overcome this impasse, two Covenants on human rights were approved. Passed on the same day, 16th December 1966, respectively⁵⁰ the International Covenant on Civil and Political Rights (ICCPR)⁵¹ and the International Covenant on Economic, Social and Cultural Rights (ICESCR).⁵² Besides, it took another ten years to obtain all the ratifications necessary for them to come into force. Both covenants include a non-discrimination clause, 'Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant', at article 2 paragraph 1 in ICCPR and paragraph 2.⁵³ The Universal Declaration with the two Covenants are the basic

⁴⁷ D. L. SHELTON, *Advanced Introduction to International Human Right Law*, Edward Elgar Publishing Limited, United kingdom, 2014, p. 75.

⁴⁸ The 8 abstentions came from some socialists countries, as they abstained *en masse*, due to the fact that they did not completely agree with all the articles of the Declaration.

⁴⁹ F. GOMEZ, K. De FEYTER, *International Protection of Human Rights: Achievements and Challenges*, University of Deusto, Bilbao, 2006, pp.77-78.

⁵⁰ F. GOMEZ, K. De FEYTER, *International Protection of Human Rights: Achievements and Challenges*, University of Deusto, Bilbao, 2006, pp.32-33.

⁵¹ International Covenant on Civil and Political Rights.

⁵² International Covenant on Economic, Social and Cultural Rights. Available at <http://www.ohchr.org/EN/ProfessionalInterest/Pages/CESCR.aspx>, last accessed on 01.11.2015.

⁵³ International Covenant on Civil and Political Rights, article 2 para. 1.

instruments of human rights codification and, as such, are known as International Bill of Human Rights.⁵⁴

United Nations has always been engaged in fostering human rights, and in the decades developed conventions and treaties, in the following list there are some that protects freedom of expression as well. At the international level the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD),⁵⁵ the Convention on the Right of the Child,⁵⁶ the General Comment 10⁵⁷ and the other General Comment 11.⁵⁸ At a regional level as well: the European Convention on Human Rights⁵⁹, the American Convention on Human Rights “Pact of San José, Costa Rica”,⁶⁰ the Declaration of principles on freedom of expression,⁶¹ African Charter on Human and Peoples' Rights,⁶² the Declaration of principles on freedom of expression in Africa⁶³ the Amsterdam Recommendations. Freedom of the Media and the Internet, the Organization for Security and Co-operation in Europe,⁶⁴ the Bishkek Declaration of the Organization for Security and Co-operation in Europe,⁶⁵ and the Arab Charter on Human Rights.⁶⁶ Some of these documents will be analysed in the following chapter.

⁵⁴ F. GOMEZ, K. De FEYTER, *International Protection of Human Rights: Achievements and Challenges*, University of Deusto, Bilbao, 2006, p. 33.

⁵⁵ International Convention on the Elimination of All Forms of Racial Discrimination, 1965.

⁵⁶ Convention on the Right of the Child, 1989.

⁵⁷ General Comment 10. Available at

<http://www.ohchr.org/Documents/Issues/Opinion/CCPRGeneralCommentNo10.pdf>, last accessed on 11.12.2015.

⁵⁸ General Comment 11. Available at

<http://www.ohchr.org/Documents/Issues/Opinion/CCPRGeneralCommentNo11.pdf>, last accessed on 11.12.2015.

⁵⁹ European Convention of Human Rights. Available at

http://www.echr.coe.int/Documents/Convention_ENG.pdf, last accessed on 11.12.2015.

⁶⁰ American Convention on Human Rights “Pact of San José, Costa Rica”. Available at

http://www.oas.org/dil/treaties_B-32_American_Convention_on_Human_Rights.htm, last accessed on 11.12.2015.

⁶¹ Declaration of principles on freedom of expression. Available at

<http://www.oas.org/en/iachr/expression/showarticle.asp?artID=26>, last accessed on 11.12.2015.

⁶² African Charter on Human and Peoples' Rights. Available at

<http://www.achpr.org/instruments/achpr/>, last accessed on 11.12.2015.

⁶³ Declaration of the Principles on Freedom of Expression in Africa. Available at

<https://www1.umn.edu/humanrts/achpr/expressionfreedomdec.html>, last accessed on 11.12.2015.

⁶⁴ Amsterdam Recommendations. Freedom of the Media and the Internet, the Organization for Security and Co-operation in Europe. Available at <http://www.achpr.org/sessions/32nd/resolutions/62/>, last accessed on 11.12.2015.

⁶⁵ Bishkek Declaration of the Organization for Security and Co-operation in Europe. Available at

<http://www.osce.org/fom/42521?download=true>, last accessed on 11.12.2015.

⁶⁶ Arab Charter on Human Rights. Available at

http://www.eods.eu/library/LAS_Arab%20Charter%20on%20Human%20Rights_2004_EN.pdf, last accessed on 08.01.2015.

CHAPTER 2

2.0 International and regional law framework

This second chapter will analyze the International and Regional Legal Framework of the right to freedom of expression, by providing the ambivalent perspectives of each norm, which holds the right and its limits. Hereafter, all the documents cited at the end of the previous chapter will be taken into consideration. I am going to follow the coming order: first International Level with United Nations⁶⁷ documents and then Regional Level, Council of Europe⁶⁸, Organization of American States⁶⁹, African Union⁷⁰ and the League of Arab States⁷¹.

2.1 International Level

In the first UN General Assembly plenary session it was affirmed that 'freedom of information is a fundamental human right and is the touchstone of all freedoms to which the United Nation is consecrated'.⁷² Providing larger freedoms, through social progress and better standards of life, is among the goals of the Organization, as it is stated in the fifth session of the preamble of its Charter.⁷³

2.1.1 Universal Declaration of Human Rights

Despite the main purposes of guaranteeing dignity, equality and freedom to all human beings, in resolution 110 approved on 3rd November 1947, the General Assembly sets out the first limit to free speech. It condemns all forms of propaganda and threats to peace. It affirms that in spite of what has been written in the Declaration about the 'respect of universal freedom, which include freedom of

⁶⁷ United Nations. Available at <http://www.un.org/>, last accessed on 12.12.2015.

⁶⁸ Council of Europe. Available at <http://www.coe.int/en/>, last accessed on 12.12.2015.

⁶⁹ Organization of American States. Available at <http://www.oas.org/en/default.asp>, last accessed on 12.12.2015.

⁷⁰ African Union. Available at <http://www.au.int/>, last accessed on 12.12.2015.

⁷¹ Arab League. Available at <http://www.al-bab.com/arab/docs/league.htm>, last accessed on 12.12.2015.

⁷² UN Resolution no. 59 (I) of 14.12.1946. Available at <http://daccess-dds-ny.un.org/doc/RESOLUTION/GEN/NR0/033/10/IMG/NR003310.pdf?OpenElement>, last accessed on 12.12.2015.

⁷³ Universal Declaration on Human rights, 1948. Available at <http://www.un.org/en/documents/udhr/>, last accessed on 27.10.2015, session 5.

expression', it is necessary to underline that the UN was created with the principal goal of avoiding future resorts to war. Hence, the General Assembly forbids all forms of propaganda which can undermine peace and encourage acts of aggression and invites Member States to promote the establishment of friendly relationships and to live in accordance to the 'purposes and principles of the Charter'.⁷⁴

During the same session, another important resolution was adopted, 127 (II) which called upon States to create a plan of measure to act in order to combat 'the diffusion of false or distorted reports likely to injure friendly relations between States'.⁷⁵ This tension that sprang since the beginning, between the uphold of the rights to freedom of expression and the application of appropriate restrictions, has animated international and regional debate for decades.

Nonetheless the toughness of balancing sometimes between human rights and other necessities that may constitutes hard limits to the freedom of expression has been a constant thing in the legal framework of human rights law, beginning from the main first document written by the United Nations Commission on Human Rights in 1948.⁷⁶

Clearly, the reference goes to the Universal Declaration of Human Rights (UDHR), whose origins have already been told in the previous chapter. A significant aspect in the document is the relation between the rule of law and human rights protection.⁷⁷ Law protection of individual fundamental rights is stated in the preamble 'that human rights should be protected by the rule of law'.⁷⁸ Despite the fact that the UDHR does not provide a specific definition of what the rule of law is, many of its articles allow us to retrace it. Among them, article 7 stressed equality before the law, the following, article 8, presents the right to an effective remedy by national tribunals, then article 11 guarantees the right to be presumed innocent until proven guilty,

⁷⁴ Res 110 (II) of 03.11.1947. Available at <http://www.un-documents.net/a2r110.htm>, last accessed on 13.12.2015.

⁷⁵ Res 127 (II) of 15.11.1947. Available at <http://daccess-dds-ny.un.org/doc/RESOLUTION/GEN/NR0/038/34/IMG/NR003834.pdf?OpenElement>, last accessed on 13.12.2015.

⁷⁶ D. L. SHELTON, *Advanced Introduction to International Human Right Law*, Edward Elgar Publishing Limited, United kingdom, 2014, p. 163.

⁷⁷ F. GOMEZ, K. De FEYTER, *International Protection of Human Rights: Achievements and Challenges*, University of Deusto, Bilbao, 2006, p. 73.

⁷⁸ Universal Declaration of Human Rights, 1948 cit. preamble, para. 3.

article 18 affirms freedom of thought, conscience and religion, and then article 19 provides freedom of opinion and expression.

The aforementioned article cites that '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'.⁷⁹

This norm is considered the milestone of free speech by which every further norm was inspired. Every right reflects the necessities of the period in which it is created. In fact, after the Second World War, which was a period of mistreatment of human beings, great space has been given to rights. Nevertheless, we shall see how this inalienable right had to face history changes and commit to news limits.⁸⁰

2.1.2 International Covenant on Civil and Political Rights

As previously mentioned, the Declaration has a non binding nature, hence, in order to oblige the UN Member States to respect human rights, the two Covenants were adopted^{81 82} and two Optional Protocols as well, the first provides for the possibility of individual complaints⁸³ and the second abolishes the death penalty.⁸⁴

Hereafter, an ICCPR presentation will follow, considering that among the challenges of freedom of expression on our age there are limits and restrictions posed by states, I will first analyze what kind of limitations does the Covenant allow and then focus on article 19.

As of December 2015 the International Covenant on Civil and Political Rights had been ratified by 167 States.⁸⁵ In October 1997 the Human Rights Committee adopted general comment no. 26 about the continuity of obligations of the State Parties to the Treaty. The Committee recalls the fact that the Covenant does not contain withdrawal or denunciation provisions, and considering as well the nature of

⁷⁹ Universal Declaration of Human Rights, 1948 cit. article 19.

⁸⁰ Res 127 (II) of 15.11.1947.

⁸¹ International Covenant on Civil and Political Rights, 1966.

⁸² International Covenant on Economic, Social and Cultural Rights, 1966.

⁸³ Optional Protocol to the International Covenant on Human Rights, 1976.

⁸⁴ Second Optional Protocol to the International Covenant on Human Rights, 1989 .

⁸⁵ United Nations Treaty Collection. Available at

https://treaties.un.org/pages/viewdetails.aspx?chapter=4&src=treaty&mtdsg_no=iv-4&lang=en, last accessed on 13.12.2015.

the Covenant in relation to the UDHR and ICESCR and the subjects dealt with, the Committee concludes that International Law does not allow a contracting State to denounce or withdraw. The Committee considers that, the Treaty does not hold any provision about its termination, denunciation or withdrawal.⁸⁶ It affirms that it is necessary to observe these actions at the light of customary law and the Vienna Convention on the law of Treaties.⁸⁷ On these bases, the Covenant is not allowed to be subject to denunciation or withdrawal. Moreover, according to its nature and along with the Declaration and the ICESCR, the Covenant cannot be subject to denunciation as the rights written in the Covenant belong to every human being and the Committee highlights 'once the people are accorded the protection of the rights under the Covenant, such protection devolves with territory and continues to belong to them, notwithstanding change in government of the State party, including dismemberment in more than one State or State succession or any subsequent action of the State party designed to divest them of the rights guaranteed by the Covenant.' The Committee concludes stating that, International law does not allow any State party withdrawal from the Covenant.⁸⁸

Furthermore, according to article 2 paragraph 1, each Member State has to respect and ensure to all individuals in its territory and under its jurisdiction the rights established in the Covenant without restrictions or discriminations of any kind. The aforementioned article holds two obligations, to respect and to ensure. The obligation to respect shows the negative aspect of the civil and political rights. It means that Member States have to refrain from restricting the exercise of these rights, where such is not expressly allowed.⁸⁹ As mentioned before, there are some cases in which the substance of a certain duty depends on its formulation. For instance, some rights are absolute, like article 7 prohibition on torture, some only forbid unnecessary interference; as article 17, about the right to privacy and other provisions expressly invite States to impose restrictions like article 19. The other responsibility that States hold is to ensure that, this is a positive character of civil and political rights. It means

⁸⁶ General Comment 26. Available at <http://www.refworld.org/docid/453883fde.html>, last accessed on 13.12.2015.

⁸⁷ Vienna Convention on the Law of Treaties. Available at <https://treaties.un.org/doc/Publication/UNTS/Volume%201155/volume-1155-I-18232-English.pdf>, last accessed on 13.12.2015.

⁸⁸ General Comment 26.

⁸⁹ International Covenant on Civil and Political Rights, article 2 para. 1.

that contracting States have to show a positive attitude toward the Covenants rights and to make efforts to implement it into their law system.⁹⁰ Hence, it results that almost all the rights can be restricted, limited or derogated, depending on their provisions.⁹¹

Another interesting matter is presented in paragraph 4, which deals with the necessary restrictions that States can take in situations of 'public emergency' which endangered the State security. According to this, States are allowed to take measures that derogate from the Covenant, in order to defend the human rights and other Member States, article 4 imposes conditions and restrictions that the needing State has to respect. Among these, it needs to clearly proclaim the state of emergency, any restriction is only permitted to the extent that it is strictly required by the emergency and should not be against no derogated articles, such as the right to life, prohibition of torture, slavery, detention, freedom of thought, conscience, religion and belief.⁹²

Apart from reservations and derogation, there are other possibilities to limit Covenant provision, among them, the technique of the use of the word 'arbitrary'; as in article 6 (1), 9 (1) and 17 (1) of the ICCPR or other provision; 12 (3), 13, 18 (3) and 19 (3) hold the 'limitation clauses', which allow restrictions as long as they are authorized by the law. In the end, the ultimate parameter to adopt while reasoning about possible limitations is the principle of proportionality.

This first part was necessary to understand up to which grade States can decide and produce restrictions to civil and political rights. Hereafter the main article 19 will be analysed.

Article 19 cites that:

1. Everyone shall have the right to hold opinions without interference.
2. Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.

⁹⁰ F. GOMEZ, K. DE FEYTER, *International Protection of Human Rights: Achievements and Challenges*, University of Deusto, Bilbao, 2006, pp. 144-145.

⁹¹ A. C. KISS, *Permissible Limitations on Rights*, en Henkin, L. (Ed.): *op. cit.*, pp.290-310.

⁹² *International Covenant on Civil and Political Rights*, para. 4.

3. The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:
 - a. For respect of the rights or reputations of others;
 - b. For the protection of national security or of public order, or of public health or morals.⁹³

According to the UN Office of the High Commissioner,⁹⁴ paragraph 1 of the aforementioned article does not allow any form of limitation, hence to human beings' faculty of holding opinions without interference, exception or any imposition of restriction of any kind. Differently, it is paragraph 2 that widely includes the right to seek, receive and impart information of any type regardless of country borders, in whatever form and through any means. It is considered a form of expression art as well. Moreover, in general comment 10 about article 19 of the ICCPR approved in 1983 by the Human Rights Committee, it was argued that not all States have provided detailed reports about how freedom of expression is ruled by their Constitutions, as follows, 'in order to know the precise regime of freedom of expression in law and in practice, the Committee needs in addition pertinent information about the rules which either define the scope of the freedom of expression or which set forth certain restrictions, as well as any other conditions which in practice affect the exercise of this right'.⁹⁵

In the end, paragraph 3 deals with restrictions, it affirms that in order to be lawful, they must comply with the principles of legality and proportionality and be imposed to safeguard other individuals' reputations, to protect national security and to maintain public order.⁹⁶ Freedom of expression belongs to the group of rights that may be limited on the basis of article 20 which foresees limitation priorities in case of

⁹³ International Covenant on Civil and Political Rights, article 19.

⁹⁴ UN Human Rights Office of the High Commissioner. Available at <http://search.ohchr.org/results.aspx?k=freedom%20of%20expression#k=expression>, last accessed on 14.12.2015.

⁹⁵ HRC, General Comment no. 10, 29.09.1983, para. 1, 2, 3.

⁹⁶ Communication No. 628/1995, T. Hoon Park versus the Republic of Korea (Views adopted on 20 October 1998) in UN doc. GAOR, A/54/40 (vol. II), p. 91, para. 10.3. Available at <http://www.ohchr.org/Documents/Publications/training9chapter12en.pdf>, last accessed on 15.12.2015.

war propaganda and incitement to national, racial and religious hatred that may lead to discrimination, hostility or any form of violence.⁹⁷ General comment 10 goes a bit further affirming that it is clear that in some circumstances the State necessarily has to pose some limits, however without jeopardising the right itself.⁹⁸

In the following section, some examples of the right of free speech will be presented. Freedom of information, does not include the right to speak ones' language in court processing. This was pretty clear in the case of *Cadoret and Le Bihan versus France*, where the claim was that individuals could not speak their own language, the Breton, in French courts. The authors of the claim were told by the Committee that they had no right to speak the language they chose in front of the Court. The Committee declared that the case raised no issue under article 19 paragraph 2.⁹⁹

Paragraph 2 does not limit any form that individuals choose to express themselves to the public, would it be in the political, cultural, artistic or advertising field. However, a distinction between public and private sphere must be done. In fact, outside the public domain individuals can freely express themselves with the language they mostly like. On the contrary, the public sphere requires the State to choose one or more official languages.¹⁰⁰

The Committee realized that restrictions in cases of defamation and dissemination of false information in some cases go beyond what is allowed by paragraph 3 of article 19 and impose more severe constraints. It expressed its concern for instance, in the case of Iraq, where severe punishments were imposed on the right to express opposition, criticism of the Government and of its policies and to the fact that it imposed life imprisonment for insulting the President of the Republic and, when it is worse, death.¹⁰¹ Considering this given example, according to the Human Rights in the Administration of Justice, A Manual on Human Rights for Judges, Prosecutors and Lawyers (Manual), and State parties of the Covenant have to make sure that provisions of defamation and dissemination are in accordance with the principle of legal certainty. Namely, Constitutional laws have to be detailed to allow citizens not to violate them with their behaviour. Furthermore, governmental laws that generally

⁹⁷ UN Human Rights Office of the High Commissioner, slide 37.

⁹⁸ HRC, General Comment no. 10, 29.09.1983, para. 4.

⁹⁹ *Gradidge versus Grace Bros. Pty. Ltd.*, 1988, Federal Law Reports, vol. 92, p. 414.

¹⁰⁰ UN Human Rights Office of the High Commissioner, slide 38.

¹⁰¹ UN doc. GAOR, A/53/40 (vol.I), p. 21, para. 105.

limit free speech penalizing ‘disrespect for authority’ and ‘criticism of governing bodies and ruling parties’ are against article 19 of the Covenant. Finally, freedom of expression must be protected as it is a precept for the fulfilment of articles 21 and 22.¹⁰²

The case hereafter analyzed is about denial of crimes against humanity and advocacy of hatred.

The first thing that the Manual outlines is that duties bring responsibilities. The idea of denying crimes against humanity appeared, as in the case *Faurisson versus France*.¹⁰³ The author, during an interview, affirmed that there were ‘no homicidal gas chamber for the extermination of Jews in Nazi concentration camps’.¹⁰⁴ In order to consider the author’s freedom of expression limitation in accordance with article 19 paragraph 2, it was necessary to prove the three necessary conditions exposed in paragraph 3. The three provisions to be considered were the principle of legality, which was respected as the author violated ‘the rights and reputation of others’; then the principle of legitimate purpose, which justified the imposed constraint as legitimated by article 19 paragraph 3 that ensure respect for the rights or reputations of others, considering others both as single persons or as a community as a whole. The last parameter to be taken into consideration is the principle of necessity. The Committee, acknowledging the Government submission to the *Gayssot Act*¹⁰⁵ and a former claim by a Minister of Justice stating ‘the denial of the existence of the Holocaust as the principal vehicle for anti-Semitism’, with satisfaction affirmed that the limit imposed to *Mr. Faurisson* was necessarily accurate under paragraph 3 of article 19 of the Covenant.¹⁰⁶

Another case that is worth to be illustrated concerns freedom of expression of teachers, the case *Ross versus Canada* will be taken as example. The question is that the author’s right of free speech has been restricted contrary or not under article 19,

¹⁰² Human Rights in the Administration of Justice: A Manual on Human Rights for Judges, Prosecutors and Lawyers, pp. 550-551. Available at <http://www.ohchr.org/Documents/Publications/training9chapter12en.pdf>, last accessed on 15.12.2015.

¹⁰³ Human Rights in the Administration of Justice: A Manual on Human Rights for Judges, Prosecutors and Lawyers, p. 552.

¹⁰⁴ Communication No. 550/1993, R. Faurisson versus France, views adopted on 8 November 1996, in UN doc. GAOR, A/52/40.

¹⁰⁵ Gayssot Act does not allow any contest to the existence of the category of crimes against humanity, as defined by the London Charter of 8 August 1945.

¹⁰⁶ Communication No. 550/1993, R. Faurisson versus France, p. 96 para. 9.7.

he has been condemned to freedom of expression restrictions by decision of the Human Rights Board of Inquiry, upheld by the Supreme Court of Canada, due to statements written in his pamphlets and books, outside his teaching activities, however about denigrating Jew faith and believes. The punishment foresaw his leave from teaching position.¹⁰⁷ The Committee found necessary to analyze whether this decision of limiting the author's freedom of expression was justified under article 19 paragraph 3. It verified that the measure was provided by the law, following the Court interpretation of the New Brunswick Human Rights Act. The second principle, legitimate purpose, was respected in accordance with *Faurisson* ruling case and the Committee added that limits are allowed in the case in which certain statements foster anti-Semitic feelings. Lastly, considering the provision about necessity, the Committee affirmed that 'the exercise of the right of freedom of expression carries with it special duties and responsibilities.' It added that they are particularly relevant especially to the teaching of young students. Since teachers exercise great influence on young mindset formation, thus it approved the author restriction, in order not to give legitimacy to its discriminatory ideas widespread.¹⁰⁸

I am almost at the end of the analysis of the possible limits to the right of freedom of expression imposed by the International Covenant on Civil and Political Rights, however, there are still two restriction causes worth to be dealt with; threats to national security and public order and freedom of the press.

The former will be hereafter illustrated; it is an example of the fact that, to impose free speech restrictions, it is not always acceptable that States invoke one of the principles stated in article 19 paragraph 3.¹⁰⁹ In the case *Hoon Park versus the Republic of Korea*; the author was punished according to article 7 paragraph 1 and 3 of the National Security Law on the bases of his active participation to the activists group of the Young Korean United, while he was studying in the United States. The society was American based and to it belonged young Korean people that discussed together

¹⁰⁷ Communication No. 736/1997, M. Ross versus Canada (Views adopted on 18 October 2000), in UN doc. GAOR, A/56/40 (vol. II), pp. 72-75, para. 4.1-4.6, and p. 83, para. 11.1.

¹⁰⁸ Communication No. 550/1993, R. Faurisson versus France, p.96 para. 9.6.

¹⁰⁹ Human Rights in the Administration of Justice: A Manual on Human Rights for Judges, Prosecutors and Lawyers, p. 556.

possible solutions to reunify the Korean Peninsula.¹¹⁰ What emerged from the judgement of the Korean Supreme Court was that the punishment was justified due to the fact that the author with his participations in peaceful demonstrations in American soil, fostered certain political slogans and positions.¹¹¹ The Committee underlined that Member States in order to apply restrictions must provide relevant proves.¹¹² The Republic of Korea justified the restrictive measure as a form to protect national security. The Committee affirmed that the State was not able to provide a specific description of the nature of the threat and concluded that none of the claims advanced by the Government justified the author's restriction of freedom of expression, hence his imprisonment had to be considered as a violation of article 19.¹¹³

The latter focus is on freedom of press. According to the Committee, and after having analyzed the situation in different States, the right to free speech encompasses freedom of the press, as stated in article 19. The aforementioned provision, should be read together with article 25 of the Covenant as well, which ensured the right to take part in the conduct of public affairs. To effectively implement such right, it is necessary to have a free circulation of information and ideas among the population, on both public and political issues. This includes also freedom of the press and of other media able to deliver opinions and comments without censorship fears. Journalists' right to access information, stated under article 19 paragraph 2, includes criteria for accreditation scheme must be specific, fair and reasonable and, among that, to news reports must not be prohibited the participation to parliamentary debates. Moreover, the right to free press highly forbids any form of violence against journalists and it adds that they have to be able to work and travel safely. Eventually, censorship and penalties are considered as impediments to the fulfilment of the right to free press. In addition, article 19 paragraph 3 does not permit the government to impose restrictions in the media to silence possible critics.¹¹⁴

¹¹⁰ Communication No. 628/1995, T. Hoon Park versus the Republic of Korea (Views adopted on 20 October 1998, in UN doc. GAOR, A/54/40 (vol. II), p. 86, para. 2.2.

¹¹¹ Communication No. 628/1995 p. 87, para. 2.4.

¹¹² Communication No. 628/1995 p. 91, para. 10.3.

¹¹³ Communication No. 628/1995 p. 91, para. 10.3.

¹¹⁴ Human Rights in the Administration of Justice: A Manual on Human Rights for Judges, Prosecutors and Lawyers, p.560.

2.1.3 International Convention on the Elimination of All Forms of Racial Discrimination

The Covenant on the Elimination of All Forms of Racial Discrimination (Covenant)¹¹⁵ is concerned, is among the first treaties elaborated by United Nations. The text of the treaty was adopted by General Assembly in 1965 and entered into force in 1969.¹¹⁶ Currently, the Covenant has been ratified by 177 States.¹¹⁷ Its process of elaboration and entrance into force was relatively short, if compared to the long conference session period that was necessary to shape the two Covenants on Civil and Political rights and on Economic, Social and Cultural rights. This time acceleration was due to the political interests of some of the contracting States, especially African countries. In fact, some of these countries had already entered the UN Organization and they put a great pressure on the issues of decolonization and of racial discrimination in their continent. It is interesting to know that along the decades, the concept of racial discrimination has evolved and broaden, leading to the fact that it included new criterion of discrimination and not just race. However, this topic will be analyzed in the third chapter.¹¹⁸

In the Covenant, there are some interesting aspects concerning limitation to freedom of expression. The first to be analyzed will be article number 4 prohibition of racial incitement, it cites that:

‘States Parties condemn all propaganda and all organizations which are based on ideas or theories of superiority of one race or group of persons of one colour or ethnic origin, or which attempt to justify or promote racial hatred and discrimination in any form, and undertake to adopt immediate and positive measures designed to eradicate all incitement to, or acts of, such discrimination and, to this end, with due regard to the principles embodied in the Universal Declaration of Human Rights and the rights expressly set forth in article 5 of this Convention, inter alia:

- a. Shall declare an offence punishable by law all dissemination of ideas based on racial superiority or hatred, incitement to racial discrimination, as well as all

¹¹⁵ International Convention on the Elimination of All Forms of Racial Discrimination. Available at <http://www.ohchr.org/EN/ProfessionalInterest/Pages/CERD.aspx>, last accessed on 18.12.2015.

¹¹⁶ F. GOMEZ, K. De FEYTER, *International Protection of Human Rights: Achievements and Challenges*, University of Deusto, Bilbao, 2006, p. 175.

¹¹⁷ Status of Ratification. Available at <http://indicators.ohchr.org/>, last accessed on 18.2.2015.

¹¹⁸ F. GOMEZ, K. De FEYTER, *International Protection of Human Rights: Achievements and Challenges*, University of Deusto, Bilbao, 2006, p. 175.

- acts of violence or incitement to such acts against any race or group of persons of another colour or ethnic origin, and also the provision of any assistance to racist activities, including the financing thereof;
- b. Shall declare illegal and prohibit organizations, and also organized and all other propaganda activities, which promote and incite racial discrimination, and shall recognize participation in such organizations or activities as an offence punishable by law;
 - c. Shall not permit public authorities or public institutions, national or local, to promote or incite racial discrimination.¹¹⁹

The Committee has always emphasized the supreme value of article 4, which imposes a strict limit to the excessive use of free speech, as affirmed above, this is in complete compliance with the Universal Declaration of Human Rights. According to the aforementioned article, contracting States have to consider offences to be punished by these types of acts; circulation of information based on racial superiority and hatred, fostering of racial discrimination, acts or incitement to violence against any race or group of people due to complexion colour or ethnic origins and providing any form of help or assistance to those groups. Furthermore, any organization or group inciting racial discrimination through their activities must be declared illegal and forbidden by the States. Every person belonging to such organizations or group, or attending their activities, will be considered guilty of acting against the law. In the end, the article underlines the obligation of Member States to forbid to any public authority to incite racial discrimination. Sometimes, Governments find difficulties in balancing the restrictive provisions under the International Covenant on the Elimination of All Forms of Racial Discrimination and the necessity to respect citizens' human right on freedom of expression.¹²⁰ In 1993, the Committee elaborated its General Recommendation No. 15 which states: 'the prohibition of the dissemination of all ideas based upon racial superiority or hatred is compatible with the right to freedom of opinion and expression' human right guaranteed by the Universal Declaration of Human Rights and

¹¹⁹ International Convention on the Elimination of All Forms of Racial Discrimination, December 1965, article 4.

¹²⁰ ICERD and CARD A Guide for Civil Society Actors. Available at <http://www.ohchr.org/Documents/HRBodies/CERD/ICERDManual.pdf>, last accessed on 18.12.2015.

recalled in article 5 of the Covenant¹²¹. The CERD makes many references to the UDHR, in fact, it evokes article 29 paragraph 2 which affirms that rights carry duties and responsibilities, and adds, that among the latter there is the obligation of not disseminating racist ideas.¹²²

The second and last interesting article as far as freedom of expression in the CERD is concerned, is article 5, according to which 'In compliance with the fundamental obligations laid down in article 2 of the Convention, States Parties undertake to prohibit and to eliminate racial discrimination in all its forms and to guarantee the right of everyone, without distinction as to race, colour, or national or ethnic origin, to equality before the law, notably in the enjoyment of the following rights:

[...]

- a. Political rights, in particular the right to participate in elections-to vote and to stand for election-on the basis of universal and equal suffrage, to take part in the Government as well as in the conduct of public affairs at any level and to have equal access to public service;
- b. Other civil rights, in particular:

[...]

- viii. The right to freedom of opinion and expression;

[...]

Article 5 deliver a list of rights that contracting States have an obligation to provide to every single person inhabiting their soils. The roll, in section 5, comprehends civil and political rights and the right to freedom of opinion and expression as well.¹²³ As mentioned in CERD's General Recommendation No.20 (1996), article 5 recognizes human rights and foster Member States to forbid and eradicate racial discrimination to allow everyone to enjoy every human right. Nonetheless, article 5 gives only a list of rights, without providing their explanation, thus their acknowledgement and protection is translated differently from country to country.¹²⁴

¹²¹CERD Committee, General Recommendation No.15, 1994. Available at <http://www1.umn.edu/humanrts/gencomm/genrxv.htm>, last accessed on 18.12.2015.

¹²² International Convention on the Elimination of All Forms of Racial Discrimination, article 4.

¹²³ International Convention on the Elimination of All Forms of Racial Discrimination, article 5.

¹²⁴ CEDAW General Recommendation No. 20, 1992. Available at <http://www.refworld.org/docid/453882a422.html>, last accessed on 19.12.2015.

To conclude the analysis of the ICERD provisions, it is curious to highlight how article 4 and 5 seem to be in contrast with each other. When invoking article 4, it should always take into consideration the 'due regard' clause¹²⁵, in fact, the Committee affirms that to narrow the field of action of free speech is not against the 'due regard' clause. Especially if it takes into consideration the fact that in every international instrument that protects freedom of expression there is a provision dealing with its possible restrictions. Whether the action is too discriminating, the principle of 'due regard' clause will not be implemented and the limits will be imposed.¹²⁶

2.1.4 Convention on the Right of the Child

The last international analyzed treaty will be Convention on the Right of the Child (Convention).¹²⁷

It was adopted in 1989 by the General Assembly resolution after ten year of conference drafting works. It came into force on the 2nd of September 1990, when reached the 20th ratification, as stated in article 49.¹²⁸ It is among the most widely ratified international agreements and at as of December 2015, it has been ratified by 196 of its Member States, United States have not ratified yet, however it has at least signed it.¹²⁹ There are so many ratifications due to the fact that States have entered numerous reservations, many of those however have been rejected by both the Committee on the Rights of the Child and other state Parties as they have been recognized as running counter to the object and purpose of the Convention.¹³⁰

The Convention is the first international treaty that holds together political and civil rights and economic, social and cultural. Furthermore, the incorporation of civil and political rights is even more significant in a convention like this, as they required to be implemented immediately in the internal juridical system of the contracting States.

¹²⁵ Due regard means that in making decisions a body subject to the duty must consciously consider the need to do the things set out in the general equality duty: eliminate discrimination, advance equality of opportunity and foster good relations.

¹²⁶ ICERD and CARD A Guide for Civil Society Actors.

¹²⁷ The Convention on the Right of the Child, 1989.

¹²⁸ General Assembly Resolution 44/25, para. 2. Available at <http://www.un.org/documents/ga/res/44/a44r025.htm>, last accessed on 19.12.2015.

¹²⁹ Status of Ratification.

¹³⁰ Freedom of Expression and the UN Convention on the Rights of the Child. Available at <https://www.article19.org/data/files/pdfs/publications/children-kid-s-talk.pdf>, last accessed on 19.12.2015, pp.7-8.

Moreover, the fact that two different types of rights, for the first time, managed to be enclosed in the same international agreement, has not to be taken for granted. In fact, the first draft proposal came from Poland delegation and instantly encountered the opposition of the Western block, of United States especially. Nonetheless, in the end, the body of the treaty was successfully adopted.¹³¹

The Convention furnishes a great protection of the rights to freedom of expression and information, enshrined in two relevant articles, 12 on the view of the child and 13 on freedom of expression. This treaty will be analyzed as the previous one, going through its rights and highlight the limits.¹³²

Article 12 of the Convention on the Rights of the Child states:

1. States Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child.
2. For this purpose, the child shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly, or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law.¹³³

It underlines the respect for the views of the child. This guarantee is both broader and narrower than the certainty given to freedom of expression by the ICCPR. It is more circumscribed as it only refers to the formulation of opinions and not the right to seek and receive information.

Article 13 of the Convention on the Rights of the Child states that:

1. The child shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds,

¹³¹ 1924 Declaration of Geneva, Paragraph 2, cited in Sharon Detrick, ed., *The United Nations Convention on the Rights of the Child: A Guide to the "Travaux Préparatoires"* (Dordrecht/Boston/London: Martinus Nijhoff Publisher, 1992), pp. 20-22.

¹³² Freedom of Expression and the UN Convention on the Rights of the Child, p. 8.

¹³³ The Convention on the Right of the Child, 1989, article 12.

regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of the child's choice.

2. The exercise of this right may be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:
 - a. For respect of the rights or reputations of others; or
 - b. For the protection of national security or of public order, or of public health or morals.¹³⁴

This article has been one of the most controversial in the drafting sessions and it underwent many changes. It defines one of the basic political rights, as it defends children from governmental unlawful interference. The proposal of incorporation of this article came from United States in order to ensure that kids could fully enjoy their civil and political rights, through freedom of expression, released from any inappropriate authority interference.¹³⁵ The aim of this motion was to restrict governmental impediments and probably due to this reason, the initial reactions were negatives. Eventually, all those complaints were rejected and article 13 adopted. However, though very similar to article 19 of the International Covenant on Civil and Political Rights, there is one huge relevant difference, namely article 13 does not protect the act of 'holding opinion without interference', a right to which the Human Rights Committee gives the highest importance.¹³⁶

Article 13 allows restrictions to freedom of expression, however, only under three conditions; limits must be prescribed by the law, be in accordance with specific aims or legitimate interests and felt necessary the safeguard such interests. A note has been added to the last part, aimed at raising the standard to impose restrictions, namely, the necessity has to involve a pressing social need, sufficiently serious to justify a freedom of expression constraint. Some States adopted restrictive policy regarding the publication and distribution of certain products considered noxious for children due to their content. On this topic, not article 19 ICCPR neither article 13 CRC provide specific limitations.¹³⁷ Although, in the case of the Convention on the Rights of

¹³⁴ Convention on the Rights of the Child, 1989, article 13.

¹³⁵ Declaration of Geneva, 1924, Paragraph 2, cited in Sharon Detrick, ed., *The United Nations Convention on the Rights of the Child: A Guide to the "Travaux Préparatoires"* (Dordrecht/Boston/London: Martinus Nijhoff Publisher, 1992), p. 230.

¹³⁶ Human Rights Committee, General Comment 10, 1983, para. 1.

¹³⁷ Freedom of Expression and the UN Convention on the Rights of the Child, pp. 17-18.

the Child, it can raise a controversy between article 13 and 3, the latter establishes one of the pillar of the treaty, namely, ‘in all actions concerning children [...] the best interest for the child shall be a primary consideration’. Taking this in mind, it is possible that sometimes the best interests of the child are contrary to article 13. For instance, it can be forbidden to a child to watch programmes on violence, for its own good, even though this does not meet any of the aforementioned three accepted conditions under article 13. In these circumstances the balance can be difficult to be found, nonetheless, the ‘best interests test’ may influence the judgment and prevail on article 13 three provisions.¹³⁸

In the end, the Child Rights International Network recalls a reflection made by the UN Committee on the Rights of the Child. It outlined the similarities between article 12 and 13 of the Convention on the Rights of the Child, but explained the differences. The former article poses on Member States obligations to shape in their juridical system some provisions to allow children to take active part in such matters that concern them. Whereas, article 13, does not entail this kind of action. Instead, under the provision of the latter, States ought not to abuse of their power to pose limitations or restrictions to the enjoyment of children free speech and they should put effort to shape an ecosystem where children can freely express themselves.¹³⁹ Moreover, article 13 holds the rights to seek, receive and impart information and ideas but lacks the paternalistic characteristic that marks article 12. The latter includes as well the ‘due right’ positive obligation for contracting States to make sure that children participate into decision making process on issue that affect them.¹⁴⁰

2.2 Regional Level

In the second part of this chapter I will deal with the regional legal framework. The Council of Europe, the Inter-American States Organization, the African Union and Arab League will be discussed. The regional documents analysed will be the European

¹³⁸ Convention on the Right of the Child, 1989, article 3.

¹³⁹ Child Rights international Network. Available at <https://www.crin.org/en/home/rights/convention/articles/article-13-freedom-expression>, last accessed on 19.12.2015.

¹⁴⁰ Freedom of Expression and the UN Convention on the Rights of the Child, p.18.

Convention on Human Rights, the American Convention on Human Rights, the African Charter on Human and People's Rights and the Arab Charter on Human Rights.

2.2.1 Council of Europe

2.2.1.1 European Convention of Human Rights

The first focus will be on the European Convention on Human Rights. After the end of the Second World War the International Committee of Movements for the European Unity (European Movement)¹⁴¹ organized a Congress of Europe in The Hague from the 8th to the 10th of May 1948 inspired by the desire to create a Charter to protect Human Rights. The European Movement drafted the text, which comprehends a great quantity of rights, an authoritative control mechanism established in Strasbourg in charge of ensuring the compliance of Member States. The draft was evaluated by the Committee of Ministers of the Council of Europe and signed in its Roman session on the 4th of November 1950. The Convention is binding in character and it transformed many principles of the Universal Declaration of Human Rights in effective obligations.¹⁴² It entered into force on the 3rd of September, after obtaining 10 ratifications. As at December 2015, all 47 Council of Europe Member States have ratified it and clearly, its binding character is applicable only for them.¹⁴³

The purpose of this dissertation is to analyse the limits imposed to freedom of expression, hence, the restrictions established by the European Convention will be here examined. The Convention stated that some of its rights may be put under restriction, namely, rights guaranteed under articles 8 to respect of private and family life, 9 to freely profess a religion, 10 to freedom of expression and 11 to peacefully assembly. The second part of each of the aforementioned articles envision limitations to the first part, considered necessary to safeguard basic democratic values, among which national security, public safety, prevention of any form of crime, to protect health and morals and other citizens' rights. There have been some questions about the meaning of 'necessary in a democratic society', as it is difficult to define, as it is an

¹⁴¹ <http://europeanmovement.eu/who-we-are/history/>

¹⁴² F. GOMEZ, K. De FEYTER, International Protection of Human Rights: Achievements and Challenges, pp. 359-360.

¹⁴³ Details of the European Convention on Human Rights. Available at <http://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/005>, last accessed on 23.12.2015.

abstract concept with shadowy lines. Despite this, it has been said that the impediment in the enjoyment of a certain right needs to be proportional as the Convention recommends to balance between individual rights and general interests.¹⁴⁴

Moreover, article 15 affirms that in war time or in any other emergency situation, which will threaten the life of the nation, contracting States can waive from Convention's obligations. This procedure must not be taken as an easy get away not to respect human rights, because, in order to invoke it, Member States need to show that it is necessary and in accordance with the emergency broken out.¹⁴⁵ Nonetheless, even when a derogation is allowed, there is one circumstance in which this must not be applicable, under articles 2 the right to life, 3 freedom from torture, 4 (1) freedom from slavery and 7 right to protection against retroactive criminal laws.¹⁴⁶

In the European Convention on Human Rights, the article that discipline freedom of expression is article 10. This provision and the European Court case Law will be presented hereafter. Article 10 reads:

1. 'Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.
2. The exercise of these freedoms, since it carries with it duties and responsibilities, 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 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.'¹⁴⁷

¹⁴⁴ F. GOMEZ, K. De FEYTER, *International Protection of Human Rights: Achievements and Challenges*, p. 365.

¹⁴⁵ European Convention on Human Rights, 1950, article 15.

¹⁴⁶ *Ibid*, articles 2, 3, 4 para. 1 and 7.

¹⁴⁷ European Convention on Human Rights, 1950, article 10.

These legitimate grounds of imposing constraints are well listed in article 10 paragraph 2. In order to be valid under article 10 paragraph 2, ‘formalities, conditions, restrictions or penalties’ must conform with the principle of legality, the condition of legitimate purpose and the principle of necessity in a democratic society.¹⁴⁸

2.2.1.2 European Court of Human Rights case law

The Court when examining instances related to freedom of expression uses the following approach: it evaluates the role of free speech in a democratic society, Member States’ margins of appreciation and the Court’s own supervisory role.¹⁴⁹

Since the beginning, the Court has been underling the importance of freedom of expression to guarantee the fulfilment of the democratic values. In fact, in the *Handyside* case¹⁵⁰ it stated that free speech is among the basic conditions on which a democratic State lays and fundamental for the progress of every human being. Moreover, paragraph 2 of article 10 regulates information and ideas both in offensive or indifferent and those ones that shock the public community or disturb the State. Here rises the question about pluralism, tolerance and broad-mindedness, which are intrinsic in a democratic society. From all this, derives that any taken constraint have to be proportionate to the aim pursued.¹⁵¹ Thereafter, in the *Sunday Times* case the Court affirmed that what mentioned above is particularly important for the press. It is relevant that before Court judgment is taken, issues have been widely known and discussed by the public opinion. This process of getting the citizens informed is possible only if journalists and press can work freely. In fact, the media are in charge of sharing information and ideas as the citizens have the equal right to receive them.¹⁵²

The Court in evaluating the cases takes into consideration the State’s margin of appreciation as well. The Court expressed its opinion on how to interpret the limits and their exceptions stated in paragraph 2 article 10. It stated that they must be

¹⁴⁸ Human Rights in the Administration of Justice: A Manual on Human Rights for Judges, Prosecutors and Lawyers, pp. 575-576.

¹⁴⁹ Human Rights in the Administration of Justice: A Manual on Human Rights for Judges, Prosecutors and Lawyers, p. 576.

¹⁵⁰ European Court HR, *Handyside Case versus the United Kingdom*, judgment of 7 December 1976, Series A, No. 24, application number 5493/72.

¹⁵¹ *Ibid.*, para. 49.

¹⁵² European Court HR, *the Sunday Times Case versus the United Kingdom*, judgment of 26 April 1979, Series A, No. 30, application number 6538/74, p. 40, para. 65.

deeply interpreted and the necessity on each limitation has to be strictly justified.¹⁵³ It further explained that the adjective 'necessary' indicates an urgent social necessity. However, it is not a synonym of 'indispensable', 'admissible', 'ordinary'. It would be the job of State authorities to understand the urgency of the matter. In fact to them it is left some space for visualisation.¹⁵⁴ The margin of appreciation of the Member States is always guided by the Court. It is the Court, actually, in charge of the final evaluation to define whether a constraint is allowed under article 10.¹⁵⁵ In the end, the Court, in order to accept an imposition of limitations on freedom of expression has to decide that the measures are 'proportionate to the legitimate aim pursued' and that the justifications shown by the contracting States are appropriate.¹⁵⁶

As previously mentioned, a great deal of importance is given to the freedom of the press. Many cases have been analyzed by the Court on this issue and they both showed the key importance but also the fragility of the watchdog role of the press in Europe. Hereafter examples concerning free press restrictions in order to maintain the authority of the judiciary and to protect the reputation and the rights of others will be provided.

As far as the maintenance of the authority of the judiciary is concerned, the case examined concerns *Sunday Times* weekly newspaper; to which the Court ordered not to publish the article on thalidomide tragedy, as it will have create disdain to the Court itself. The article was about thalidomide children and their compensation claims in the United Kingdom. The drug was ordered especially to expecting women and they later gave birth to deformed children. The firm that created the drug, the *Distillers Company Limited*, managed to find agreements with the affected families, however the period of negotiation was extremely long that the weekly newspaper decided to

¹⁵³ Eur. Court HR, Case of the Observer and Guardian versus the United Kingdom, judgment of 26 November 1991, Series A, No. 216, application number 13585/88, p. 30, para. 59 a-c.

¹⁵⁴ European Court HR, Handyside Case versus the United Kingdom, judgment of 7 December 1976, Series A, No. 24, p. 22, para. 48.

¹⁵⁵ Ibid., p.23, para. 49.

¹⁵⁶ European Court HR, the Sunday Times Case versus the United Kingdom, judgment of 26 April 1979, Series A, No. 30, application number 6538/74, p. 36, para. 59.

sustain the parents.¹⁵⁷ The European Court without any doubts affirmed that there has been an 'interference by public authority' in the implementation of applicants' freedom of expression under article 10 paragraph 1. In order to verify the legality of such restriction, it is necessary to go through the principles stated in paragraph 2.¹⁵⁸ The Court began with the 'prescribed by the law' criterion. The Court noted that it involves both written and unwritten law. Moreover, it required that legal provisions must be easily accessible and good formulated to allow every individual to conform his or her behaviour to it. The Court analyzed the law of contempt of English law and stated that it satisfied the criteria of accessibility and foreseeability¹⁵⁹ and concluded that the 'prescribed by law' principle was in accordance with article 10 paragraph 2.¹⁶⁰ The second rule to be testified is whether the interference with freedom of expression has a legitimate aim. The Government and the applicants agreed in recognizing that the law of contempt of the court had the aim of safeguarding the impartiality and authority of the judiciary and the rights and interests of the litigants as well. The Court accepted the reasons of the House of Lords and the interference resulted in accordance both with the principle of legality and the condition of a legitimate purpose. The final and pivotal principle to be answered was whether it was necessary in a democratic society. The Court stated that the State's 'power of appreciation' is not included in the categories of possible restrictions under article 10 paragraph 2. It also recalled the importance of freedom of expression in a democratic society and underlined that, article 10 safeguards not only freedom of the press to inform the citizenship, but also the right of the citizenship to be informed. In the Sunday Times case, the families of the victims, not aware of the long legal difficulties of the process, were supposed to be informed of all the facts and their possible solutions. They could not have been told this highly important information only if it was absolutely certain that its spreading would have been perceived as a threat to the 'authority of the judiciary'.¹⁶¹ The Court took into consideration the 'weigh of the interests involved and

¹⁵⁷ European Court HR, the Sunday Times Case versus the United Kingdom, judgment of 26 April 1979, Series A, No. 30, p. 27, para. 38.

¹⁵⁸ Ibid., p. 29, para. 45.

¹⁵⁹ The foreseeability criterion means that people must be able to foresee the consequences that their behaviour may raise.

¹⁶⁰ European Court HR, the Sunday Times Case versus the United Kingdom, judgment of 26 April 1979, Series A, No. 30, pp. 31-33, para. 49-53.

¹⁶¹ Ibid., p.33 para. 54; p. 38 par209, 213; pp. 41-42, para. 66.

assess their respective force'. Eventually, the Court concluded that 'the interference complained of, did not correspond to a social need sufficiently pressing to outweigh the public interest in freedom of expression within the meaning of the Convention'. Therefore, the Court judged the restraints not based on solid motivation. The limit resulted then not necessary to safeguard democratic values and to maintain the authority of the judiciary. Thus, article 10 of the European Convention has been violated.¹⁶²

In the case *Bergens Tidende and Others versus Norway*, the protection of the reputation was analysed by the Court.¹⁶³ This case involves the newspaper, its editor-in-chief and a journalist. The charge began when the newspaper published an article about women complaints concerning the work of a cosmetic surgeon. This was a sequel of another article, published by the aforementioned newspaper, in which the work of the surgeon and the benefits of the cosmetic surgery were described, which was followed by a huge quantity of women claims. The first article praised the doctor's work, whereas the second, written after all women complaints, carried a huge critic about his work. This resulted in a front page article with the title 'Beautification resulted in disfigurement' affirming that many women's bodies have been ruined forever.¹⁶⁴ This caused harmful publicity to the surgeon who was forced to close his business. Claims against him were brought before health authorities concluded that he did not provided any improper surgery, for this reason, they decided to take no action. The doctor went for defamation proceeding against the applicants and the Supreme Court decided in favour of the surgeon, awarding him damages.¹⁶⁵ Both the parties know that before the European Court this judgment was an impediment with the applicants' right to free speech.¹⁶⁶ As a procedure, this needs to be justified under article 10 paragraph 2. Starting from 'prescribed by the law' provision, the restriction is regulated under section 3 paragraph 6 of the Damage Compensation Act, and it pursues the legitimate goal of protecting 'the reputation or rights of others'. The other

¹⁶² Ibid., p. 42, para. 67.

¹⁶³ European Court HR, Case of Bergens Tidende and Others versus Norway, judgment of 2 May 2000, application number 26132/95.

¹⁶⁴ Ibid., para. 12.

¹⁶⁵ Ibid., para. 17-19.

¹⁶⁶ Ibid., para. 20-24.

remaining provision to be satisfied was 'necessary in a democratic society'. The Court, considered its case law of free speech and the role of public watchdog carried out by the press in a democratic society, took into consideration duties and responsibilities of this task. Moreover, the Court acknowledged the importance of human health matter and made serious issues affecting the public interest. In this case, the Court found that measures such as those ruled by the Supreme Court may discourage journalists to carry on with their job, which can create great public concern.¹⁶⁷

The Court followed keeping always in mind that freedom of expression holds duties and responsibilities, which are particularly important when the issue is about attacking individuals' privacy and undermining others' rights. Journalists' conduct can be justified by the proviso that they are acting in good faith to furnish precise and constant information in agreement with the ethics of journalism. Moreover, reading the article, the Court found a correct explanation of the events and decided that the reality of the facts mirrored the truth. The Court invoked its previous judgements affirming that the reporting techniques can extensively vary and this depends on the topics dealt with. It added that on the same page where the infamous article was published, there was also another one reporting an interview to a cosmetic surgeon who talked about the 'small margins between success and failure' and afterwards, two other articles have been published in defence of the incriminated surgeon by the newspaper.¹⁶⁸ In the end, the Court accepted that the series of articles created negative results on the professional activity of the doctor. The Court reasoning affirmed that considering the damages provoked to his patients, it was inevitable that it would have negative repercussions on his career and his reputation. Taking all this into consideration, the Court concluded that the necessity of the surgeon to safeguard his reputation did not outweigh the importance of public free press to share considerable information on the subject, which was of legitimate public concern. Briefly, the interference admitted by the Supreme Court was not in accordance with the principle of 'necessary in a democratic society'. Therefore, it resulted that there was no relationship of proportionality between the limits posed by the Norwegian

¹⁶⁷ Ibid., para. 33, 49.

¹⁶⁸ Ibid., para. 53, 56-57.

Court on the applicant's right to freedom of expression and the aim pursued. Consequently, article 10 of the European Convention has been violated.¹⁶⁹

Another interesting issue is expression of elected politicians. The Court declared that freedom of expression is an important and essential value for everyone, however, it is especially so for elected representatives of the people. Hence, they accurately balance and prepare their speeches and the possibilities of interferences have to be deeply examined by the Court.¹⁷⁰ In the case at issue, *Jerusalem versus Austria* the applicant was a Member of the Vienna Municipal Council and a representative in the Regional Parliament as well. He has been banned by the Austrian Court not to mention again that two associations, respectively *IMP* and *VPM*, were sects totalitarian in character. Such sentences had been mentioned by the applicant during a Vienna Municipal Council session.¹⁷¹ The two associations asked for an injunction against the applicant to forbid her from calling them 'sects'. The Court took into consideration both parties' opinions, considering, on one side, that the association's injunction constituted a restriction of the applicant's freedom of expression under article 10 paragraph 1. And, on the other side, according to article 10 paragraph 2, the interception was both 'prescribed by law' and pursued a legitimate aim, namely, 'the protection of the reputation of the rights of others'. The last remaining principle was whether it was 'necessary in a democratic society'.¹⁷² Subsequently, the Court underlined the weight of freedom of expression for people's representatives, saying that the limits of acceptance of critics in their regards are wider, the words they pronounce are more carefully studied and they have to show a tolerant behaviour in regards of critics. In its case law, the Court had declared that anyone that shows in public lay himself open to scrutiny. The two associations were engaged in field of public concern, taking active part into public discussions and operating with a political party. Considering that they actively participated in the public domain, they should show a greater degree of tolerance. Moreover, the Court noted that the accused statements were stated during a Vienna Municipal Council session,

¹⁶⁹ Ibid., para. 59-60.

¹⁷⁰ European Court HR, Case of Jerusalem versus Austria, judgment of 27 February 2000, application number 26958/95, para. 36.

¹⁷¹ Ibid., para. 18, 10.

¹⁷² Ibid., para. 30.

which is considered similar to a Parliament arena, given the importance of freedom of expression in a democratic society. Parliaments are considered the organs for political debate, hence only a much pondered opinions can justify any free speech interference.¹⁷³ Consequently, in opposition to the Austrian Court, the European court declared that the applicant's statements were: 'fair comments on matters of public interest by an elected member of the Municipal Council [were] to be regarded as value judgments rather than statements of fact'. The final query to be decided was if there were sufficient factual bases for such a judgment. In order to prove the value judgement the Court needed that the applicant provided proves and documents about the structure of the associations and their activities. After analyzing them, the Court observed that the Austrian Regional Court accepted this evidence and rejected the applicant witnesses. The Court affirmed that the internal court refused to examine all available evidence and concluded that the Austrian Court overstepped its margins of appreciation and the injunction against the applicant resulted in an inappropriate interference with freedom of expression.¹⁷⁴

The last examined topic about the European Court case law concerns freedom of artistic expression. Freedom of expression includes artistic expression, which contributes to the public exchange of information and ideas. Hence, art expression as well, is fundamental for the widespread and maintenance of democratic values. Thus, the State must not interfere in artists' creations, performances and distributions of pieces of art.¹⁷⁵

In the case *Müller and Others versus Switzerland* the application was filed by the Swiss Criminal Code.¹⁷⁶ The petitioners were accused of publishing indecent paintings during an art exhibition. The Court confirmed that the conviction and the confiscation of the items was an obstruction to the applicants' free speech.¹⁷⁷ It accepted that the measures taken were in agreement with the law and that the condemnation pursued a legitimate aim, which was the protection of public morals.

¹⁷³ Ibid., para. 38-40.

¹⁷⁴ Ibid., para. 44-46.

¹⁷⁵ European Court HR, Case of Karatas versus Turkey, judgment of 8 July 1999, application number 23168/94, Reports 1999-IV, p. 108, para. 49.

¹⁷⁶ European Court. HR, Case of Müller and Others versus Switzerland, judgment of 24 May 1988, application number 10737/84, Series A, No. 133.

¹⁷⁷ Ibid., p. 19, para. 28-30.

The Court recalled the immense role that freedom of expression plays in the fulfilment of democratic values in European societies, though, artists as well are subject to restrictions provided under article 10 paragraph 2. As every person that takes advantage from this right has to be aware of the fact that it carries duties and responsibilities. The Court expressed its opinion about morals as well. There is a uniform European concept of moral underlining Member States, however, the main issues that compose public moral vary from area to area from culture to culture. For this reason, government authorities are facilitated in giving opinions concerning national standards of morals and figuring out which consequences needed to be taken. To conclude, the Court affirms, as did the Swiss Court before, that the meaning and the content of morals have been changing over time. Eventually, the Court critically examined the infamous paintings and ruled that: ‘liable grossly to offend the sense of sexual propriety of persons of ordinary sensitivity’ and concluded that the measure adopted by the national Court agreed with article 10 of the European Convention.¹⁷⁸

2.2.2 Art and obscenity

Continuing with the analysis concerning freedom of art expression, it is worth raising the border between art and obscenity. A case that created a great deal of scandal was *Richard Prince, Spiritual America* image. It depicted 10-year-old Brooke Shields naked wearing only some make-up. The picture was supposed to be exhibited at the Tate Modern, however it was banished from Scotland Yard as judged an infringement to British obscenity laws. In fact, the police found exposition of child images indecent and outrageous by the law.¹⁷⁹ The two concerning British provisions on the matter are the Protection of Children Act¹⁸⁰ and the Criminal Justice Act.¹⁸¹ The first act encompasses children exploitation and the making and distribution of improper material.¹⁸² In order to verify the immorality of children pictures the ‘indecenty’ test needs to be proved. The problem is that the Protection of Children’s Act does not give any definition of indecenty and case law affirmed that it is the jury

¹⁷⁸ Ibid., p. 22, para. 34-37.

¹⁷⁹ Chapter 7, Blasphemy, Obscenity and Censorship, p. 257.

¹⁸⁰ Protection of Children Act. Available at <http://www.legislation.gov.uk/ukpga/1978/37>, last accessed on 30.12.2015.

¹⁸¹ Criminal Justice Act. Available at <http://www.legislation.gov.uk/ukpga/1988/33/introduction>, last accessed on 30.12.2015.

¹⁸² Protection of Children Act, section 1 para. d.

that has to decide according to the recognized standards of propriety. This was not the first time in which the painting was shown, in fact, it participated to a prior exhibition in New York in 2007, where it did not moved any discontent. However, some art experts considered the image as a great critique to the 'sex sells' mentality of the American media market. The still unanswered question is whether *Miss Shield's* picture was to be viewed as an extravagant piece of art or obscenity. According to Mr. Prince, the title of the image 'Spiritual America' was the image that perfectly matches with American society, as it disclosed the underneath discomfort of the United States of America that celebrates its democratic and Christian values while delivering a message of over-sexualisation of individuals.¹⁸³

Intrinsic to freedom of expression there is the obligation to protect minors, ruled in the Obscene Publications Act 1959.¹⁸⁴ Robert Mapplethorpe is among the most contestable artists as he is famous for creating sex- based and especially homosexual black and white portraits. In fact, when in 1989 his piece of art 'The Perfect Moment' appeared for the first time in Philadelphia, it was deeply criticized for its obscenity. Many of his photographs have been censored and deemed offensive and led to the conviction of Dennis Barrie the director of the Cincinnati Contemporary Art Centre, as he allowed the public exhibition of such pictures for twelve years in museums and galleries.¹⁸⁵

In England and Wales law prohibits indecent revelations, performances and images, as it is well ruled in the Obscene Publican Act. Such Act might be defined as differing from article 10 of the European Convention on Human Rights, as any limitation to freedom of expression imposed by Member States law must be objectively justified, being necessary in a democratic society and in accordance to the aim pursued. The aforementioned margin of appreciation enables States to decide rules and social policies taking into consideration their cultures and values. This was affirmed by the European Court in the before analyzed *Handyside* case. Briefly, it regarded the applicant conviction with the censorship of all the copies and destruction of the matrix of the *Little Red Schoolbook* with the aim of protecting moral in a

¹⁸³ Ibid., pp. 257-258.

¹⁸⁴ Obscene Publication Act. Available at <http://www.legislation.gov.uk/ukpga/Eliz2/7-8/66/introduction>, last accessed on 30.12.2015.

¹⁸⁵ Chapter 7, Blasphemy, Obscenity and Censorship, p. 277.

democratic society, as the target of this book were teenagers. The Court concluded that article 10 was not violated by the strong adopted measures.¹⁸⁶ According to the Court reasoning, the 1959 and 1964 Obscenity Acts hold an aim that is considered in accordance with article 10 paragraph 2, respectively, the protection of morals in a democratic society. The European Court is in charge of making sure that British courts act logically according to the principle of good faith and staying in the limits of the margin of appreciation guaranteed to each contracting State under article 10 paragraph 2. The Court enforces its opinion by affirming that there is not only one definition of morals, and sometimes state parties are more appropriate in expressing judgment than the European Court, due to the acknowledgements of their own culture and society.¹⁸⁷

The expression 'necessary in a democratic society' means a pressing social need. It might be thought that blasphemy and obscenity laws are obsolete, instead they can be justified and necessary in democratic societies in Europe where Christianity is the predominant religion. Even if it is necessary to underline that their application is decreasing in Europe and nonetheless precise provisions on human rights freedom of expression and religion many Member States enjoy a wider margin of appreciation in deciding for restrictions.¹⁸⁸

Until now the European perspective from the European Court of Human Rights has been provided, hereafter, next regional legal framework will be dealt with.

2.2.3 Organization of American States

2.2.3.1 American Convention on Human Rights

The second regional human rights provisions and system to be explained will be the Organization of American States.

Since 1889 American States started to periodically gather, tracing the foundations of a system based on shared rules and roles. The first official conference took place in Washington where 18 States gave birth to the 'International Union of American Republics for the prompt collection and distribution of commercial

¹⁸⁶ European Court HR, EHRR 737, *Handyside Case versus the United Kingdom*, judgment of 7 December 1976, application number 5493/72, Series A, No. 24.

¹⁸⁷ *Ibid.*, para. 46, 2.

¹⁸⁸ Chapter 7, *Blasphemy, Obscenity and Censorship*, p. 279.

information', which today's definition is Organization of American States. In 1948 there were 21 States at the meeting held in Bogotá and adopted the Charter of the Organization of American States and the American Declaration on Human Rights and Duties of Man. The latter was shaped before the adoption, by United Nations, of the Universal Declaration of Human Rights. It defined the commitment of American States to safeguard human rights and paved the way to the Pact of San José, namely the American Convention on Human Rights, adopted in 1969 and entered into force in 1978. As of January 2016 it has 25 ratifications. The Charter defined as well the relation with United Nations, affirming that the Organisation of American States is the UN regional agency.¹⁸⁹

An important role has been played by the Inter-American Commission and Court of Human Rights (the Court or American Court), which nowadays, exercises both advisory and contentions functions, as foreseen in the Convention. To exercise its advisory jurisdiction, it has adopted 18 Advisory Opinions. For our purpose of analysis, for freedom of expression, number fifth, emanated in 1885, will be examined.¹⁹⁰

To begin with, the provision will be presented, respectively article 13 about freedom of opinion and expression cites:

1. 'Everyone has the right to freedom of thought and expression. This right includes freedom to seek, receive, and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing, in print, in the form of art, or through any other medium of one's choice.
2. The exercise of the right provided for in the foregoing paragraph shall not be subject to prior censorship but shall be subject to subsequent imposition of liability, which shall be expressly established by law to the extent necessary to ensure:
 - a. respect for the rights or reputations of others; or
 - b. the protection of national security, public order, or public health or morals.

¹⁸⁹ Organisation of American States, History. Available at http://www.oas.org/en/about/our_history.asp, last accessed on 02.01.2016.

¹⁹⁰ F. GOMEZ, K. De FEYTER, International Protection of Human Rights: Achievements and Challenges, University of Deusto, Bilbao, 2006, pp. 475-477.

3. The right of expression may not be restricted by indirect methods or means, such as the abuse of government or private controls over newsprint, radio broadcasting frequencies, or equipment used in the dissemination of information, or by any other means tending to impede the communication and circulation of ideas and opinions.
4. Notwithstanding the provisions of paragraph 2 above, public entertainments may be subject by law to prior censorship for the sole purpose of regulating access to them for the moral protection of childhood and adolescence.
5. 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 as offenses punishable by law.¹⁹¹

As anticipated above, on 13th November 1885 the Court expressed itself in the Fifth Advisory Opinion, after a request moved by the Government of Costa Rica concerning the interpretation of articles 13 and 29 of the Convention.¹⁹² The Court underlined the 'dual aspect' of such right, as in the first place it affirms that 'no one be arbitrarily limited or imposed' to express his own thoughts and then that to every human being is guaranteed the right 'to receive any information whatsoever and to have access to the thoughts accessed by others'. From this derives a very close relationship between the right to freedom of expression and the right to receive and impart information and ideas, in fact, they should be both assured. Moreover, the Court stated that any applicable limitation has to comply with one of the objectives presented in article 13 paragraph 2, a and b of the Convention, respectively, respect 'the legitimate needs of democratic societies and institutions.' Furthermore, the Court ruled that freedom of expression specified that free speech cannot only be affected by States' restrictions, but also by the lobby work of monopoly or oligopoly that own communication media. It added that a society needs to be well informed to preserve its democratic foundations and be truly free and the Court continued asserting that it

¹⁹¹ American Convention on Human Rights, 1969, article 13. Available at <http://www.oas.org/en/iachr/expression/showarticle.asp?artID=25&>, last accessed on 03.01.2015

¹⁹² In this session only the part related to article 13 will be considered.

is necessary to provide a wide and pluralistic net of means of communication, forbidding monopoly. It closed its reasoning affirming that mandatory licensing of news providers is against article 13 of the Convention, as it prevents the 'full use of the news media as a means of expressing opinions or imparting information.'¹⁹³

According to the aforementioned Manual, the definition of freedom of expression under article 13 of the American Convention is very similar to article 19 of the International Covenant on Civil and Political Rights, with an addition of freedom of thought. Paragraph 2 of article 13 deals with possible and necessary limitations applicable to freedom of expression. The requirements that justify restrictions are the same as provided in article 19 paragraph 3 ICCPR. Paragraph 4 allows prior censorship of public entertainment or to regulate their access to protect children and adolescents.¹⁹⁴ Hence, apart from this dispensation the Court specifies that prior censorship is against the complete fulfilment of the rights stated in article 13, even if the aim of such restrictive action is preventing abuses on freedom of expression. In fact, in this area, any unjustified restriction is considered an infringement of the aforementioned article. A pivotal sample of the court's case-law is *Olmedo Bustos et Al. versus Chile* case, about the prohibition by Chilean courts to broadcast the film *The Last Temptation of Christ*. In its judgment of 5th May 2001, the American Court recalled the individual and social dimensions of freedom of expression, underlining that 'the expression and dissemination of thought and information are indivisible', thus a limit on the plausibility of dissemination is a direct limitation to free speech, which needs to be respected as it widespread information and ideas among the citizens. In the end, the Court found this case of prior censorship a violation to the right of freedom of opinion and expression.¹⁹⁵ The Court affirmed that while abuses of free speech can be controlled only with the imposition of penalties of the abuse committer, to impose liability some requirements need to be satisfied, respectively, 'the existence of previously established grounds of liability, the express and precise definition of these

¹⁹³ Fifth Advisory Opinion, 2001, Series C number 73, para. 30, 33, 42, 85. Available at <https://mail.google.com/mail/u/0/?tab=wm#inbox/152018e3a0679726?projector=1>, last accessed on 03.01.2015.

¹⁹⁴ Human Rights in the Administration of Justice: A Manual on Human Rights for Judges, Prosecutors and Lawyers, pp.565-566.

¹⁹⁵ I-A Court HR, Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism (arts. 13 and 29 American Convention on Human Rights), Advisory Opinion OC-5/85 of November 13, 1985, Series A, No. 5, pp. 103-104, para. 38, 64-66.

grounds by law, the legitimacy of the ends sought to be achieved and a showing that these grounds of liability are 'necessary to ensure' the aforementioned ends'.¹⁹⁶ Paragraph 3 of article 13 bans limitations on freedom of expression by shortcuts, such as, private or governmental control over the media or any other means that tries to impede a fluent circulation of information. The Government plays an important role, as it has not to impose violations that can be in contrast with the Convention, but it also holds the responsibility to make sure that no private control cause any form of violation. Paragraph 5 of article 13 goes back to article 20 of the ICCPR, in fact it affirms that the propaganda of war and incitement to hatred must be considered as offences, thus punishable by the law.¹⁹⁷ To conclude, article 14 of the American Convention that protects the right to reply will be presented. It affirms that to individuals accused of inaccurate or offensive statements must be ensured the right to reply or to correct their statements through the same means they were delivered the first time. Moreover, the corrections provided ought not to create any other legal liabilities.¹⁹⁸

2.2.3.2 Inter-American Court case law

Hereafter Court's case law focused on different categories of analysis will be shown. The first to be dealt with will be about the individual and collective dimensions of freedom of expression, considering the role of the mass media. This analysis will start by an advisory opinion in the case of Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism (Compulsory Membership), which has been confirmed in the case of *Ivcher Bronstrein versus Peru*.¹⁹⁹ The Court reaffirmed that people protected by article 13 have the right to express their opinions and also the right to freely seek, receive and impart any kind of information. Hence, free speech acquires both individual and social dimensions. Individually, this implies that no one can be prevented from expressing his mind; whereas socially, it presents the right to be given any information and to be shared the thought of other people. The Court took

¹⁹⁶ 2I-A Court HR, Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism (arts. 13 and 29 American Convention on Human Rights), Advisory Opinion OC-5/85 of November 13, 1985, Series A, No. 5, p. 104, para. 39.

¹⁹⁷ I-A Court HR, Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism (arts. 13 and 29 American Convention on Human Rights), Advisory Opinion OC-5/85 of November 13, 1985, Series A, No. 5, pp. 103-104, para. 39.

¹⁹⁸ I-A Court HR, Enforceability of the Right to Reply or Correction (arts. 14(1), 1(1) and 2 American Convention on Human Rights), Advisory Opinion OC-7/86 of August 29, 1986, Series A, No. 7.

¹⁹⁹ I-A Court HR, *Ivcher Bronstein Case versus Peru*, judgment of February 6, 2001, Series C, No. 74.

into consideration both dimensions of the right, beginning with the individual part, where explained that free speech is not just a theoretical recognition of the right to speak or write, but includes the right to use any possible means to widespread ideas and to be able to reach the greatest number of individuals as well. In this context, the expression of ideas and the sharing of information are related.²⁰⁰ According to the social dimension, the Court asserted that freedom of expression is a means that allows the exchange of information and thoughts among people and it encompasses the right to attempt to communicate a person's viewpoint to others. It emphasises that for citizens the right to know others' thoughts is equally important to the right of sharing their own. Thus, according to the Court, these two dimensions have the same importance and ought to be simultaneously assured, as to respect article 13 of the American Convention. It ties its reasoning to the primary role that free speech plays in the maintenance of a democratic system. Furthermore, the Court expressed its opinion on the role and protection of journalists, underlining that they should be provided with a safe environment in which they can accomplish their tasks.²⁰¹ In its advisory opinion to Compulsory Membership the Court explained what it means by stating that individual and social dimensions ought to be assured simultaneously. On one side the right of the society being properly informed cannot be a justification to allow the development of regimes of prior censorship to ban information believed untrue by the censor. Whereas, on the other side, the right to share information and ideas cannot support the creation of public or private monopoly on media to shape public opinion with their own point of view. From this reasoning derives that it is through mass media that freedom of expression takes concrete shape, hence the conditions of its work have to be in accordance with the terms of this freedom. As a result, there have to be a greater amount of communication, the elimination of all monopolies and the warranty of the independence of media providers.²⁰²

Next examined topic will be freedom of expression and the concept of public order in a democratic society. As far as the Inter-American Court is concerned, the concept of public order in a democratic environment encompasses a free and huge

²⁰⁰ Ibid., para. 147.

²⁰¹ Ibid., para. 148-150.

²⁰² I-A Court HR, Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism (arts. 13 and 29 American Convention on Human Rights), Advisory Opinion OC-5/85 of November 13, 1985, Series A, No. 5, pp. 101-102, para. 33-34.

passage of ideas and thoughts and the possibility for citizens to have access to the largest quantity of information. Free speech is an important element to maintain public order in a democratic society, which requires free debate and the possibility of express dissent. To back its opinion the Court referred to the jurisprudence of the European Court of Human Rights, which stated that ‘freedom of expression in one of the essential pillars’ of a democratic government and ‘a fundamental condition for its progress and the personal development of each individual’. The European Court affirmed that this principle has to be applicable to that kind of information that can be unwelcomed or shock the State for its content as well. It added that this is particularly relevant for the press.²⁰³ The American Court in the Compulsory Membership case showed the role played by freedom of expression. Namely, it is defined as a milestone on which lies the democratic systems. It is crucial for the development of public opinion and it is considered a *condition sine qua non* for the growing of political activities, trade unions, scientific and cultural societies. It keeps communities updated to the public life and allows them to play an active role. Thus, societies in which free speech does not work properly, are to be considered not completely free.²⁰⁴

Hereafter, restrictions on freedom of expression; meaning of the term ‘necessary to ensure’ will be presented. With reference to article 13 paragraphs 2, one of the requirements that Member States have to satisfy in order to impose a limit on free speech is that such limit has to be ‘necessary to ensure’ one of the aims cited in the article. In the Compulsory Membership case the Court said that throughout the American Convention it is said how restrictions that can be put on rights have to be interpreted. Hence, considering many democratic references the statement ‘necessary to be ensure’ means that it has to be in accordance with one of the purposes stated in the article and being judged necessary taking into consideration the needs of a democratic society.²⁰⁵ After having clarified the meaning of democratic society according to article 13, the Court continued analyzing the word ‘necessary’. To do so, it took inspiration from the case law of the European Court, as far as the latter is

²⁰³ I-A Court HR, Ivcher Bronstein Case versus Peru, judgment of February 6, 2001, Series C, No. 74., para. 151-153.

²⁰⁴ I-A Court HR, Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism (arts. 13 and 29 American Convention on Human Rights), Advisory Opinion OC-5/85 of November 13, 1985, Series A, No. 5, p. 123, para. 70.

²⁰⁵ Ibid., p. 106, para. 42.

concerned, 'necessary' is not synonymous with 'indispensable', it connotes the presence of a 'pressing social need'. For a constraint to be felt as 'necessary', it is not sufficient to prove that it is 'useful', 'reasonable' or 'desirable'. According to the American Convention opinion, 'necessity' depends on 'a showing that the restrictions are required by a compelling governmental interest'. Thus, if there are other possibilities that allow fewer restrictions, they have to be considered. Taking this as a standard, it has to be done to demonstrate that a law shows a useful or desirable aim, in agreement with the Convention. In order to be compatible, limitations have to be proved by reference to governmental goals, which go way much further than social necessity to guarantee the fulfilment of article 13 provisions. Moreover, any limit has to be proportionate and fair to the governmental objective that needs it.²⁰⁶

The aforementioned case of *Ivcher Bronstein versus Peru* is about the indirect control of the mass media and it will be now dealt with.²⁰⁷ Article 13 of the American Convention was found to be violated in this circumstance. Mr. Ivcher was the chief executive and the primary investor of the company operating on Peru television Channel 2. As playing such an important role, he could take editorial decisions on programming. In April 1997 Channel 2 was transmitting the programme *Contrapunto*, whose aim was to discover news of national interest. In this case, the reports were about possible tortures perpetrated by the Army Intelligence Service, the murder of an agent and the large earnings gained by an advisor to the Peruvian Intelligence Service. In 1997 Channel 2 had a large quantity of audience and consequently of this editorial choice, Mr. Ivcher has been victim of various threatening actions. Mr. Ivcher is a Peruvian national who was born in Israeli, to whom was removed the Peruvian citizenship and after these events received a suspend order, which removed him from the position of major stakeholder and chief of the company. The Court decided that after the change in leadership all the staff under Mr. Ivcher had to be banned from entering the Channel and the broadcasting schedule was changed. The American Court stated that the invalidation of his citizenship and the layoff of his staff were indirect means that limited their freedom of expression. In fact, by discharging Mr. Ivcher and his staff from their responsibilities the Government was restricting their possibilities of imparting news and information and influenced Peruvian people the capacity of

²⁰⁶ Ibid., p. 109, para. 46.

²⁰⁷ I-A Court HR, *Ivcher Bronstein Case versus Peru*, judgment of February 6, 2001, Series C, No. 74.

receiving information, restricting their freedom to voice their political opinions and fulfil democratic values. Considering all this reasoning, the American Court decided that Peru has violated article 13 of the American Convention.²⁰⁸

The last analysed case of the American Court case law will be about the *Compulsory Licensing of Journalists*.²⁰⁹ The Court had to verify the compliance of the plan of compulsory licensing of journalists in Costa Rica with its article 13 provision. This system could result for those that were not members of the Colegio de Periodistas creating criminal liability if they engaged in the professional practice of journalism.²¹⁰ The requirement was found by the Court as a limit on freedom of expression of those who were not members of the Colegio. Hence, it had to verify whether this imposition was in agreement with article 13 paragraph 2 parameters. It stabilized that the organization of professions (colegios) is not against the Convention, but this is a method to control journalists and verify if they are working in good faith and according to the demands of their ethic code. Recalling the notion of public order as the prerequisite to make the state institution working efficiently in the respect of democratic values; it can be said that the organization of the practice of professions is included in such order. However, the Court kept on with its reasoning affirming that the concept of public order also meant that the great majority of news has to circulate within a democratic society and there have to be as well the widest access to information and adds that free speech is a cornerstone for every democratic society.²¹¹ The Court thinks that journalism is the fundamental source of freedom of expression, the latter is an inherent right of human beings, for this reason journalism cannot be compared to a normal profession and generic associations. Consequently the Court concluded that the justification of public order that can be used in order to make redundant professionals, cannot be used to license news providers, as the result would be a deprivation of those who are not members of the right to make full use of provision number 13 of the Convention. Furthermore, it would violate the principles of

²⁰⁸ Ibid., para. 156-161.

²⁰⁹ I-A Court HR, *Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism* (arts. 13 and 29 American Convention on Human Rights), Advisory Opinion OC-5/85 of November 13, 1985, Series A, No. 5.

²¹⁰ Ibid., pp. 114-115, para. 58.

²¹¹ Ibid., pp.122-123, para. 68-70.

democratic public order on which the same Convention is based.²¹² Moreover, the Court suggested the creation of a code of conduct to define journalists' responsibilities and ethics and to impose sanctions on each infringement. In the case of journalists, imposing limitations is necessary to take into consideration article 13 paragraph 2 requirements. Thus, the Court stated that: 'a law licensing journalists, which does not allow those who are not members of the 'colegio' to practice journalism and limits access to the 'colegio' to university graduates who have specialized in certain fields, is not compatible with the Convention.' In fact, this law would be in opposition to the content of article 13 on both sides: either the individual, as he would not be able to impart his ideas and the public as it would not be well informed. Eventually, by unanimity the Court decided that compulsory licensing of journalists and the Organic Law of Association of Costa Rica were incompatible with article 13 of the American Convention.²¹³

2.2.4 United States First Amendment

Among the Organization of American States, United States has developed in its Constitution, which dates back to 1789, the Bill of Rights. It is composed of 10 Amendments with the aim of protecting fundamental freedoms. The one particularly interesting for freedom of expression is number one, which cites:

'Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances'.

It is particularly important and worthy to be analyzed not only as it safeguards freedom of expression, but also due to nowadays hypothesis of possible restrictions or changes that this pivotal provision may suffer.²¹⁴

The fundamental element of freedom of expression is free speech. This provision entitles citizens to express their minds without fearing Government constraints. The Supreme Court recalls that whether there would be the necessity to

²¹² *Ibdi.*, pp. 125-128, para. 76-81.

²¹³ *Ibid.*, pp. 131-132, para. 85.

²¹⁴ United States Constitution. First Amendment. Available at http://www.usconstitution.net/xconst_Am1.html, last accessed on 07.01.2015.

regulate the content of the speech, Government needs to provide solid explanations. The right to free speech includes the necessary means to deliver the message as well.²¹⁵

The Amendment deals respectively with: free speech and free press. In the minds of the Founders there were ideas such as: the acquisition of truth, scientific progress, cultural development, and people improvement, the fortification of the community spirit and the control of politicians' conducts. Without any doubt the first generations believed in these rights, however, like today still happens, these general terms were interpreted in different ways by different people. Many citizens did and do not think about the consequences of their actions and bitter controversies are very likely to rise.²¹⁶

The degree of protection of the right depends on the forum in which it is delivered. The Supreme Court has identified less protected and unprotected categories of speech, among which: advocacy of illegal action, fighting words, commercial speech and obscenity. Respectively, advocacy of illegal action refers to those behaviours that may give life to law violations and incite lawless actions. Then, by fighting words it is meant all those that can incite illicit reactions in the reader or interlocutor. Moreover, commercial speech, as it is mainly refers to advertisements and eventually obscenity, it is a difficult category to define and its many characteristics have been derived from the Supreme Court judgements.

It is considered that the right to free press does not very differs from the right of free speech, as it permits human beings to voice and share their ideas and thoughts. It is protected by the Constitution and news providers do not have any special treatment with respect to other citizens.

Another important faceting is the right to petition, it can be employed in front of the Government to gain relief after a wrong litigation of the Court. It matches the right of assembly as well, as citizens can together demand for change.²¹⁷

²¹⁵ First Amendment. Available at https://www.law.cornell.edu/wex/first_amendment, last accessed on 07.01.2015.

²¹⁶ The Heritage Guide to the Constitution. Available at <http://www.heritage.org/constitution#!/amendments/1/essays/140/freedom-of-speech-and-of-the-press>, last accessed on 07.01.2015.

²¹⁷ First Amendment. Available at https://www.law.cornell.edu/wex/first_amendment, last accessed on 07.01.2016.

As mentioned before, admitted restrictions depend on some circumstances, the Supreme Court outlines them in the way that follows. First of all, limits can be imposed only by the Government and not privately.²¹⁸

Free speech and free press provisions have to guarantee the same protection to both speakers and writers.²¹⁹

Both freedom of expression and press are provided not only to political speech, but also to religion, science, morality, social conditions, daily life and art and entertainment as well.²²⁰

First amendment ensures any type of prolongation of the meaning of the provision, would it be good or evil. In fact, there is no exception for Communism, Nazism, Islamic radicalism, sexist speech or hate speech. The Court said: 'Under the First Amendment there is no such thing as a false idea. However pernicious an opinion may seem, we depend for its correction not on the conscience of judges but on the competition of other ideas'.²²¹

In addition, there is a compartment of some narrow exceptions and these are: incitement, false statements of fact, obscenity, child pornography, threats, fighting words, speech owned by others and commercial advertising.²²²

After having presented the provision and how it has been interpreted, the focus will be moved to nowadays concerns. United States of America (America) society, has been living a period of deep concern caused by their being in war against terror. Many newspaper articles have been reporting reasoning made by important law scholars and politicians about the whole ISIS issue. Among the risen matters, appeared the idea of modifying the stated freedom of speech of the First Amendment. An interesting

²¹⁸ New Your Times Co. versus Sullivan, 1964. Available at <http://www.uscourts.gov/about-federal-courts/educational-resources/supreme-court-landmarks/new-york-times-v-sullivan-podcast>, last accessed on 07.01.2016.

²¹⁹ Reno versus ACLU 1997. Available at <https://supreme.justia.com/cases/federal/us/521/844/case.html>, last accessed on 07.01.2016.

²²⁰ Winters versus Ney York, 1948. Available at <https://supreme.justia.com/cases/federal/us/333/507/case.html>, last accessed on 07.01.2016.

²²¹ Gertz versus Robert Welch, Inc., 1974. Available at <https://supreme.justia.com/cases/federal/us/418/323/case.html>, last accessed on 07.01.2015 and New York Times and Co.

²²² The Heritage Guide to the Constitution. Available at <http://www.heritage.org/constitution#!/amendments/1/essays/140/freedom-of-speech-and-of-the-press>, last accessed on 07.01.2015.

analysis was provided by the New York Times journalist Erik Eckholm on the 27th December 2015. First Amendment is considered one of the most indisputable principles of American democracy, which should not be restricted unless it represents a 'clear and present danger', a real imminent threat and not an illusory dangerous idea or behaviour. However, considering the success of the recruiting policy undertaken by ISIS in luring young Americans over the internet, some experts ponder the possibility to revise the provision.²²³ American society is going through the electoral run for the White House, which sees the exponents, Republican Donald Trump and the Democratic Hilary Clinton, expressing their viewpoints on the subject. Respectively, Trump affirms that many Americans are getting lost due to the internet. He suggested Bill Gates and other Information Technologies experts to find a way to close the net. Whereas Mrs. Clinton states that as US is fighting to deprive jihadists from their actual territories, the fight should enlarge to deprive them from their virtual territory as well. Her suggestion is to work with host companies to eliminate all the virtual means through which jihadists' damages the American society.²²⁴ As mentioned above, recently, many outstanding law scholars have expressed their minds on this delicate matter. Sunstein suggested the idea that terroristic threats are posing challenges on the 'clear and present danger test' that has always ruled free speech. Basically, this principle foresees restrictions on freedom of expression when the safety of the community is in danger and US is in a status of war. However, one of the eminent judges of United States, Mr. Hand, refused to consider the aforementioned test as he considered that it did not protect explicit and direct provocations to violence. For decades his formula has not been used by the courts. Sunstein concludes his speech affirming that a possible solution might be combining Hand's approach with a form of balancing, which considers that whether people would expressively incite violence with their speech, then perhaps their speech would be better to be restricted.²²⁵ Another opinion considered belongs to Posner, who affirms that it is the first time that

²²³ New York Times. Available at <http://www.nytimes.com/2015/12/28/us/isis-influence-on-web-prompts-second-thoughts-on-first-amendment.html?smid=nytcore-ipad-share&smprod=nytcore-ipad&r=0>, last accessed on 08.01.2016.

²²⁴ Washington Post. Available at <https://www.washingtonpost.com/news/volokh-conspiracy/wp/2015/12/21/protecting-the-first-amendment-in-the-internet-age/>, last accessed on 08.01.2015.

²²⁵ Islamic State's Challenge to Free Speech. Available at <http://www.bloombergview.com/articles/2015-11-23/islamic-state-s-challenge-to-free-speech>, last accessed on 08.01.2016.

enemies well succeed at widespread dangerous information throughout American soil. This, according to him, shows the necessity to adopt some restrictive measures on free speech. He affirms that asking internet companies to shut down their websites would be useless, as jihadists would find others encrypted means of communication. He suggested to approve a law by which every person entering a site sponsoring ISIS activity commits a crime and for this he would be punished. This provision targets all those naive people that look for information just by curiosity. Posner's idea is to eradicate ISIS informing channels and the goal is to make it strictly forbidden, as child pornography is. However, this would not stop sophisticated terrorists, but would deter their recruiting mechanism and weak (American) people to fall in their traps. One worry about this system is that it would prevent 'scientific' research on the subject, like those driven by journalists, academics, private security agencies and alike. Nonetheless, this would not be a problem, as the law can consider making exceptions for such legitimate purposes. Another important aspect is that by censoring such websites, citizens will be prevented from having good access to information.²²⁶ Post was among those who highly criticized Posner's idea, considering it a slippery slope, as he thinks that: 'the efforts to suppress radical view can be far too easily twisted into a prohibition against dissenting viewpoints'. Recalling the idea of the 'clean and present danger tests', it was introduced in 1919, hence it can be considered a bit out dated considering the today's highly constitutional protection that such a right has gained. Posner affirmed that his view was not very popular in the legal community, however he stated that the current meaning of the First Amendment carries with it years of thinking, judgments and trade-offs, hence Americans should reconsider such trade-offs according to the changes of society and technology.²²⁷

2.2.5 African Union

Another area relevant for its regional provisions on human rights protection is Africa. Respectively the African Union (AU) is composed of 54 African countries. It had

²²⁶ ISIS Gives UN no Choice but to Consider Limits on Speech. Available at http://www.slate.com/articles/news_and_politics/view_from_chicago/2015/12/isis_s_online_radicalization_efforts_present_an_unprecedented_danger.2.html, last accessed on 08.01.2016.

²²⁷ New York Times. Available at <http://www.nytimes.com/2015/12/28/us/isis-influence-on-web-prompts-second-thoughts-on-first-amendment.html?smid=nytcore-ipad-share&smprod=nytcore-ipad&r=0>, last accessed on 08.01.2016.

been established on the 26th May 2001 and replaced the former Organization of American Unity (OAU).²²⁸ Around the '60s the idea of creating an African Charter to protect human rights, supported with a Court and a Commission started to be shared. The founding treaty of the Organization of African Unity did not specify any obligation on contracting States on the respect of human rights. It only ruled to regard human rights as foreseen in the Universal Declaration of Human Rights. Afterwards, in the Dakar Declaration of 1967 the necessity of establishing a regional mechanism of human rights was renewed. United Nations facilitated the dialogue between the counterparts to find an agreement and started drafting a Charter, however this attempt failed. Eventually, in 1979 the Assembly of Heads of States and Government of the OAU met in Liberia and unanimously asked for Secretary General of the OAU to organize a cabinet of experts to draft the text of the Charter, on the bases of the already existing ones, European and Inter-American Human Rights Conventions. The aim of the group of experts was to shape a text of the African Charter on Human and People's Rights, with related bodies to foster and protect human and people's rights, based on African values and cultures and strictly concentrated to the needs of African people, such as development and the duties of individuals. The Charter was then adopted on 28th June 1981, after being ratified by the majority of state parties of the Organization of African Unity came into force on 21st October 1986 and by 1999 it had obtained all the ratifications of OAU Members.²²⁹

The African Charter institutes the African Commission on Human and People's Rights, to which confers four tasks; promotion of human and people's rights, protection of such rights, interpretation of the Charter and the performance of other tasks required by member States. A great change in the system happened in 1998 when an Additional Protocol established the African Court on Human and People's Rights, which took inspiration from other regional Courts.²³⁰

²²⁸ African Union History. Available at <http://au.int/en/history/oau-and-au>, last accessed on 05.01.2016.

²²⁹ History of African Charter. Available at <http://www.achpr.org/instruments/achpr/history/>, last accessed on 05.01.2016.

²³⁰ D. L. SHELTON, *Advanced Introduction to International Human Right Law*, p. 67.

2.2.5.1 The African Charter on Human and Peoples' Rights

After this introduction to set the scene, article 9 of the African Convention on Human and Peoples' Rights will be presented. It cites:

1. 'Every individual shall have the right to receive information
2. Every individual shall have the right to express and disseminate his opinions within the law.'²³¹

It is remarkable, and differs from the provisions until here analyzed, that the terms 'within the law' is not followed by any other requirement, as legitimate purposes or the concept of necessity.

2.2.5.2 African Union case law

Freedom of the press was analyzed in the case of *Media Rights Agenda versus Nigeria*, which originated from the conviction of Mr. Malaolu, editor of an independent Nigerian newspaper.²³² He has been accused of covering of sedition and condemned to life imprisonment by the Special Military Tribunal. The African Court affirmed that article 9 of African Convention had been breached as Mr. Malaolu has been only convicted for accomplishing his job of delivering information on his newspaper. The problem for him was that such information were about a coup d'état affecting certain people. The Government counters argue affirming that the editor with some other journalists was involved in the coup and this was not the case of victimization of the profession of the journalist.²³³ The Commission verified that it was only Mr. Malaolu piece of news that led to the writer's conviction and concluded that it had happened in violation of article 9 of the Convention.²³⁴

Free press was the matter of the *Constitutional Rights Project and Civil Liberties Organization versus Nigeria* case.²³⁵ It is about the seizure of many copies of the

²³¹ African Charter on Human and Peoples' Rights, article 9. Available at <http://www.achpr.org/instruments/achpr/>, last accessed on 05.01.2015.

²³² ACHPR, *Media Rights Agenda (on behalf of Mr. N. Malaolu) versus Nigeria*, No. 224/98, decision adopted during the 28th session, 23 October – 6 November 2000.

²³³ *Ibid.*, para. 67-68.

²³⁴ *Ibid.*, para. 69.

²³⁵ AHCPR, *Constitutional Rights Project and Civil Liberties Organisation versus Nigeria*, Communication No. 102/93, decision adopted on 31 October 1998.

magazine, The News, after citizens' objections against the annulment of the elections. The journal was closed after a military order in June 1993. Before proceeding with the closure many copies were seized and some journalists persecuted by officers. The same destiny had allegedly happened to copies of the magazine Tempo. The excuse used by the Government was that such actions were necessary to calm the chaotic situation that took place after the annulations of the elections. The Commission did not share the Government opinion, it mentioned the general principle by which States ought not to restrict people's rights by making constitutional provisions prevail on them, and they should not as well weaken primary rights protected by both the constitution and human rights provisions. Considering this, Member States should not implement limiting policies and take care of those rights encompassed by the constitution and the international human rights law. Under no circumstances violation of human rights has to be perpetrated. In fact, continuous restrictions make weak citizens confidence in the rule of law and in the Government.²³⁶ The Commission agreed that Nigeria possessed all the required provisions on libel suits to face violation of domestic law, however, the Government had a specific concern, as it affirmed: 'laws made to apply to specifically one individual or legal entity [raised] the acute danger of discrimination and lack of equal treatment before the law as guaranteed by Article 2' of the Charter. Therefore, the closure of The News and the seizure of 50.000 copies of the Tempo and The News breached article 9 of the Charter.²³⁷

A related topic that the Commission used to evaluate this case concerns whether the payment of a registration fee and a pre-registration deposit for payment of penalty or damages is or not in accordance with freedom of expression. According to the Commission, it is. Nonetheless, the amount of the fee ought not to exceed administrative expenses of the registration, while the pre-registration fee should not to exceed the amount needed to secure against damages or penalties against the editor of the journal. In the aforementioned case, the Commission evaluated that the fees were high but in accordance with the aim pursued, hence it did not constitute any restriction. Yet, the Commission was interested by the formula of the decision of the registration board, which concedes the Government the power to prohibit the publication of any magazine they do not want to be released. According to the

²³⁶ Ibid., para. 57-58.

²³⁷ Ibid., para. 59.

Commission this is a clear invitation to censorship and damages the right of the citizens to be informed. Would these circumstances happen, article 9 would be violated.²³⁸ In this case the Commission restated that, considering article 9 paragraph 2 of the Charter, every person ought to have the right to impart his opinion within the law. According to the Commission, this does not mean that the law can marginalize the right to express and disseminate one's opinions, because this would invalidate the right of free speech. In addition to that, international human rights provisions always prevail over contradictory national law. As, any restriction with the rights guaranteed in the Charter, must be in accordance with the Charter itself. Moreover, the Charter does not contain a derogation clause, as 'limitations on the rights and freedoms enshrined in the Charter cannot be justified by emergencies or special circumstances'. Sure enough, the only allowed limitation to the rights and freedoms of the African Charter are legitimate under article 27 paragraph 2, which states that citizens have to properly behave taking into consideration the rights of others, collective security, morality and common interest. Furthermore, restrictions have always to be proportionate for the aimed to be pursued.²³⁹

Taking all this reasoning into consideration, the Government of Nigeria had no prove that the proscription of the journal *The News* could be justified under article 27 paragraph 2 and considering the convenience of national libel laws, the proscription of the journal was evaluated 'disproportionate and uncalled for' and defined a breach of article 9 of the Charter.

The following case is about freedom of express opinions. In cases in which citizens are convicted for the mere fact of belonging to opposition parties or trade unions, the African Commission believes that 'blanket restrictions' on the right to freedom of expression are against article 9. It restates the provision by which, if it is

²³⁸ ACHPR, *Media Rights Agenda and Others versus Nigeria*, Communications Nos. 105/93, 128/94, 130/94 and 152/96, decision adopted on 31 October 1998, para. 55-57 (The registration fee was N100,000 and the deposit for any penalty or damages awarded against the newspaper etc. amounted to N250,000, para. 6).

²³⁹ *Ibid.*, para. 63 and 66-71.

necessary to constraint human rights, limits have to be minimal and do not subvert primary rights safeguarded in international documents.²⁴⁰

Likewise, when a leading member of a Kenyan student union had been convicted, sentenced to prison, remained there for months and in the end had to flee the country, only for his opinions and ideas, the Commission considered such treatment a violation of article 9 of the African Charter. In the case in which individual's views are different from the national law, the affected person or the Government should find a compromise in a court of law.²⁴¹

In the end, in the case on behalf of the writer *Ken Saro-Wiwa Jr. and the Civil Liberties Organization the Commission*²⁴² highlighted the relation between freedom of expression, association and assembly stated in articles 9, 10 and 11 of the Charter and affirmed that when Member States violate articles 10 paragraph 1 and 11, they simultaneously violate 9 paragraph 2. It is known that people had been sentenced to death penalty for having just expressed their opinions. The circumstances were set during a rally in which the victims have been preaching, through the organization Movement for the Survival of the Ogoni People, about the population's rights, living in an important oil-producing region of the country. Eventually, the Commission noted that the assertions were not contradicted by the Government.²⁴³

Last matter to be dealt with is about human rights defenders. The case is of *Huri-laws versus Nigeria*, it deals with the harassment and persecution of a member belonging to a human rights organization in Nigeria. The accusation affirmed that the Civil Liberties Organization haired employees who worked together to safeguard human rights creating specialized programs with the aim of informing people about their rights. The Commission affirmed that these people persecuted and raid at the organization's office had the goal to stop their work. This was considered as a violation

²⁴⁰ Amnesty International and Others versus Sudan, Communications Nos. 48/90, 50/91, 52/91 and 89/93, decision adopted on unknown date, para. 77-80.

²⁴¹ John D. Ouko versus Kenya, Communication No. 232/99, decision adopted during the 28th Ordinary session, 23 October – 6 November 2000, para. 27-28.

²⁴² International Pen and Others (on behalf of Ken Saro-Wiwa Jr and Civil Liberties Organisation) versus Nigeria, Communications Nos. 137/94, 139/94, 154/96 and 161/97, decision adopted on 31 October 1998.

²⁴³ Ibid., para. 110.

of both freedom of expression and association of respectively articles 9 and 10 of the African Convention.²⁴⁴

2.2.6 League of Arab Countries

Hereafter, the League of Arab States (LAS) and the Arab Charter on Human Rights will be analyzed. The organisation of Arab countries dated back to 19th March 1945, even prior to the United Nations. The founding countries were 7, nowadays its Member States have grown up to 22, and however Syria is currently suspended. The League was shaped with the purpose of strengthening the ancient relations between Arab countries and to improve together the welfare of their region. In 2004 they finally decided to give birth to the Arab Charter on Human Rights, which entered into force in 2008. This pivotal event has been the result of 45 years of attempts to furnish the Arab area with a human right treaty. In fact, prior efforts took place in 1960 when the Union of Arab Lawyers strongly persuaded the League to vote for the adoption of an Arab Convention on Human Rights and a first version was proposed in 1994, however, never ratified. Finally, on 24th May 2004 a new version of the Arab Charter on Human Rights was voted during the League Session in Tunis. This new Charter entered into force in 2008 after obtaining its 7th ratification and as at January 2016 it has been ratified by 17 countries. The document has been a matter of critiques by the Arab civil society as it is believed falling out of international standards in many parts. Nonetheless, it instituted an Arab Human Rights Committee with the task of analyzing contracting States reports. Since 2011 many Civil Societies Organization have been fostering human rights through the Arab League. Nevertheless, the situation of the Arab countries of the last years has been deeply critique, hence civil society tried to strengthen human right protection by improving the League monitoring skills and amending the Charter in agreement with the international human rights standards. Since 2013 the League has been working to institute an Arab Human Rights Court, based in Bahrain and operating in accordance with the Charter. The Court statute has already been drafted, and it is waiting for at least 7 Member States ratifications.²⁴⁵

²⁴⁴ Huri-Laws (on behalf of Civil Liberties Organisation) versus Nigeria, Communication No. 225/98, decision adopted during the 28th Ordinary session, 23 October – 6 November 2000, para. 47.

²⁴⁵ The International Center of Not-For-Profit-Law. Available at <http://www.icnl.org/research/monitor/las.html>, last accessed on 08.01.2015.

2.2.6.1 Arab Charter on Human Rights

Freedom of expression is a right defended by the Arab Charter of Human Rights as well, respectively article 32 cites:

1. 'The present Charter guarantees the right to information and to freedom of opinion and expression, as well as the right to seek, receive and impart information and ideas through any medium, regardless of geographical boundaries.
2. Such rights and freedoms shall be exercised in conformity with the fundamental values of society and shall be subject only to such limitations as are required to ensure respect for the rights or reputation of others or the protection of national security, public order and public health or morals.'²⁴⁶ ²⁴⁷

2.3 Conclusion

To conclude this second chapter which has broadly dealt with the different international and regional provisions about human right of freedom of expression, I will briefly present some interactions between the two levels. The development of Courts' interpretations makes raise questions of coherence. In the specific matter of the interpretation of the norms, it resulted that the European Court of Human Rights is considered the most developed and detailed.²⁴⁸

The European Court of Human Rights in the *Loizidou versus Turkey* judgment affirmed that the European Convention of Human Rights 'cannot be interpreted and applied in a vacuum.' This means that on the Court's opinion on human rights conventions ought to be interpreted in the public international law arena.²⁴⁹ However, fundamental human rights are usually stated in a general way, which means that they can be interpreted in a very ample way. In the specific case of freedom of expression this variable is even more stressed as its limits are deeply questioned. Article 19 of the International Covenant on Civil and Political Rights is the most important international

²⁴⁶ Arab Charter on Human Rights. Available at http://www.eods.eu/library/LAS_Arab%20Charter%20on%20Human%20Rights_2004_EN.pdf, last accessed on 08.01.2015.

²⁴⁷ Neither the Commission nor academics have provided an analysis of article 32 yet.

²⁴⁸ Antoine Buyse, Tacit Citing - The Scarcity of Judicial Dialogue between the Global and the Regional Human Rights Mechanisms in Freedom of Expression Cases, p. 1. Available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2279350, last accessed on 08.01.2016.

²⁴⁹ ECtHR, *Loizidou versus Turkey*, 18 December 1996 (Appl.no. 15318/89) para. 43.

provision and it has been interpreted by general comments, observations and specific countries views of the Human Rights Committee. The inquiry that Mr. Buyse wanted to understand was whether there exists a form of dialogue and confrontation among different levels. To find out if there is a 'global community of courts' he compared the international body of Human Rights Committee and regional mechanisms.²⁵⁰

After the Second World War the international community has seen the rise of human rights treaties with respective supervisory mechanisms. This enlargement of the institutionalized watchdog has given rise to law fragmentation. Many States are members of more than one organization and this may lead to different interpretations of norms that have very similar bases. In fact, judges belonging to different organizations may not be motivated to take inspiration or confront their opinions with judges of other fora. It is clear that judges' attitude depends on their socio-legal culture.²⁵¹ Considering this trend, risks of fragmentation seem likely to materialize. According to Mrs. Slaughter there is a juridical dialogue between international mechanisms and it is possible through two ways. On one side, directly and informally when judges meet together and, on the other, indirectly through case law, when clear reference is made to the ratio of other courts.²⁵² Sharing dicta or ratio might result useful to the Courts when they have to resolve similar cases already evaluated by others, always taking into consideration the limit of such practise, as fully knowing the juridical system of others is not possible.²⁵³ Nonetheless, it is difficult to assert that the relation among human rights supervisory systems is dialogue, as it has been found out that there are asymmetries in courts citing other courts.²⁵⁴ As, there is no hierarchy

²⁵⁰ Antoine Buyse, Tacit Citing - The Scarcity of Judicial Dialogue between the Global and the Regional Human Rights Mechanisms in Freedom of Expression Cases, p. 2.

²⁵¹ Ronald J. Krotoszynski, "'I'd Like to Teach the World to Sing (in Perfect Harmony)": International Judicial Dialogue and the Muses – Reflections on the Perils and the Promise of International Judicial Dialogue', 104 Michigan Law Review (2006) pp. 1321-1359, at p. 1325.

²⁵² Anne-Marie Slaughter, 'A Global Community of Courts', 44 Harvard International Law Journal (2003) pp. 195 and 201.

²⁵³ Ronald J. Krotoszynski, "'I'd Like to Teach the World to Sing (in Perfect Harmony)": International Judicial Dialogue and the Muses – Reflections on the Perils and the Promise of International Judicial Dialogue', 104 Michigan Law Review (2006) pp. 1321-1359, at p.1356-1358.

²⁵⁴ Nathan Miller, "An International Jurisprudence? The Operation of 'Precedent' Across International Tribunals", 15 Leiden Journal of International Law (2002), pp. 483-526; and Erik Voeten, "Borrowing and non-borrowing among International Courts", paper nr. 1402927 (2009) on ssrn.com. For a more elaborate overview of that research, see my own 'Does Strasbourg Echo in Geneva? The Influence of

between juridical bodies in human rights field, then some courts are much more active in citing than others. This depends also on the degree of case law of a court, if it is limited the Court will be much more inclined to take inspiration from the others.²⁵⁵ This relation may be similar to the one between regional bodies and UN Human Rights Committee.²⁵⁶

Carrying on with juridical borrowings, it is worthy to notice that almost all European Convention Member States have ratified the International Covenant on Civil and Political Rights and its optional protocol, which institutes an individual complaints mechanism. Therefore, when a case concerning individuals arises, it will be reasonable to analyse it in front of the ECHR and in harmony with ICCPR, as the opposite would be difficult, due to the broad and international character of ICCPR and HRC.²⁵⁷

Many dimensions of interplay have been found. The first is procedural and underlines that the two organizations have different origins and there is not a formal connection between them. It highlighted also that individuals that need to expose their complaints do not know which mechanism refer to.²⁵⁸ The second dimension considers the substance of human rights, the two conventions, ICCPR and ECHR, are similar. The articles that regulate freedom of expression are similar as well. Nevertheless, there are some divergences, for examples many contracting States evaluate the ECHR possibilities of restriction of human rights broader than under ICCPR, which made many European countries pose declarations and reservations while ratifying ICCPR. For example France affirmed that the right of freedom of expression of the Covenant would be carried into effect in agreement with article 10 of the European Convention. The difference in the outlining of restrictions is more evident in

ECHR AntiTorture Case-Law on the United Nations Human Rights Committee', Irish Human Rights Law Review (2011).

²⁵⁵ Patricia M. Wald, 'Tribunal Discourse and Intercourse: How the International Courts Speak to One Another, Boston College International and Comparative Law Review vol. 30 (2007) pp. 23-24.

²⁵⁶ Human Rights Committee (HRC), General Comment 33, 'The Obligations of States Parties under the Optional Protocol to the International Covenant on Civil and Political Rights', 5 November 2008, UN Doc, CCPR/C/GC/33, para. 11.

²⁵⁷ Yogesh Tyagi, The UN Human Rights Committee. Practice and Procedure (CUP, Cambridge 2011) p. 653.

²⁵⁸ Committee of Ministers, Resolution 70(17), 15 May 1970. See also: Manfred Nowak, CCPR Commentary (N.P. Engel Verlag, Kehl am Rhein 2005, 2nd ed.), p. 881; and Antoine Buyse 'Does Strasbourg Echo in Geneva? The Influence of ECHR Anti-Torture Case-law on the United Nations Human Rights Committee', Irish Human Rights Law Review (2011/2012).

the second paragraph of both articles 19 ICCPR and 10 ECHR, and the latter is definitely broader. Moreover, under article 16, it regulates 'restrictions on political activities of aliens', which enable contracting States to limit foreigners' political activities.

In the end, considering both procedural and substantive matters, it seems that the relation between human rights mechanisms does not really work. In fact, the Human Rights Committee has often voiced its consternation about the preference that ECHR shows for European States.²⁵⁹

From this words it seems that there is a *jalousie de metier* toward the European system, however, the fact that members of European countries more often take part in the work of the Committee ensures that there will be space for a suitable 'legal empathy' between both systems.²⁶⁰

Hereafter a focus on the European Court of Human Rights will be provided. Academics discovered that the European Court case law has inspired many regional human right bodies, among which the Inter-American Court of Human Rights and the African Commission on Human and People's Rights.²⁶¹ The following part will explain how European Court has dealt with Human Rights Committee in the cases of freedom of expression.

To begin with, two sentences against Germany, *Glaserapp* and *Kosiek* of 1986 where ECtHR first mentioned ICCPR.²⁶²

Another example is the case *Groppera Radio AG and others versus Switzerland*. The European Court based its analysis on article 10 paragraph 1 sentence: 'This article shall not prevent states from requiring the licensing of broadcasting television or cinema enterprises'. The Court affirmed that ICCPR lacked this reference. The Court studied the history of article 19, evidencing that such reference was not included in the final version as the idea that they had of licensing corresponded to technical aspects and it would have been necessary to avoid chaos by using frequencies. In the end, it

²⁵⁹ Report of the Human Rights Committee 1994, Vol. 1, 21 September 1994, para. 76. See also Tyagi (2011) p. 744

²⁶⁰ Antoine Buyse, Tacit Citing - The Scarcity of Judicial Dialogue between the Global and the Regional Human Rights Mechanisms in Freedom of Expression Cases, p. 6.

²⁶¹ David Harris, Michael O'Boyle, Edward Bates and Carla Buckley, Harris, O'Boyle & Warbrick: Law of the European Convention on Human Rights (OUP, Oxford 2009, 2nd ed.) pp. 30-31.

²⁶² ECtHR, *Glaserapp versus Germany*, 28 August 1986, application number 9228/80, para. 48; *Kosiek versus Germany*, 28 August 1986, application number 9704/82, para. 34.

was not included as it could have been used to hinder freedom of expression. Moreover, it has been decided not to include it as its meaning was part of the 'public order' of paragraph 3. In this circumstance article 19 of the ICCPR was helpful to build ECtHR interpretation, as it proposes the broadest possible defence for free speech.²⁶³

Other positive references to the United Nations system are found in various hate speech cases, as in *Jersild versus Denmark* case, which is about a journalist condemned with the charge of disseminating hate speech by interviewing right-wing youth on television. The Court cites article 20 of ICCPR as an important obligation to fight hate speech.²⁶⁴

In a small part of cases the Court used Human Rights Committee work. For instance, the *Lepojic versus Serbia* case resulted in a journalists convicted of defamation of mayor. The applicant complained that it was part of a great deal of pressure put on the press. The Court looked at the international standards and took inspiration from Human Rights Committee concluding observations on *Serbia and Montenegro* case, in which it pointed out the elevate number of proceeding done against media providers due to media-related offences.²⁶⁵

In the end, as some of these examples can show, the European Court case law makes short reference to the international standard provisions. Most of the time, the Covenant has been used as an additional tool, to reinforce its own freedom of expression norm. Sometimes the Court used Human Rights Committee observations with the same purposes, as its case law on freedom of expression is definitely more limited than the European.²⁶⁶

Attention now will be driven on two other important regional human rights defence systems: the Inter-American and African.

As far as the first is concerned, it holds a tradition of open acceptance of other law sources, not just human rights provisions but also international humanitarian law

²⁶³ ECtHR, *Groppera Radio AG and others versus Switzerland*, 28 March 1990, application number 10890/84, para. 61. The Court referred to Document A/5000 of the sixteenth session of the United Nations General Assembly, 5 December 1961, para. 23.

²⁶⁴ ECtHR, *Jersild versus Denmark*, 23 September 1994, application number 15890/89, para. 21.

²⁶⁵ Concluding Observations of the United Nations Human Rights Committee: *Serbia and Montenegro*, 12 August 2004, UN Doc. CCPR/CO/81/SEMO, as cited in: ECtHR, *Lepojić versus Serbia*, 6 November 2007, application number 13909/05, para. 40.

²⁶⁶ Antoine Buyse, *Tacit Citing - The Scarcity of Judicial Dialogue between the Global and the Regional Human Rights Mechanisms in Freedom of Expression Cases*, pp. 9-10.

norms. Hereafter the relation between Human Rights Committee case law and Inter-American Court of Human Rights (ARCH) will be dealt with.

As already mentioned in previous sections, American provision that protects freedom of expression is article 13 of the American Convention on Human Rights, which is the equivalent of article 19 and 20 of the International Covenant on Civil and Political Rights. Just over twenty cases of the American Court encompass Human Rights Committee case law, which are all positive in reference. In fact, the Court has been invoking the Committee to support American judgements. However, in only very few cases the issue was about freedom of expression.²⁶⁷

Among them there is the already analyzed judgment *Olmedo-Bustos and others versus Chile*, known as '*The Temptation of Christ*' as well. The Court countered Chile's decision of prohibiting the showing of the movie as censorship, hence article 9 has been violated by the contracting States. However, a judge in a concurring opinion said that under international human rights law, both national judicial and legislative bodies have obligations. He underlined that Human Rights Committee had in a free speech case called for legislative changes.²⁶⁸

The last American analyzed case is *Ríos and others versus Venezuela*, it is about the impediment posed by Governmental officials on journalists' work in their RCTV television station. The Court expressed itself on the criteria under which Member States ought to manage television stations. It affirmed that concerning the authorisation of written media to take part to official events, their application have to be proved legal, to seek a legitimate objective and have to be necessary and proportional considering democratic society values.²⁶⁹ Such ratio partly derives from Human Rights Committee opinions on *Gauthier versus Canada* case to which the Court expressively makes reference.²⁷⁰

²⁶⁷ Ibid., p. 10.

²⁶⁸ Para. 6, note 17, of his concurring opinion, citing HRC, J. Ballantyne, E. Davidson and G. McIntyre versus Canada, 5 May 1993, Nos. 359/1989 and 385/1989, para. 13.

²⁶⁹ IACtHR, *Ríos and others versus Venezuela*, 28 January 2009, Series C, No. 194, para. 346.

²⁷⁰ HRC, *Gauthier versus Canada*, 5 May 1999, No. 633/1995, para. 13.6.

As far as African Commission on Human and People's Rights is concerned, it seems that it does not make reference to Human Rights Committee work and now.²⁷¹

The last part will be dedicated to the analysis of the Human Rights Committee. The first noticeable element is the complete absence of regional case law in the Human Rights Committee's jurisprudence. This is in accordance with Committee practice as this is its attitude, regardless the issue it has to evaluate.²⁷² On the contrary, both applicants and the States usually prefer to be judged by regional human rights law, especially by the Strasbourg jurisprudence.

The first relevant example is the aforementioned case of *Professor Faurisson*, who has been judged guilty by the French Government under *Gayssot Act*, according to which minimizing Nazi crimes is considered against the law. France, to defend its position, called upon article 5 of the ICCPR which firmly bans the destruction of rights. It adds as well that article 20 of the same Convention obliges it to forbid fostering of racial or religious hatred. France found ground for counting on article 5 in European case law too, in fact, article 17 of the ECHR bans the abuse of rights. Therefore, the European Court practice affirmed that cases on the condemnations of racist applicants are inadmissible under article 17. The Human Rights Committee was not as sharp as the European Court, in fact more blandly affirmed that *Professor Faurisson* case said that the condemnation had a legitimate aim and was therefore necessary.²⁷³

Another example is, *Zeljko Bodrozic versus Serbia and Montenegro*, the case about the punishment of a journalist for offending a politician in an article.²⁷⁴ The applicant used in his defence four freedoms of expression judgements of the European Court: *Handyside*, *Lingens*, *Oberschlick* and *Schwabe*.²⁷⁵ All these cases are related by the fact that freedom of expression protects critical speech as well and that the limits of allowed critics are broader in the case of politicians with respect to normal citizens. The Human Rights Committee stated that 'in circumstances of public debate in a

²⁷¹ Antoine Buyse, *Tacit Citing - The Scarcity of Judicial Dialogue between the Global and the Regional Human Rights Mechanisms in Freedom of Expression Cases*, p. 11.

²⁷² *Ibid.*, p. 12.

²⁷³ HRC, Communication No. 550/1993, *R. Faurisson versus France*, p. 96 para 9.7.

²⁷⁴ HRC, *Zeljko Bodrozic versus Serbia and Montenegro*, 31 October 2005, No. 1180/2003.

²⁷⁵ ECtHR, *Handyside versus the United Kingdom*, 7 December 1978, application number 5493/72; *Lingens versus Austria*, 8 July 1986 application number 9815/82; *Oberschlick versus Austria*, 23 May 1991 application number 11662/85; *Schwabe versus Austria*, 28 August 1992 application number 13704/88.

democratic society, especially in the media, concerning figures in the political domain, the value placed by the Covenant upon uninhibited expression is particularly high'.²⁷⁶ This mirrors Strasbourg case law, however the Committee preferred to make reference to its own jurisprudence, respectively the case of *Aduayom and others versus Togo* where it noted the importance of having the opportunity to openly express critics to the political world.²⁷⁷

In the end, to both conclude these levels' comparison and chapter it is to say that among the international and regional level there are relations, however they are minimalist and intermittent. In fact, each human rights defence body shows its own policy of willingness to use others jurisprudence. The hugest difference is that regional bodies do take inspiration by international standards, however this process is unilateral, as the Committee does not do it as directly as the other do. Of all regional systems, perhaps European Court is the unique one that does not need a further confrontation, as its jurisprudence and case law is well extended. What has just been stated may explain why the ICCPR sometimes appears as a comparative standard of the ECtHR. In the Inter-American Court jurisprudence, there are some circumstances in which the Committee case law is used, with the purpose of noting that a certain interpretation is in agreement with international standards and to increase the force of the Court.

The Human Rights Council perspective has a completely different approach. Both, applicants and States make very often reference to the European Court cases and the latter may influence the results of the Committee, although it is very rare this to has happen. There can be found reasoning of the European Court in the Committees' work, however, they will not be openly defined as such. The probable justification of this attitude lies in the fact that with citing European ratio the Committee would weaken its persuasive power. Furthermore, making clear reference to only one of the regional bodies may not be acceptable and it could incite critics affirming that the human rights defence system is Western rather than universal.

²⁷⁶ HRC, *Zeljko Bodrozic versus Serbia and Montenegro*, 31 October 2005, No. 1180/2003, para. 7.2.

²⁷⁷ HRC, *Aduayom and others versus Togo*, 12 July 1996, Nos. 422/1990.

Hence, nowadays Human Rights Committee policy is the ‘tacit citing’, meaning that it learns from regional bodies without openly recognizing it.²⁷⁸

After having set the bases of this dissertation by deeply analyzing freedom of expression international and regional provisions, in next chapter I would like to focus on a specific issue of freedom of expression, hate speech. The purpose is to discover how all the aforementioned human rights defence systems find the border between freedoms of expression and hate speech.

²⁷⁸ Antoine Buyse, *Tacit Citing - The Scarcity of Judicial Dialogue between the Global and the Regional Human Rights Mechanisms in Freedom of Expression Cases*, p. 15.

CHAPTER 3

3.0 Prohibition of hate speech and freedom of expression

Until now I have analyzed human rights freedom of expression, outlining first its origins as human rights and then focusing on whether and how this right can be restricted. In this chapter, I will concentrate specifically on freedom of expression, hate speech. The purpose of this reasoning is to understand where hate speech lies. First of all, I will analyse the bases of hate speech, then its controversial and still not shared definition and in the end, found how the difference and the border between freedom of expression and hate speech is defined. In this latter part, I took into consideration two perspectives: international and regional. The international viewpoint will be on the quasi-jurisprudence of the Human Rights Committee and the regional will be based on the European Court of Human Rights²⁷⁹, the Inter-American Court of Human Rights²⁸⁰ and a parenthesis will be made on United States Supreme Court²⁸¹ as well.

3.1 Historical attempts to outline hate speech

When considering the issue of hate speech it is always fundamental to remember the question that bodies and courts have to answer, whether it is hate speech or not. From this notion begins all the reasoning to outline the border between freedom of expression and hate speech with the purpose of eliminating any form of discrimination without unnecessary freedom of expression infringements.

In the first place, an historical background defining the attempts to define how to identify hate speech will be provided. Provisions against hate speech do not appear in the first document regulating human rights, namely the Universal Declaration of

²⁷⁹ European Court of Human Rights. Available at [http://hudoc.echr.coe.int/eng#{"documentcollectionid2":\["GRANDCHAMBER","CHAMBER"\]}](http://hudoc.echr.coe.int/eng#{), last accessed on 13.01.2016.

²⁸⁰ Inter-American Court of Human Rights. Available at <http://www.corteidh.or.cr/index.php/en>, last accessed on 13.01.2016.

²⁸¹ Supreme Court of United States. Available at <http://www.supremecourt.gov/>, last accessed on 13.02.2016.

Human Rights (UDHR),²⁸² however, its drafting history shows that hate speech was broadly debated. The founders of the Declaration discussed whether and how should freedom of expression consent forms of intolerance. However, in 1945, the majority of UN States preferred to omit any reference to free speech constraints.²⁸³

The International Covenant on Civil and Political Rights under article 20 provides the duty of Member States to outlaw hate speech.²⁸⁴ The drafting of article 20 was very problematic, its first version only restricted to 'any advocacy of national, racial or religious hostility that constitutes and incitement to violence'. Article 20 sustainers justified it in memory of the Second World War tragedies and the Holocaust, whereas its opponents found inappropriate posing this kind of restrictiveness in a human rights treaty, as it could weaken freedom of expression.²⁸⁵

The International Convention on the Elimination of All Forms of Racial Discrimination (ICERD) is an important international treaty that matters and regulates free speech as well.²⁸⁶ After the end of the Second World War the world faced an extremely harsh period, in which hostility, ire and indignation lied at the bases of some episodes, among which anti-Semitic attacks took place in Germany, such as the 'Swastika epidemic' of the 1950 decade and the struggle against colonialism and apartheid. Those summed to all the atrocities witnessed during the war, led to the necessity of adopting this convention.²⁸⁷ According to article 4 of the ICERD any contracting State: 'shall declare an offence punishable by law all dissemination of ideas based on racial superiority or hatred, incitement to racial discrimination'.²⁸⁸ Clearly, each duty must comply with the 'due regard' clause of freedom of expression. This article has been considered even more dispersive than article 20 of the ICCPR, as it encompasses any spreading of ideas and demands for the criminalization, instead of the elimination, of hate speech. Moreover, undemocratic States greatly praised the consequences of article 4, as it authorises Member States to expel any form of

²⁸² Universal Declaration on Human rights. Available at <http://www.un.org/en/documents/udhr/>, last accessed on 27.10.2015.

²⁸³ The Sordid Origins of Hate-Speech Laws, Hoover Institution, 01.12.2011, para. 4. Available at <http://www.hoover.org/research/sordid-origin-hate-speech-laws>, last accessed on 03.01.2016.

²⁸⁴ International Covenant on Civil and Political Rights. Available at <http://www.ohchr.org/en/professionalinterest/pages/ccpr.aspx>, last accessed on 13.01.2015.

²⁸⁵ The Sordid Origins of Hate-Speech Laws, para. 17-19.

²⁸⁶ International Covenant on the Elimination of All Forms of Racial Discrimination. Available at <http://www.ohchr.org/EN/ProfessionalInterest/Pages/CERD.aspx>, last accessed on 13.01.2016.

²⁸⁷ The Sordid Origins of Hate-Speech Laws, para. 22

²⁸⁸ International Convention on the Elimination of All Forms of Racial Discrimination, article 4.

discrimination through a coercive plan of action. Despite the initial opposition that Western States showed for article 20 of the ICCPR and article 4 of the ICERD, nowadays their national legal framework hold hate speech criminalization. In fact, since 1970 Europe saw an increasing in countering hate speech legislations.

After the end of the Cold War, that divided the world way of thinking and behaving, freedom of expression has continuously be matter of discussions and constraints. In fact, a new issue challenging free speech came to the floor. In this new settle, Western States have been playing once again the role of free expression defenders against the countries of the²⁸⁹ Organization of Islamic Cooperation (OIC)²⁹⁰. This organization has been asking for limitations on freedom of expression due to the fact that they consider it a source of ‘defamation of religion’ and ‘Islamophobia’.²⁹¹ Their campaign for the criminalization of ‘defamation of religion’ is part of the idea that universal human rights is a system of ‘Western soft imperialism’, which clearly endangers Islamic culture and traditions. Moreover, they insist that the OIC do believes in human rights, as it adopted the²⁹² Cairo Declaration on Human Rights in Islam²⁹³ whose aim is to connect Islam and human rights; nonetheless, the result is a predominance of the former.²⁹⁴

Nowadays, the situation has changed, as Western countries are taking greatly measures to counter hate speech. Taking for instance France as European country, after the 7th January 2015 shooting at Charlie Hebdo staff, the debate about hate speech limitations was back into the politic scene. According to Erik Bleich, all liberal democracies in some way ban some forms of speech. He provides, on one hand, the example of US which bases its policies of freedom of speech on the First Amendment, where the CIA staff has to swear not to share governmental secrets in the public sphere and furthermore, federal and state law can banish false claim that create harm

²⁸⁹ The Sordid Origins of Hate-Speech Laws para. 23, 27, 30-31.

²⁹⁰ Organization of Islamic Cooperation. Available at <http://www.oic-oci.org/oicv2/home/?lan=en>, last accessed on 14.01.2016.

²⁹¹ Negative criticism of Islam and Muslims.

²⁹² The Sordid Origins of Hate-Speech Laws para. 31-32.

²⁹³ Cairo Declaration on Human Rights in Islam. Available at <http://www.oic-oci.org/english/article/human.htm>, last accessed on 14.01.2015.

²⁹⁴ The Sordid Origins of Hate-Speech Laws para. 32.

to individuals or business. On the other hand he claimed that, France's restrictive norms on free expression are sharper than American ones. In fact, a week after the attack more than thirty-five people were convicted for having released statements infringing the law against 'apology' of terrorism. Examples include a man who said to police officers, 'There should be more Kouachis. I hope you'll be the next ones...You are a godsend for the terrorists.' Most infamously, Dieudonné M'bala M'bala, the controversial performer who has in the past been convicted for anti-Semitic hate speech, was arrested for a Facebook post in which he said he felt like Charlie Coulibaly. Clearly some questions arise concerning whether these convicted people were Charlie Hebdo terrorist supporters or only people expressing their opinions. In any case, this is different from what United States considers of hate speech.²⁹⁵

3.2 Hate speech definition

It is worth and necessary to provide a definition of hate speech, however there is not a shared one. In fact, what is or can be considered insulting, injurious, offensive or discriminating for a person may be not for another, and the same ratio works for cultures, societies and countries. The result is that there is not a universally shared definition and not shared parameters, hence the purpose of this chapter is to outline how experts define hate speech and, in the following, how human rights mechanisms entitle to judge, outline it.

As far as experts' opinion on hate speech is concerned, the first to be considered is the UN Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, Frank La Rue²⁹⁶, on 5th November 2012 affirmed that such right is fundamental to shape an environment open to critical debates and religions and racial issues, to foster mutual understanding and tolerance, eliminating negative stereotypes and preconceptions.

The Special Rapporteur has to present every year a report to the Human Rights Council, in the one presented in 2012 La Rue focused on hate speech issue, asserting:

²⁹⁵ Erik Bleich, French hate speech laws are less simplistic than you think. Available at <https://www.washingtonpost.com/blogs/monkey-cage/wp/2015/01/18/french-hate-speech-laws-are-less-simplistic-than-you-think/>, last accessed on 14.01.2016.

²⁹⁶ UN Special Rapporteur, Frank La Rue. Available at <http://www.ohchr.org/EN/Issues/FreedomOpinion/Pages/OpinionIndex.aspx>, last accessed on 16.01.2016.

‘The struggle against intolerance is both an urgent and permanent task. Regrettably, incitement to hatred continues to be found in all regions of the world. The question is when and how States can legitimately limit freedom of expression.’ He outlined the unique circumstances in which free speech should be limited: child pornography, incitement to genocide and incitement to hatred, advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence and incitement to terrorism. Clearly, he underlines that any form of constraints must be in agreement with the law and proportionate to the purported aim.

Moreover, the expert delineates the practices of many UN Member States in managing hate speech issues and claims that they adopt misleading legislations which very often serve to forbid expression of political criticism. An example of this can be anti-blasphemy law, which are vague for definition and are frequently used as means of repress free speech. Hence, La Rue suggested contracting States to revise such laws and go for a legislation that clearly protects human rights and is in accordance with international human rights standards.

Furthermore, he finds out methods to understand origins and various aspects of hate speech, including ample societal programmes to counter inequality and structural discrimination. The Special Rapporteur considers that norm to fight hate speech have to be deeply studied and carefully applied and adds: ‘States must invest more in the promotion of human rights education and must continuously promote open public debate as the best antidote to combat discriminatory patterns’.²⁹⁷

The United Nations Committee on the Elimination of Racial Discrimination in its 81st Session reunion in 2012, reasoned about racist hate speech, providing an analysis and definition of the broad term hate speech.

Nazila Ghanea wrote a report about this, and she drove the attention on the notion of racist hate speech as complicated concept intrinsically connected with the broader spectrum of hatred. She retains that among the harshest denunciation of hate speech there is article 20 of the International Covenant on Civil and Political Rights. Such article does not specifically mention ‘hate speech’ but ‘incitement’, however it takes into consideration the great average of hatred congenital in propaganda of war,

²⁹⁷ UN Special Rapporteur, Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, Frank La Rue.

advocacy of national, racial and religious hatred. The Committee on the Elimination of Racial Discrimination made a comment on article 4, affirming that every Member State has to make detailed researches with due diligence on any rising threat of racial hatred, especially when they come from the public sphere and by a group.

In her report, she takes as reference the difference made by the ICCPR between 'incitement' and 'hate speech', there is clearly a great deal of confusion and exchange about the terms.²⁹⁸ Then, she included Susan Benesch's distinction between 'incitement' and 'hate speech'. It considers the effects the speech produces, instead of its gravity. She affirmed that incitement can be separated from the broad category of speech. This separation can be based on the effects that a piece of speech can produce when it is inflammatory, as it can drive a person or a group to harm other individuals. In this case, the effect is violence and that piece of speech can be defined as successful incitement. Sometimes, hate speech do not strike the targeted victims and, therefore, it cannot be considered incitement.²⁹⁹

The Committee of the CERD explains what it means by 'hate speech' in its General Recommendation no. 29 it states: 'measures being taken against any dissemination of ideas of caste superiority and inferiority or which attempt to justify violence, hatred or discrimination against descent-based communities' and 'to raise awareness among media professionals of the nature and incidence of descent-based discrimination' and more 'strict measures being taken against any incitement to discrimination or violence against the communities, including through the Internet'. Considering specifically hate speech, the CERD added 'strict measures to be taken against the justification of violence, hatred or discrimination against specific communities, and put emphasis on awareness raising among media professionals'.³⁰⁰

²⁹⁸ The Concept of Racist Hate Speech and its Evolution over time. Available at <http://www2.ohchr.org/english/bodies/cerd/docs/discussion/TD28082012/NazilaGhanea.pdf>, last accessed on 17.01.2016.

²⁹⁹ Susan Benesch, Consultant to UN Special Advisor on the Prevention of Genocide, 'Contribution to OHCHR Initiative on Incitement to National, Racial, or Religious Hatred', paper made available at the UN OHCHR 2011 Expert workshop on the prohibition of incitement to national, racial or religious hatred, Vienna, February 2011, available at <http://www.ohchr.org/Documents/Issues/Expression/ICCPR/Others2011/SBenesch.doc>, last accessed August 2012.

³⁰⁰ UN CERD General Recommendation no. 29, CERD, General Recommendation 29, Article 1, paragraph 1 of the Convention (Descent), Sixty-first session, 01.11.02, para. 18, 20, 19.

According to Ghanea, another differentiation that it is important to mention lays between hate speech and discriminatory speech. There exists a great deal of discriminatory forms of expression that does not hold hatred. As it fosters bias and harmful stereotypes, but it does not use designations to stigmatize or offend. While, hate speech goes further than discriminatory speech, as the former uses epithets or symbols of scorn to defame on the basis of the characteristics of a specific group and it is more inclined to create emotional sorrows and to provoke visceral response.³⁰¹

In addition, Ghanea suggests a graduated scale of hate speech based on its hatred intensity, starting from the less intense there is: discriminatory speech, hate speech (as described in the aforementioned CERD General Recommendation), incitement to hatred (as mentioned under article 20 ICCPR), incitement to terrorism (as stated in Security Council Resolution 1624 'incitement to commit a terrorist act or acts')³⁰², and incitement to genocide (as stated in the Convention on the Prevention and Punishment of the Crime of Genocide, 'direct and public incitement to commit genocide'³⁰³).

An important step forward was made with the Rabat Plan of Action on the prohibition of advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence, which was adopted in Rabat in October 2012 and plays a pivotal role on the matter of defining where ends freedom of expression and begins incitement. The Plan managed to reach the goal of obtaining a consensus on how efficiently face the issue of 'incitement' and shaped a strategy to mark the line between freedom of expression and incitement.

Navi Pillay, UN High Commissioner for Human Rights, valued the difficult equilibrium between freedom of expression and protection from incitement as well, and affirmed that there are opposite opinions on the subject, some want tougher restrictions, whereas others believe that free speech ought to be near-absolute, stressing that such norms that limit freedom of expression are often misapplied by authorities to silence critics and dissent.

³⁰¹ David O. Brink, *Millian Principles, Freedom of Expression, and Hate Speech*, 7 *Legal Theory*, 2001, pp. 138-139.

³⁰² Security Council Resolution no. 1624, 2005 article 1 para. 1.

³⁰³ Convention on the Prevention and Punishment of the Crime of Genocide 1948, article 3 para. 8.

The Plan covers many issues, among others it examines such forms of speech that are banned by criminal laws. This process is reached by a test, which clearly has a high threshold for characterizing restrictions on freedom of expression, incitement to hatred and for the utilization of article 20 of the ICCPR. The test parameters are: 'the context of incitement to hatred, the speaker, the intent, the content, the extent of the speech, and the likelihood of causing harm'.³⁰⁴

The 6 parts are:

Context: which sets the speech in the social and political environment at the time such speech is delivered;

Speaker: considers which status or position within the society the hater holds;

Intent: which is requested under article 20, 'neglect' and 'imprudence' are not enough to apply article 20, which asks for 'advocacy' and 'incitement' rather than just widespread or distribution;

Content or Form: the content is a discriminating element of incitement. Studying the content may help to understand the degree to which the speech was a direct attack. At the same level, an analysis of the form, style, origin of the arguments can help finding the balance between argument and harsh offence;

Extent of the speech: this considers the magnitude and size of the speech and to which audience it is targeted;

Likelihood, including imminence: incitement is an incipient crime, which means that a violent action must not necessarily be committed for speech to become a crime, however, it has to be verified whether that speech was likely to lead to a violent action against a targeted group or not.

In the end, the Plan reaffirmed that freedom of expression has been getting ground and being recognized both internationally and nationally, however, its practical employment acknowledgment is not completely respected. In addition, international standards that prohibit racial and religious hatred still need to be greatly inserted in

³⁰⁴ Between Free Speech and Hate Speech: The Rabat Plan of Action, a practical tool to combat incitement to hatred. Available at <http://www.ohchr.org/EN/NewsEvents/Pages/TheRabatPlanofAction.aspx>, last accessed on 17.01.2016.

national legislations. This makes understand the toughness of outlining this concept in a way that respects freedom of expression.³⁰⁵

3.3 UNESCO's analysis of hate speech

Hate speech issue has become even more relevant since it has found a means of widespread on the internet and became viral. The United Nations Educational, Scientific and Cultural Organization (UNESCO), in charge of fostering freedom of expression, in 2015 released an accurate analysis of the online phenomenon of hate speech, 'Countering Online Hate Speech'.³⁰⁶ In this research, the UN agency provides this definition:

'Hate speech lies in a complex nexus with freedom of expression, individual, group and minority rights, as well as concepts of dignity, liberty and equality. Its definition is often contested. In national and international legislation, hate speech refers to expressions that advocate incitement to harm (particularly, discrimination, hostility or violence) based upon the target's being identified with a certain social or demographic group. It may include, but is not limited to, speech that advocates, threatens, or encourages violent acts. For some, however, the concept extends also to expressions that foster a climate of prejudice and intolerance on the assumption that this may fuel targeted discrimination, hostility and violent attacks.'³⁰⁷

The report sustains the position by which there should always be free circulation of information. And, in cases where limitations are required, counter-speech is preferable to the complete elimination of the statement. Still, clearly, it has to be deeply weighted and exceptional in character. As already analyzed, international law adopted norms to regulate speech that holds hatred. Internet as well is disciplined by a law framework, however it is difficult to outline and apply legal solutions to online hate speech. It is for this reason that UNESCO envisaged social responses to back State provisions. Anyhow, in this chapter I will not go through such social solutions, instead I will provide some information to make the concept of hate speech more clear.

³⁰⁵ Rabat Plan of Action on the prohibition of advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence.

³⁰⁶ UNESCO, Countering Online Hate Speech. Available at <http://unesdoc.unesco.org/images/0023/002332/233231e.pdf>, last accessed on 14.01.2016.

³⁰⁷ Countering Online Hate Speech, p. 12. Available at <http://unesdoc.unesco.org/images/0023/002332/233231e.pdf>, last accessed on 14.01.2016.

3.3.1 Online hate speech

Online hate speech is the keystone of many pressured issues, as it contains the conflicts between different groups within and across societies and cultures. It shows how technology through the means of internet can give birth to both opportunities and challenges. And, it encompasses the necessity of balancing between human rights, such as freedom of expression and the safeguard of human dignity.

According to UNESCO study, the definition of hate speech is extended in some cases to expressions that insult politicians or are depreciatory for other people. A single and clear denotation is not likely to be reached, however, a way to draw hate speech contours can be through its degrading and dehumanizing actions. According to Waldron, a form of speech that counts as hateful delivers two types of messages: to the recipient group and to the actions to dehumanize and diminish the members of the targeted group. An example of a written hate speech message can be,³⁰⁸

‘Don’t be fooled into thinking you are welcome here. [...] You are not wanted, and you and your families will be shunned, excluded, beaten, and driven out, whenever we can get away with it. We may have to keep a low profile right now. But don’t get too comfortable. [...] Be afraid’.³⁰⁹

Another important feature of hate speech is that it creates a sense of in-group between people that share the same hateful opinions. They want to create a sense of unanimity among haters to be able to spread the message in a more persuasive way. A clear example of it can be,³¹⁰

‘We know some of you agree that these people are not wanted here. We know that some of you feel that they are dirty (or dangerous or criminal or terrorist). Know now that you are not alone. [...] There are enough of us around to make sure these people are not welcome. There are enough of us around to draw attention to what these people are really like’.³¹¹

³⁰⁸ Countering Online Hate Speech, p. 10.

³⁰⁹ J. WALDRON. The Harm in Hate Speech. Harvard University Press, Boston, 2012.

³¹⁰ Countering Online Hate Speech, p. 10.

³¹¹ J. WALDRON. The Harm in Hate Speech. Harvard University Press, Boston, 2012.

Hate speech works on already existing anxieties to exacerbate them, with the goal of strengthening the division between 'us' and 'them'. It concerns hostility among people. The UNESCO research underlines that the hugest quantity of discrimination is in areas of the world where the rate of connectivity is higher.³¹²

The study has outlined that there is an ongoing debate on hate speech. According to it, hate speech issue has been questioning the pillars on which most of world's societies lie. Any society then has elaborated its own reaction to hate speech trying to find an equilibrium between freedom of expression and respect for human equality and dignity. What has emerged is the glaring difference between the European and American approach on hate speech regulation. American tolerance threshold of free speech goes well beyond the European one, as it relies on the 'clear and present danger', criterion necessary to verify and correct or eliminate any form of disagreeable speech. On the other side on the Atlantic, hate speech regulation is much more strict, as, for instance, in France or Germany not only some forms of expression are eliminated as considered likely to create some sort of injury, but also for holding inherent content.

Due to its broadness, hate speech has been target of manipulation and extension as well. In fact, sometimes it is considered related to 'dangerous speech' and 'fear speech'. Yet, they are different concepts. Hate speech can be found in every society, whereas 'dangerous speech' refers to remote acts that are likely to exacerbate violence escalation between two groups. Conversely, 'fear speech' is an expression recently created to determine such forms of speech that are likely to incite violent actions to defend groups' safety and integrity. In studies on mass atrocities, the concept of 'fear speech' is a sign that helps to understand when violence is about to break out.³¹³

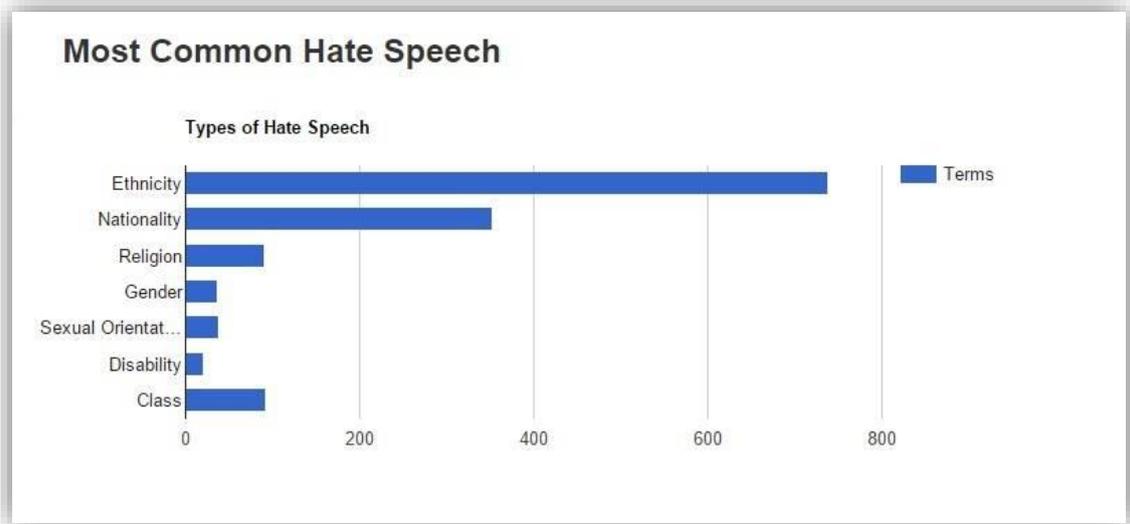
The following focus will be on the differences between hate speech online and offline and non technological means of communications.

As defined by Ms. Rita Izsàk, United Nations Human Rights Council Special Rapporteur on Minority Issues in 2015, the increase of online hate speech creates a

³¹² Countering Online Hate Speech, p. 11.

³¹³ Ibid., p. 11-12.

new set of challenges. Even if there are not yet statistics offering a global overview of the phenomenon, it is possible to affirm that hate based messages launched online are increasing, with consequent adequate responses.³¹⁴



According to HateBase,³¹⁵ an online organization that analyzes hate speech trends, the major discriminating targets are about ethnicity and nationality, as the graph above shows, however, religion is an increasing value as well.

Hate speech online is different from offline, hence legal provisions that work for other media result unsuitable in online circumstances. The main bases on which online and offline hate speech lie are extremely different. For instance, issues that can only belong to the former are, the misunderstanding due to which a simple tirade written on a social network can be interpreted as an imminent threat and part of an organized and systematic campaign to spread hatred. Or, the great difference between a post that receives completely no attention and another that goes viral. In addition, the difficulties to regulate a social platform increase when such company is located in a different country. Consequently, even if the content of online and offline hate speech

³¹⁴ UN Human Rights Council Special Rapporteur on Minority Issues in 2015.

³¹⁵ HateBase, Most Common Hate Speech. Available at <http://www.hatebase.org/popular>, last accessed on 15.01.2016.

is sometimes the same, the means by which it is widespread is completely different. This difference is evident in many passages, the most important is that offline hate speech is well regulated and can be restricted by the law, whereas, online cannot yet.

Moreover, online hate speech can remain online and be visible and go viral for a long period, in different formats and across various channels.³¹⁶ As the CEO of the Online Hate Prevention Institute has said,³¹⁷ 'The longer the content stays available, the more damage it can inflict on the victims and empower the perpetrators. If you remove the content at an early stage you can limit the exposure. This is just like cleaning litter, it doesn't stop people from littering but if you do not take care of the problem it just piles up and further exacerbates'.³¹⁸

From the UNESCO survey, it emerges that hate speech can be itinerant as well. In fact, even if messages are eliminated, their content can be found in other platforms, in different conformations. As if a website is closed due to the messages it spreads, it can easily be online again using a web-hosting service with more flexible rules or reallocating it in a country where internet laws on hate speech are more tolerant. This itinerant feature of hate speech also implies that, ancient opinions that did not find fame during their time can be launched on the internet platform and spread, thanks to globalization.

Another feature of online hate speech is anonymity.³¹⁹ As Drew Boyd, Director of Operations at The Sentinel Project³²⁰ affirmed, Internet seems to allow people to say whatever they want, because they think they will not be caught. This is the main feature of online hate speech, as it is more comfortable insulting sitting in front of the computer, than facing the enemy and dealing with the consequences. In addition, most of hate speech strikes come from pseudonymous accounts. Using pseudonymity is the other strategy with anonymity through which internet users hide their identities. Another huge issue is the transnational and universal reach of the net, which gives voice to those suggesting a cross-juridical co-operation to create legal mechanism to

³¹⁶ Countering Online Hate Speech, p. 13.

³¹⁷ The Online Hate Prevention Institute. Available at <http://ohpi.org.au/>, last accessed on 15.01.2016.

³¹⁸ Interview to Andre Oboler, CEO, Online Hate Prevention Institute, 31 October 2014.

³¹⁹ Countering Online Hate Speech, p. 14.

³²⁰ The Sentinel Project. Available at <https://thesentinelproject.org/>, last accessed on 15.01.2016.

control hate speech. There already exist Mutual Legal Assistance treaties among countries, however they are very slow in solving problems.

In spreading hateful messages individuals commit a series of crime: they harass their victims, they infringe terms of service of a certain company and sometimes even the law. On their side, the victims feel weak for having received the hassle and for not knowing the source.³²¹

The last provided expert viewpoint on the concept of hate speech is of Matuma Ruteere, Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia, and related intolerance presented to the Human Rights Council a report on racism, radical discrimination, xenophobia and related forms of intolerance.

In May 2014, the expert focused on the unimaginable fast development of the new information and technology system, that is making of Internet and social media dangerous means of dissemination of racist and xenophobic messages, apt to provoke racial hatred and violence. The Special Rapporteur focused his report on the analysis of the connection between Internet and racism, going through the most relevant tendencies in the use of the net to widespread racism, racial hatred, xenophobia, racial discrimination and forms of intolerance. According to him, one of the most evident disadvantages that Internet has brought is the fact that it furnishes a stage to racist and hateful movements.³²²

Abraham Foxman and Christopher Wolf, have recently expressed their opinions about how racism, xenophobia and hate behave on the net:

‘Today there are powerful new tools for spreading lies, fomenting hatred, and encouraging violence. [...] The openness and wide availability of the internet that we celebrate has sadly allowed it to become a powerful and virulent platform not just for anti-Semitism but for many forms of hatred that are directly linked to growing online incivility, to the marginalization and targeting of minorities, to the spread of falsehoods that threaten to mislead a generation of young people, to political polarization, and to real-world violence’.³²³

³²¹ Countering Online Hate Speech, p. 14-15.

³²² Human Rights Council, Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia, and related intolerance, 2014.

³²³ Abraham H. Foxman and Christopher Wolf, *Viral Hate: Containing its Spread on the Internet*, New York, Palgrave Macmillan, 2013.

The expert continued affirming that there is the growing use of electronic devices to propagate racist and xenophobic information and to foster racial hatred and violence. Especially right-wing extremist groups and racist movements serve themselves with Internet for their transborder communications and transfer of racist materials. Extremists' hate sites have been improving with the evolution of technology.

Ruteere with concern affirms that the use of the net and social media by organizations of extremists and individuals is becoming much more frequent to disseminate racist ideas and to generate racism, racial discrimination, xenophobia and intolerance in general. This great issue has been concerning States, non-governmental organizations, internet companies and social media as well. One of the worst consequences of the continuous diffusion of hatred material on the net is the fact that the more people read and see information carrying hate, the more they get used to it and acknowledge these facts and their underlining ideas as normal and mainstream.³²⁴

3.3.2 Terrorism and hate speech

An issue that nowadays is creating concern to all international community is terrorist groups' use of Internet. Along with the improvement of new technologies, internet has been used as a means through which disseminating racist ideas and hate speech covered by the supposed anonymity deceptively given by online platforms. The Special Rapporteur expressed his concern on the fact that some extremist groups could have spread their activity online and take advantage of social media networks to express their ideals and propaganda knowing that they would not be caught. He affirms that not only the activity of such groups is harmful, but it is necessary to gain the control on those individuals that cooperate with them in spreading hatred and enlarging their net. In fact, apart from spreading their ideas and foster racial violence, terrorists use internet social platforms to recruit their crew. The net and social media platforms can legitimize extremists' organisations making them believe that their hateful messages and ideas are shared by a huge amount of people. This excuse of their opinions gives them the confidence to perpetrate hate crimes in the real world.

³²⁴ Human Rights Council, Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia, and related intolerance, 2014.

Through this path, racism and hate pass from the virtual to reality causing an incommensurate damage on targeted groups.³²⁵

3.3.3 Greece Minority and hate speech

An interesting focus on hate speech was made by Human Rights Council Forum on Minority Issues in its session on 25th and 26th November 2014. The centre of the attention of the meeting was hate speech and hate motivated crimes against Muslims Turkish Minority in Greece.

They provide a definition of hate crimes as such crimes that haters commit depending on victims background or features. In many cases, the perpetrators are fossilized in prejudices that they have been acknowledged through history. One of the mechanism that plays a very important role in the oppressors' mindset is the difference between 'us' and 'the others'.

Two different synonymous of hate speech have been outlined, they vary depending on the context: 'politically motivated violence' or 'right or left extremism'. Whoever the victims are, the State has the duty to prevent and defend citizens from hatred and violent attacks.

This paper made reference to a specific circumstance happening in Greece where the State was making oppressing and discriminating polices and media providers were delivering news with provocative articles victimizing the Muslim Turkish Minority of Western Thrace. Migrants and other people that did not belong to Greek Orthodox were as well victims of the same discrimination. Although the Greek Government took some actions and strengthened anti-racism laws, some issued remained untouched. As the cabinet complains that not only perpetrators are victims of prejudices, but also politicians and law-makers are. Such hate based crimes lie at the bases of damaging and irritating murals and slogans and some religious incidents.³²⁶

³²⁵ Report of the Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance on the implementation of General Assembly resolution 68/150, 2014.

³²⁶ Hate-Speech and Hate-Motivated Crimes against Muslim Turkish Minority-Greece. The Role of the State Authorities and Media. Available at <http://www.ohchr.org/Documents/HRBodies/HRCouncil/MinorityIssues/Session7/Item3/Participants/Western%20Thrace%20Minority%20University%20Graduates%20Association.doc>, last accessed on 19.01.2016.

3.3.4 Lesbian, Gay, Bisexual, Transgender and Intersexual discrimination

An issue that is becoming more relevant in nowadays society is the Lesbian, Gay, Bisexual, Transgender and Intersexual (LGBTI) discrimination. Human rights are intrinsic to every human being and human beings are entitled not to be discriminated regardless their nationality, place of residence, sex, national or ethnic origin, colour, religion, language or status, such as age, disability, health conditions, sexual orientation or gender identity. States, when decide to become members of human rights treaties, have some obligations to fulfil, they have to respect and not to impede citizens enjoyment of human rights. They hold the duty of defending people against human rights abuses from third parties.

Clearly, discriminate lesbian, gay, bisexual, transgender or intersex people are against the law.³²⁷ As the Universal Declaration on Human Rights says: 'All human beings are born free and equal in dignity and rights'.³²⁸ Equality and non-discrimination have to be applied to all regardless of sex, sexual orientation, gender identity or any other status. United Nations human rights agreements confirm that sexual orientation and gender identity are part of the banned ground of discrimination under international human rights law. This means that any differentiation in citizens' rights based on their sexual gender must be considered against the law and punished.

This position has been underlined many times by United Nations treaty bodies and Committees, such as Nations Human Rights Committee, the Committee on Economic, Social and Cultural Rights, the Committee on the Rights of the Child, the Committee against Torture, and the Committee on the Elimination of Discrimination against Women.

There are some forms of violence perpetrated on LGBTI people, the reported are: violent attacks due to assertive verbal abuses and psychological bullying, physical aggressions, beatings, tortures, kidnapping and targeted murders. Then, discriminatory criminal norms, used against LGBTI people to harass them; and curbing their free

³²⁷ International Human Rights Law and Sexual Orientation & Gender Identity. Available at https://www.unfe.org/system/unfe-6-UN_Fact_Sheets_v6_-_International_Human_Rights_Law_and_Sexual_Orientation_Gender_Identity.pdf, last accessed on 20.01.2016.

³²⁸ Universal Declaration of Human Rights, 1948, article 1.

speech and prohibiting them to free associate and assembly, including provision to ban the so-called 'LGBTI propaganda'.

UN General Assembly in many Resolutions has expressed its great concern about violence and discrimination against persons due to their sexual orientation and gender identity. There are many steps to be undertaken to safeguard and protect LGBTI people, such as impede homophobic and transphobic violence and halt torture, cruel, inhuman and degrading treatment. Governments have to decree hate crimes provisions to dampen violent acts against individuals based on their sexual orientation. Then, they have to create an efficient mechanism of reporting hate motivated crimes, which encompasses an adequate investigation method and prosecution of perpetrators, managing to punish haters. Furthermore, there is the high necessity of think and educate, promote a culture of equality and diversity to prevent any future form of discrimination based on hate against lesbian, gay, bisexual, transgender and intersexual people.³²⁹

3.4 UN Treaty Based Bodies Quasi-Jurisprudence

After having outlined the contours of hate speech and having provided some concrete examples as well, I will now move to the second part of this chapter where I will examine which kind of expressions have been considered carrying hate. In doing so, I will take into consideration Human Rights Committee Quasi Jurisprudence first and then I will move to the regional level case law.

3.4.1 Quasi-Jurisprudence

The Human Rights Committee is a human rights treaty body expressly designed to control the implementation of the International Convention on Civil and Political Rights. Those States that ratified its First Optional Protocol, agreed to allow individual under their jurisdiction to submit their complaint, about a State violation of the Covenant, to the Committee. In such form the Committee is entitled to express its opinion on individual complaint and repair to the State abuse. The Committee is not

³²⁹ International Human Rights Law and Sexual Orientation & Gender Identity.

allowed to emanate judgments legally binding, but decision, which carry a high moral value. This can be defined as quasi-jurisprudence.³³⁰

The Human Rights Committee is the UN body in charge of verifying whether and how Member States implement the International Covenant on Civil and Political Rights. It can evaluate individual complaints and it expresses its opinions in numerous cases, some of which will be presented hereafter.

3.4.2 Cases Analysis

The first case to be analysed is *Kashif Ahmad versus Denmark*, decided by the UN Committee on the Elimination of Racial Discrimination in 2000.³³¹

The case was set in June 1998 at the Avedore Gymnasium, Hvidovre. The petitioner and his brother were waiting for a friend outside his classroom with a video camera, while he was finishing his exam. They were making some noise and the teacher asked them to leave. The two refused and the head of the teachers called the police, alluding to them as 'a bunch of monkeys'. When the petitioner affirmed his intention to complain, the head teacher answered that the brothers were just 'a bunch of monkeys, who could not express themselves correctly'. The police ensured the applicant to have a discussion with the teacher.³³²

Later, the teacher was contacted by the lawyer of the two brothers, asserting that his form of expression was a violation of s. 266 paragraph b of the Danish Penal Code. The teacher explained his position asserting that the petitioner was in a noisy attitude during the exams, but he did not deny the fact of having used racist expressions.³³³

On July 1998 the lawyer made a rapport to the police, where, among other things, asked the police to make an interview to the teacher. The police interviewed the teacher the following month and declared that his statement was outside the s. 266 paragraph b and thus the case would be ceased. The counsel appealed the police

³³⁰ ABC delle Nazioni Unite, traduzione Daniele Amoroso, editoriale scientifica Napoli, 2012, p. 244.

³³¹ Human Rights Committee, *Kashif Ahmad versus Denmark*, opinion no. 16/1999 of 13.03.2000.

³³² *Ibid.*, para. 2.1.

³³³ *Ibid.*, para. 2.3.

to transfer the case to the State Attorney that, in the end, supported the decision of the police.³³⁴

The international provisions taken into consideration in this case were all part of the International Convention on the Elimination of all Forms of Racial Discrimination, respectively article 2 paragraph 1 d, under which every State party ought to forbid and cease any form of racial discrimination; article 4, under which Member States condemn all propaganda and all ideas based on the superiority of the race and article 6, which deals with effective protection and remedies.³³⁵

As far as the petitioner's opinions are concerned, he claimed that the case had not been accurately analyzed by the domestic authorities and he never obtained the deserved apology. He insisted as well that to conduct a carefully investigation, the police should have deeply interviewed the applicant himself and the witnesses.³³⁶

On its side, the State affirmed that in a statement that the teacher presented, there was a different version of the facts. In fact, there was written that the expression 'monkeys' had been used as slang to intend a group of people showing an inappropriate behaviour and did not have the intention to mention any race, religion or ethnic question.

The State submitted that the investigation was conducted in accordance with the parameters of the Convention. The police based their analysis on the details driven by the petitioner, the teacher and the headmaster. There was no need to decide whether the statements were actually made as they would not have been defined as criminal under s. 266 paragraph b.³³⁷

In the end, the Committee considered the communication admissible and sustained that there had been a violation of the International Convention on the

³³⁴ Ibid., para. 2.4-2.7.

³³⁵ International Convention on the Elimination of all Forms of Racial Discrimination, article 2 para. 1; article 4 and 6.

³³⁶ Human Rights Committee, Kashif Ahmad versus Denmark, opinion 16/1999 of 13.03.2000, para. 3.1-3.2.

³³⁷ Ibid., para. 4.5-4.6, 4.14.

Elimination of all Forms of Racial Discrimination. In fact, the teacher did not deny of having used the word 'monkey' and in presence of witnesses. This clearly makes of the case a public offence for the applicant. Moreover, the State party did not investigate sufficiently to determine whether the petitioner had been insulted on the basis of race, which guilt could have been easily found with a more detailed examination of the police.

The Committee acknowledged that people had already been condemned by the Danish courts for s. 266 paragraph b infringements for injurious statements similar to those said by the professors. Furthermore, the petitioner had been denied the opportunity to determine whether his rights had been breached and thus he had been denied effective protection against racial discrimination and related remedies. Hence, it concluded that there had been a violation of article 6 of the Convention.³³⁸

Another case was the *Jewish Community of Oslo versus Norway*. The Committee on the Elimination of Racial Discrimination on the Meeting on 15 August 2005 adopted the following views.³³⁹

The leader of the Jewish community of Oslo, of Trondheim and of the Norwegian Antiracist Centre (NAC) that claimed to be victims of violations by Norway of Article 4 and Article 6 of the Convention on the Elimination of all forms of Racial Discrimination.³⁴⁰

In August 2000 the group Bootboys manifested with a march in honour of Rudolf Hess. The leader of the group, Sjolie, delivered a speech praising Adolf Hitler and Rudolf Hess, mentioning 'Bolshevism and Jewry', the 'robbing, rape and killing of Norwegians by immigrants' and the 'daily plundering and destruction of the country of Jews'. He asked for a 'Norway built on National Socialism'. This speech was followed by a minute's silence to honour Hess and the audience made the Nazi salute shouting 'Sieg Heil'.³⁴¹

³³⁸ Ibid., para. 6.1, 6.2, 8, 9.

³³⁹ Human Rights Committee, *Jewish Community of Oslo versus Norway*, opinion 30/2003 of 15.05.2005.

³⁴⁰ Ibid., para. 1.

³⁴¹ Ibid., para. 2.1, 2.2.

In February 2001, Sjolie was charged with the accusation of violating s. 135 paragraph a of the Norwegian Penal Code by the District Attorney of Oslo. The following March he was absolved by the Halden City Court.

The petitioners' lawyer successfully appealed to the Borgarting Court of Appeal. Sjolie appealed to the Supreme Court which, in December 2002 reversed the condemnation by majority decision.³⁴²

The international norms used to examine this case were article 4 and 6 of the International Convention on the Elimination of all Forms of Racial Discrimination and article 20 of the International Convention on Civil and Political Rights, which entitles any contracting State to stop advocacy of national, racial or religious form of hatred.³⁴³

The applicant affirmed that the decision of the Supreme Court was without appeal and this made national remedies unavailable. They claimed that Norway breached article 4 and 6 of the CERD as the Supreme Court eliminated the protection against the dissemination of ideas of racial, hatred and incitement to violence. Hence, the Supreme Court decision stood as a precedent and Nazi attitude and propaganda cannot be prosecuted. From this derived the impossibility of Norwegian law to safeguard people from the widespread of racist propaganda and incitement to racial discrimination, hatred and violence.³⁴⁴

The state complained that the applicants did not exhausted national remedies and did not recognize them as 'victims' under article 14 paragraph 1 of the CERD. Then, the State contested that the applicant claim, according to which, this led to the inability of Norwegian law to protect people against the dissemination of racist propaganda and incitement to racial discrimination, hatred and violence victimises them.³⁴⁵

³⁴² Ibid., para. 2.6-2.7.

³⁴³ Ibid., para. 3.1.

³⁴⁴ Ibid., para. 3.1, 2.8.

³⁴⁵ Ibid., para. 4.5.

The Committee recognized a violation of article 4 and 6 of the CERD. It elucidated that the petition had to be analysed on the basis of the facts as they appeared at the material time, irrespective of following changes in the law.³⁴⁶

The Committee deeply studied the Supreme Court decision and reasoned that Sjolie forms of expression carried racial superiority and hatred, the praising of Hitler and his followers must be considered at least incitement to racial discrimination, if not to violence. Such statements were clearly injurious and evidently not protected by the 'due regard clause' of article 4 CERD and as well his absolution declared by the Supreme Court.³⁴⁷

This case involves *Hassan Gelle versus Denmark*. The Committee on the Elimination of Racial Discrimination during its meeting on 6th March 2006 adopted the following views.³⁴⁸

On 2nd February 2003 the newspaper *Kristeligt Dagblad* published a letter to the editor written by Pia Kjærsgaard, a Member of the Danish Parliament (*Folketinget*) and leader of the Danish People's Party (*Dansk Folkeparti*). The letter had as a title: 'A crime against humanity'. It was about a discussion of the Minister of Justice on a proposed bill and was subject to objectivity complaints. The question was about why the Danish-Somali Association should have any opinion on the legislation on a crime committed by Somalis. 'Why should the Danish-Somali Association have any influence on legislation concerning a crime mainly committed by Somalis?' To this matter was given emphasis with the comparison to consulting paedophiles in writing a bill about child sex or rapists about rape.³⁴⁹

The applicant felt the Somalis compared to paedophiles and rapists as a direct offend. The Documentation and Advisory Centre on Racial Discrimination (DRC) reported the fact to the Copenhagen police, claiming that it consisted in a breach of s. 266 of the Criminal Code.

The police did not open a case, considering that it was not an offence.³⁵⁰

³⁴⁶ Ibid., para. 9.2.

³⁴⁷ Ibid., 10.4, 11.

³⁴⁸ Human Rights Committee, *Hassan Gelle versus Denmark*, opinion 34/2004 of 02.02.2003.

³⁴⁹ Ibid., para. 2.1.

³⁵⁰ Ibid., para. 2.2, 2.3.

Afterwards, the DRC appealed to the Regional Public Prosecutor (RPP) who affirmed that the infamous statements did not affirm that Somalis were criminals or equated them to paedophiles and rapists, only argued that the Somali association should not have been consulted in the drafting of a bill criminalising such offensive actions made in Denmark by Somali people. Somali have been compared to paedophiles and rapists as concerns the reasonableness of allowing them to expression their opinions on laws that directly affect them directly, and not as concerns their criminal behaviour. It added that such statements were pronounced by a Member of Parliament during a political debate, which allows wider limits of expression to stress a specific political view.

Such decision was not subject to appeal considering s. 102 paragraph 2 of the Administration of Justice Act.³⁵¹

The International norms that concern this case are article 14 and 2 of the CERD, which expressively refer to article 14: the competence of the Committee to receive and consider the communications and article 2: contracting States ban and eliminate all forms of racial discrimination.³⁵²

The applicant claimed the RPP's statement according to which Members of Parliament enjoy an 'extended right to freedom of speech' during political debates, as this was not in agreement with the Criminal Code. He argued that he had exhausted all available affective remedies of criminal action. He added that those remedies of direct civil action would be useless due to the dismissal of his criminal complaint and of an earlier sentence of the Eastern High Court, affirming that an incident of racial discrimination does not on its own constitutes an infringement of the honour and reputation of a person under Torts Act.³⁵³

The State claimed that the applicant did not successfully establish a *prima facie* case of admissibility, because the letter did not compare the Somalis with paedophiles or rapists, but it reflected the criticism toward the Ministry idea of involving the Somali

³⁵¹ Ibid., para. 2.4.

³⁵² International Convention on the Elimination of all Forms of Racial Discrimination, article 2 and 14.

³⁵³ Human Rights Committee, Denmark versus Hassan Gelle, opinion 34/2004 of 02.02.2003, para. 3.2, 3.3, 3.5.

association in the adoption of the Bill. Thus, the letter was considered as non-discriminatory and not concerning the Convention.³⁵⁴

Later on the State complained that the applicant did not exhausted all domestic remedies, as Danish Constitution foresees that decisions of administrative authorities are challengeable before the courts.

In the end, the State insisted on the fact that in the letter there was no racist content, as they were pronounced by a Member of the Parliament during a political debate, thus considered immaterial.³⁵⁵

The petitioner answered to the State that from the title of the letter it was clear the accusation against Somalis living in Denmark and practising illicit practises to women, and this was crystal clear to the police. In addition, questioning the decision of the RPP judicially is not an effective remedy, as the limits to submit proceedings under Criminal Court would have expired before the courts referred the matter back to the police.³⁵⁶

As far as the admissibility is concerned, the Committee proclaimed the petition admissible, as it evaluated the statements offensive and thus covered by the Convention. It added that the juridical review of the RPP's decision would not be an effective remedy due to its delay. Then, it would be illogical for the applicant to begin separate proceedings provided by the general provision of s. 267, after having failed s. 266. In the end, a civil action would not have led to achieve condemnation by a criminal tribunal, which was the purpose of the applicant's complaint to the police and to the RPP.³⁵⁷

As far as the merits are concerned, the Committee resolved that the Convention had been violated. It considered that the rough investigation on the petitioner's complaint breached his right to be protected against the reported acts of racial discrimination. Hence, the State ought to confer a satisfactory indemnity for the moral injury caused due to the violation of the Convention.³⁵⁸

³⁵⁴ Ibid., para. 4.2, 4.3, 4.5.

³⁵⁵ Ibid., para. 5.2.

³⁵⁶ Ibid., para. 2.4.

³⁵⁷ Ibid., para. 6.2, 6.5.

³⁵⁸ Ibid., para. 9.

The Committee concluded affirming that the letter could be felt as humiliating and disrespectful to Somali origin people, due to their origin and not their views, opinions or actions. The equation with 'paedophile' and 'rapists' were considered offensive by the applicant and acknowledged as such by the police. The Committee concluded underlining that statements pronounced during a political debate are not free from being investigated, especially if they carry racial discrimination.³⁵⁹

The last analysed case regards *Irina Fedotova versus Russian Federation*. The views were taken by the Human Rights Committee on 31st October 2012.³⁶⁰

The petitioner is an openly lesbian woman and activist in the lesbian, gay, bisexual and transgender (LGBT) field in the Russian Federation. On 30th March 2009 she was engaged in activities to promote and raise awareness on the topic of tolerance towards LGBT people, which are still discriminated by the Russian Federation. She was carrying signs with statements such as: 'Homosexuality is normal' and 'I am proud of my homosexuality' near a school in Ryazan. Her manifestation was stopped by the police and on 6th April 2009 she was condemned by the justice of the peace of an administrative offence under section 3.10 of the Ryazan Region Law, which regulates 'public actions aimed at the propaganda of homosexuality' and fined 1,500 Russian Roubles.³⁶¹

She appealed to the Oktyabrsky District Court of Ryazan (Oktyabrsky Court), and in addition to considering the decision as void, she requested the estimation of the compatibility of section 3.10 of the Ryazan Region Law with Articles 19, 29, and 55 of the Constitution. Articles 19 and 29 respectively ban discrimination based on social status and guarantee the right to freedom of thought and expression, while article 55 permits the restriction of rights hallowed in the Constitution by a federal law.³⁶²

On 14 May 2009, the decision of the justice of peace was supported by the federal judge of the Oktyabrsky Court, who considered the Code of Administrative

³⁵⁹ Ibid., para. 7.4.

³⁶⁰ Human Rights Committee, *Fedotova versus Russia Federation*, 2010, Communication No. 1932/2010 of 13.10.2012.

³⁶¹ Ibid., para. 2.1-2.3.

³⁶² Ibid., para. 2.4, 2.5.

Offence (the Code) as federal law. Hence, it was deemed lawful to restrict constitutional values to safeguard the milestones of the constitutional order, public morals, health or the rights and lawful interests of others. The petitioner and two other individuals appealed to the Constitutional Court which rejected her appeal on the fact that a banish of propaganda of homosexuality is necessary to prevent: 'Intentional and uncontrolled dissemination of information capable of harming health, morals and spiritual development, as well as forming perverted conceptions about equal social values of traditional and non traditional family relations ...'³⁶³

After this decision, the applicant decide for an individual objection to the Human Rights Committee against the Russian Federation with the claim that both ICCPR Articles 19, freedom of expression and 26, equality before law articles of the have been breached.³⁶⁴

The international norms involved in this case are the aforementioned two articles, and article 3, according to which Member States have to guarantee equal rights to all men and women and article 5 paragraph 2, the Committee can accept a communication from an individual only if the application has not been already analysed by another international investigation system and the applicant has exhausted all the domestic remedies, both of the Optional Protocol of the ICCPR.³⁶⁵

The petitioner argued that the decision of 6th April 2009 breaches articles 19 and 26 of the ICCPR. Namely, she argued that Article 19 was violated by Section 3.10 of the Ryazan Region Law which forbids her from spreading ideas of respect towards sexual minorities. According to the petitioner, these limitations could have been excused only if 'provided by law' and 'necessary' as stated in article 19 paragraph of the ICCPR. In addition, considering the Russian Constitution, freedom of expression can be limited by a federal law and the Ryazan Region Law is not. She added that a constraint that is not required under article 19 paragraph 3 of the ICCPR would not be lawful, and considering that objective was obtaining the respect for homosexuality, her free expression in this case could not be legally annulled.³⁶⁶

³⁶³ Ibid., para. 2.6, 5.5.

³⁶⁴ Ibid., para. 3.7.

³⁶⁵ First Optional Protocol of the International Convention on Human Rights, 1976.

³⁶⁶ Ibid., para. 3.1-3.3.

In the end, the petitioner affirmed that article 26 of the ICCPR was breach as well because the Ryazan Region Law de facto forbids sharing of any kind of information regarding homosexuality in general, however it does not forbids sharing of information regarding heterosexuality or heterosexual behaviour.³⁶⁷

The answer that the Russian Federation gave to all the applicant's complaints was that Fedotova did not exhaust all available domestic remedies and that an appeal to the Supreme Court of the Ryazan Region and eventually to the Supreme Court of the Russian Federation could have been blocked.³⁶⁸

The Committee considered admissible the complaint of the petitioner. Then, it analysed whether or not section 3.10 of the Ryazan Region Law was a lawful restriction as stated under article 19 paragraph 3 of the ICCPR.³⁶⁹

In interpreting article 19, the first step is to understand whether there has been any restriction according to paragraph 2. In the Fedotova case the Committee found the wording in the Ryazan Law related to 'homosexuality' in an ambiguous way, as it is unclear whether it 'refers to one's sexual identity or sexual activity or both'. Despite this, there was 'no doubt' for the Committee that right of freedom of expression of the applicant has been breached.³⁷⁰

The second step is to verify whether or not such limitation can be applicable. To verify it the test 'provided by the law' and 'be necessary' has to be implemented, i.e. for the respect of the rights or reputations of others; and for the protection of national security or of public order, or of public health or morals.³⁷¹

The Committee concluded it was not valuable to understand whether or not the Ryazan Region Law was to be deemed as a federal law, thus allowing restriction, or not. As,; 'Laws restricting the rights enumerated in article 19(2), must not only comply with the strict requirement of article 19(3) of the Covenant, but must also themselves be compatible with the provisions, aims and objectives of the Covenant, including the non-discrimination provisions of the Covenant'.³⁷²

³⁶⁷ Ibid., para. 3.6.

³⁶⁸ Ibid., para. 4.1.

³⁶⁹ Ibid., para. 9.3.

³⁷⁰ Ibid., para. 10.2.

³⁷¹ Ibid., para. 10.3, 10.4.

³⁷² Ibid., para. 10.4.

In this respect every restriction must be encompassed in the framework of the universal human rights and the principle of non discrimination. In the Fedotova case section 3.10 of the Ryazan Region Law establishes administrative responsibility for “public actions aimed at propaganda of homosexuality” as opposed to propaganda of heterosexuality or sexuality generally – among minors. The Committee affirmed that the prohibition against discrimination under article 26 holds as well for discrimination based on sexual orientation.³⁷³

The Committee added to its conclusion that adopting a different treatment would be considered as a form of discrimination in accordance with article 26 of the Covenant, unless it possesses ‘reasonable’ and ‘objective’ bases, ‘in the pursuit of an aim that is legitimate under the Covenant’. In this case, the Russian Federation was not able to present well-grounded justifications based on ‘reasonable’ and ‘objective’ criteria for the constraint of propaganda on homosexuality while allowing propaganda on heterosexuality or sexuality in general.³⁷⁴

3.5 Regional level case law on hate speech

In this section I will outline how regional mechanisms instituted to defend human rights have judged the forms of hate speech in the cases they have analyze. The courts’ jurisprudence will be analyzed in the following order. European Court of Human Rights, Inter-American Court of Human Rights and a parenthesis will be made on United States Supreme Court as well.

3.5.1 European Court of Human Rights case law

When the Court has to examine cases involving freedom of expression, it applies two criteria. The first is based on article 17 and requires the exclusion from the protection of the Convention when the form of expression is guilty of carrying hate or undermining the fundamental values of the Convention. While the second set limitations to protection. These are required by article 10 paragraph 2. In such cases, even if it is hate speech, it does not destroy the milestone values of the Convention.³⁷⁵

³⁷³ Ibid., para. 10.5.

³⁷⁴ Ibid., para. 10.6.

³⁷⁵ European Convention on Human Rights, articles 17 and 10.2.

Corresponding with the two criteria the Court case law can be divided into two parts: cases excluded from the protection of the Convention and restrictions on the protection afforded by article 10 of the Convention.³⁷⁶

3.5.1.1 Exclusion from the protection of the Covenant

The first case to be analyzed is about ethnic hate and involves *Pavel Ivanov versus Russia*.³⁷⁷ The applicant was accused of public incitement to ethnic, racial and religious hatred spread through the newspaper of which he was owner and editor. He wrote some articles that pictured the Jews as the fount of evil in Russia and asked for their relegation from social life. He held responsible Jewish people of being drawing a secret plan against Russian population and accused the Jewish leadership of having a Fascist programme. Not only in his articles, but also under trial he negated to the Jews the right to national dignity, asserting that they do not form a nation. Furthermore, he claimed that his conviction for incitement to racial hatred had not being justified.³⁷⁸

On 20th February 2007, the Court found the application inadmissible, due to its *ratione materiae*. It recognized the anti-Semitic view of Ivanov and assessed with the evaluation made by the domestic courts, which affirmed that in his pieces of writings lied the intention of inciting hatred against Jewish people. This kind of attack is not only directed to the targeted victims, but affects the values of the tolerance, social peace and non-discrimination of the Convention as well. The Court concluded that, according to article 17, the applicant did not gain the protection of article 10.³⁷⁹

As far as negationism and revisionism are concerned, the Court had to judge on 24th June 2003 the case *Garaudy versus France*.³⁸⁰ The applicant is the author of the book *The Founding Myths of Modern Israel*, who had been charged with the accusation of questioning the existence of crimes against humanity, public denigration of a community of people and incitement to racial hatred, against a Jewish group. He went

³⁷⁶ European Court of Human Rights, Factsheet on Hate Speech, 11.2015.

³⁷⁷ Eur. Court HR, Pavel Ivanov versus Russia, decision on the admissibility of 20.02.2007, application number 35222/04.

³⁷⁸ Ibid., the facts pp. 1-3.

³⁷⁹ Ibid., the law pp. 3-4 para. 1.

³⁸⁰ Eur. Court HR, Garaudy versus France, decision on the admissibility of 24.06.2003, application number 65831/01.

in front of the European Court claiming a violation of his right to freedom of expression.³⁸¹

The Court evaluated the application unacceptable as considered the applicant's remark on Holocaust denial and underlined that rejecting crimes against humanity and incitement to hatred were among the sharpest racial discrimination of Jewish population.

The Court added that questioning the subsistence of universally recognized historical events cannot be a matter of historical or scientific research, hence it considered such attitude unlawful. However, Garaudy real aim was to re-establish the National Socialist regime and accused the victims of distorting history.³⁸²

The Court valued such behaviour in contrast with the fundamental values of the Convention, hence the Court applied article 17 and the applicant could not be protected by article 10.³⁸³

Continuing on the issue of negationism, another relevant case concerns M'Bala M'Bala.³⁸⁴ The petitioner is a comedian involved in political activities, who has been condemned due to his behaviour while performing on stage. He was charged with the accusation of having accused in public a group of people due to their 'origins or to their nationality, ethnic community, nation, race or religion', in this specific case, Jewish people.³⁸⁵

On 26th December 2008, at the end of the show the comedian invited as a guest Robert Faurrison, an academic already known to France justice, as he has been convicted many times for his negationist and revisionist ideas, especially due to his rejection of the creation of gas chambers in concentration camps. The scholar received a 'prize for unfrequentability and insolence', such prize had the shape of a three-branched candlestick with an apple on each branch, and it was given to him by an actor dressed with a striped pyjama with a yellow star with 'Jew' written on it, who clearly was playing the part of a Jewish deportee.³⁸⁶

³⁸¹ Ibid., the complaint para. 9.

³⁸² Ibid., the law p. 27-29, para. 1.

³⁸³ Ibid., the law, par.29 para. 1.

³⁸⁴ Eur. Court HR, M'Bala M'Bala versus France, decision on the admissibility of 20.10.2016, application number 25239/13.

³⁸⁵ Ibid., the facts para. 3.

³⁸⁶ Ibid., the facts para. 3-6.

The Court considered the application unacceptable, due to its inconsistent *ratione materiae*, it mentioned article 35, which explains the admissible criteria of the Convention, deducing that under article 17 the applicant was not authorized to obtain the protection of article 10.³⁸⁷

The Court found as well that during the disrespectful scene, the show could not be considered entertaining anymore, but rather seemed a political meeting, promoting negationism, taking advantage of the relevant position of Robert Faurisson and the humiliating picture of a Jewish deportee faced to a person that denies Jews extermination.³⁸⁸

According to the Court, even if this was a comic performance, it went well beyond the satirical contours or permissibility under article 10, as it was in reality a show of hatred and once again an example of Holocaust denial. Under the vest of an artistic form of entertainment, it was as harmful as a sudden attack and was also a means through which such hateful ideology had the stage and could voice its contrast to the European Convention.³⁸⁹

The Court concluded that the applicant tried to divert article 10 from its real purpose, using the right to free speech to purposed conflicting with the letter and spirit of the Convention and endangering the Convention rights and freedoms themselves.³⁹⁰

This case is on religious hate and involves *Norwood versus United Kingdom*.³⁹¹ The applicant belonged to the British National Party and decided to expose in his window a poster provided by such party depicting the Twin Towers in flame. The image was accompanied by the words 'Islam out of Britain-Protect the British People'. He was condemned for exacerbating hostility against a religious group.³⁹²

Norwood claimed that his freedom of expression had been violated.³⁹³

³⁸⁷ Ibid., the law para. 42.

³⁸⁸ Ibid., the law para. 36.

³⁸⁹ Ibid., the law para. 37.

³⁹⁰ Ibid., the law para. 40.

³⁹¹ Eur. Court HR, *Norwood versus United Kingdom*, decision on the admissibility of 16.11.2004, application number 23131/03.

³⁹² Ibid., the facts para. A 1-5.

³⁹³ Ibid. the complaint para. 1.

The Court valued the application unacceptable, as it considered it as a forceful offence against a religious community and connected the whole group to terrorism. Therefore, this action was clearly conflicting with the values fostered by the European Convention, respectively, tolerance, social peace and non-discrimination.

In the end, the action of publically displaying the poster had to be considered an act within the meaning of article 17, thus, the applicant did not deserve the protection of article 10.³⁹⁴

The last provided topic of this session is threat to democratic order, as a general rule the Court considers unacceptable, as incompatible with the foundations of the Convention, any application animated by totalitarian doctrine or expressing opinions that constitute a danger to the democratic order and can led to the renewal of a totalitarian regime. The case that will be provided as sample is *Schimanek versus Austria* of 1st February 2000.³⁹⁵

The applicant was accused of fostering national-socialist Nazi based doctrines. It was found out that the applicant was the chief of a neo-Nazi organization, that recruited new members and organized meetings, whose purpose was glorifying the historical gesture of the Third Reich and denying the Nazi system of harassment, abuses and systemic killings. Moreover, not only did he promote Nazi ideology to its associates, but also he organized a delivering of pamphlets to foster his ideals. Among other things, he plotted an extreme right-wing paramilitary training camp with the purpose of creating a military group to help Austria to incorporate Enlarged Germany.³⁹⁶

The applicant complained that the Act prohibiting Nazi activities made a breach on his right to freedom of expression.³⁹⁷

The Court considered that the applicant's claim violated the Convention milestone values. Furthermore, according to international human rights law, it is not allowed to use human rights with the aim of destroying another person's rights. In this case this means that the right to freedom of expression may not be invoked to justify expression aimed at denying the rights of others, which is 'necessary in a democratic

³⁹⁴ Ibid., the law para. 5.

³⁹⁵ Eur. Court HR, *Schimanek versus Austria* of 2000, decision of the European Court of Human Rights of 01.02.2000, application number 32307/96.

³⁹⁶ Ibid., the facts para. A 1-11.

³⁹⁷ Ibid., the complaint para. 2.

society' in pursuit of a legitimate aim. Then, the applicant was found guilty of having held a leading position in a Nazi group, advocating a totalitarian doctrine incompatible with democracy and human rights. In the end the Court judged the application inadmissible as article 10 did not covered his forms of expression.³⁹⁸

3.5.1.2 Restrictions on the protection afforded by article 10 of the Convention

All the cases presented hereafter will make reference to the second approach used by the Court, namely putting restrictions on the protection afforded by article 10 of the Convention. According to it, in fact, the Court will evaluate if a case develops an interference with freedom of expression, if such interference is prescribed by law and seeks one of the legitimate purposes and if it is necessary in a democratic society.

The first topic to be analyzed will be apology of violence and incitement to hostility. The following is the case of *Sürek versus Turkey* judged by the Grand Chamber on 8th July 1999.³⁹⁹ The applicant is the owner of a weekly review which published two letters written by two readers who harshly judged authority army actions in south-east of Turkey with the denunciation of brutally overriding of the Kurdish people that are fighting to get independence and freedom.⁴⁰⁰

The applicant was condemned with the charge of 'disseminating propaganda against the indivisibility of the State and provoking enmity and hatred among the people'. He claimed that his right to freedom of expression had been violated.⁴⁰¹

As believed by the Court, article 10 had not been violated, noticing that the infamous letters asked for a bloody revenge and one of them well identified people's names, showing hatred and making of them highly likely targeted victims. Nonetheless, the owner of the weekly review did not directly associate himself with the message of the letters, he had provided the writers with a platform by which widespread their hateful messages. Hence, the Court considered the owner responsible for the information that his journal spreads to the public, which is even

³⁹⁸ Ibid., the law para. 2 c 7.

³⁹⁹ Eur. Court HR, *Sürek versus Turkey*, Grand Chamber decision of 08.07.1999, application number 26682/95.

⁴⁰⁰ Ibid., the facts para. 1. A-D.

⁴⁰¹ Ibid., the proceeding before the commission para. 37.

more important when the dealt with subject is delicate and may led to tension or conflict.⁴⁰²

Continuing on the issue of apology of violence and incitement to hostility, this is the case of *Gündüz versus Turkey* of 13th November 2003.⁴⁰³ The applicant was the leading person of an Islamic sect and had been condemned for incitement to crime and incitement to religious hatred due to statements published in the press. He was imprisoned for four years and two months in addition to a fine to be paid.⁴⁰⁴

The applicant claimed that his right to freedom of expression has been infringed.⁴⁰⁵

The Court found his application inadmissible affirming that the penalty inflicted to the applicant was appropriate to the legitimate aimed pursued, respectively the prevention of public incitement to carry out crimes. In addition, the Court added that such forms of expression that may incorporate hate speech or glorify incitement to violence are definitely not in line with the notion of tolerance and against the substantive values of justice and peace stated in the Preamble of the Convention. Clearly, Gündüz sentence was increased, as the incitement was fostered through mass media means. The Court held that norms to deterrent penalties in domestic law may be needed when the conduct reaches such high levels, as in this case, and increases up to becoming intolerable in that it denies the primarily principles of a democratic society.⁴⁰⁶

Gündüz has been involved in another case, always concerning the same matter, and the judgement took place on the 4th December 2003.⁴⁰⁷ He self-proclaimed member of an Islamic sect. He attended a televised debate where he expressed his ideas, which held an extremely critic concept of democracy, considering contemporary secular institutions 'impious', harshly commentating secular and domestic principles

⁴⁰² Ibid., the law para. II.

⁴⁰³ Eur. Court HR, *Gündüz versus Turkey*, decision on the admissibility of 13.11.2003 application number 59745/00.

⁴⁰⁴ Ibid., the facts para. A.

⁴⁰⁵ Ibid., the complaint para. 1.

⁴⁰⁶ Ibid., the law para. 1.

⁴⁰⁷ Eur. Court HR, *Gündüz versus Turkey*, decision on the admissibility of 04.12.2003 application number 35071/97.

and openly asking for the introduction of the Sharia law. After that, he was condemned for openly incited Turkish people to hatred and commit crimes on the bases of religious distinctions among the population.⁴⁰⁸

The applicant claimed that his right to freedom of expression had been breached. The Court affirmed that article 10 of the Convention had been violated and explained that the applicant represented the extremist ideals of the sect and had only been part of an active televised show. The pluralist debate went on outlining its excessive views, among which the idea that democratic values and Islam religion were not compatible. However, the topic was already familiar to the public as it had been debated by public opinion and on newspapers. Therefore, the Court affirmed that applicants claims had not to be considered as a solicitation to violence and therefore not as hate speech.⁴⁰⁹

The last analyzed topic on this subject involves the case of Faruk Temel in Turkey.⁴¹⁰ He is the director of a legal political party and in delivering a public speech to the press he criticized the United States armed intercession in Iraq and the solitary confinement of the leader of a terrorist organization. He also questioned the vanishing of prisoners confined by the police. Afterwards, Temel was found guilty of disseminating propaganda as he had publically supported the use of violence and other terroristic projects.⁴¹¹

The applicant claimed that his freedom of expression had been limited. The Court agreed with the applicant, affirming that article 10 had been breached. It stated that the applicant played the role of a speaker belonging to the opposite political party who was only expressing his mind on a political subject of general interest. Thus, his speech was not aimed at inciting violence, armed resistance or uprising, therefore, not considerable as hate speech.⁴¹²

⁴⁰⁸ Ibid., the facts para. 1.

⁴⁰⁹ Ibid., the law para. 1.

⁴¹⁰ Eur. Court HR, Faruk Temel versus Turkey of 01.02.2011 application number 16853/05.

⁴¹¹ Ibid., the facts para. I 5-25.

⁴¹² Ibid., para. I 36-64.

In this case the focus will be on condoning terrorism and it involves the case of *Leroy versus France*.⁴¹³ The applicant is a cartoonist who rejected his condemnation for approved terrorism after the first huge attack on American soil on September 11 2001 at the World Trade Centre. On his comic strip there was an inscription with the slogan: 'We all dreamt of it... Hamas did it'.⁴¹⁴

The Court affirmed that his conviction was not a violation of article 10 of the European Convention, as he had been accused of approving terrorism. As reported by the Court, Leroy's comics were not only an open critics to American imperialism, but it also sustained the Twin Towers vehement demolition. The Court based its ratio on the statement accompanying the cartoon, and from this it derived the moral support of New York's attacks. It added that the cartoonist showed his approval on the harsh acts imposed to the thousands of civilian that lost their lives and, in so doing, decreased their dignity as well.

The Court considered the politically sensitive environment in which the newspaper was spread as well. It affirmed that the publication of the cartoon had produced public opinion reactions able to make violence rise and possibly cause difficulties of public order in the region. Taking all this into consideration, the Court decided that the bases on which domestic courts convicted the applicant were right and relevant and the punishment was clearly proportionate with the legitimate aim pursued.⁴¹⁵

France had been involved in condoning war crimes in the case of *Lehideux and Isorni* on 23 September 1998.⁴¹⁶ The applicants wrote an article for the daily newspaper *Le Monde*, depicting the great Marshal Pétin without mentioning the affiliation of his Government to the Nazi Germany. They concluded their text encouraging two associations dedicated to fostering Marshal Pétin good memory to try to have his case reopened and to change the judgment of 1945 that condemned him to death and to the relinquishment of his civil rights, in order to have him

⁴¹³ Eur. Court HR, *Leroy versus France* of 02.10.2008, application number 36109/03.

⁴¹⁴ *Ibid.*, the facts para. 4-10.

⁴¹⁵ *Ibid.*, the law para. 23, 31, 42-48.

⁴¹⁶ Eur. Court HR, *Lehideux and Isorni* of 23.09.1998, application number 55/1997/839/1045.

rehabilitated. The French judges convicted the two writers with the charges of publically defending war crimes and crimes of co-operation with the enemy.⁴¹⁷

The applicants called for the violation of their right to freedom of expression.⁴¹⁸

The Court agreed as it stated that the infamous article, even if it sounded polemical in tone, cannot be considered as negationist as the authors had not been writing in a personal capacity, but on behalf of two legally constituted associations, and as single individuals did not greatly praise pro-Nazi policies. In the end concluded that the events on which it has been made reference in the text took place forty years before its publication and the lapse of time seemed to be not appropriate to underline such remarks after a long time has passed, with the same severity of ten or twenty years previously.⁴¹⁹

Hereafter denigrating national identity issue will be presented. The case involves *Dink versus Turkey* and it dates back to 2010.⁴²⁰ He was a Turkish journalist with Armenian origins and was the editor and chief of a Turkish-Armenian newspaper set in Istanbul. He wrote eight articles where he gave his opinion on the identity of Turkish citizens born in Armenia. Due to such articles, he was decreed guilty with the charge of 'denigrating Turkish identity'. In 2007 on his way out of his editorial office he was shot to death. In this case the applicants are his relatives that especially complained about the guilty sentence according to which he made of himself a target for extreme nationalists groups.⁴²¹

The Court declared that there was a violation of article 10 of the Convention as there were no pressing social needs that would define Firat Dink guilty of 'denigration of Turkishness'. It added that his articles read all together did not show forms of incitement other to violence, resistance or revolt. The author has simply been making his job of reporting and commentating on the matter of Armenian minority from his point of view as a news reporter. In addition, as a journalist he had merely absolved his task of getting informed the citizens of a democratic society. However, in societies like

⁴¹⁷ Ibid., the facts para. I A.

⁴¹⁸ Ibid., the final submission to the court 31-32.

⁴¹⁹ Ibid., the law para. 46-58.

⁴²⁰ Eur. Court HR, *Dink versus Turkey* of 14.09.2010, application number 2668/07, 6102/08, 30079/08, 7072/09, 7124/09.

⁴²¹ Ibid., the facts para. 6-7, 8-17, 18-54.

this where it is difficult and sore to discuss about historical events, academics, writers, journalists, should feel free to investigate and freely report historical truths. Moreover, the Court added that such articles were in no manner injurious or libellous and clearly not moving people to be disrespectful or hatred actions.⁴²²

In Hungary, Fáber was found guilty of displaying a flag with controversial historical connotations.⁴²³ The applicant questioned his being mulcted of showing the striped Árpád flag, that was the flag of the Hungarian dictatorship, very close to a demonstration against racism and hatred.⁴²⁴

The Court recognized that article 10 of the Convention had been breached, read in the light of article 11, which ensures freedom of assembly and association. The Court considered that displaying everywhere a symbol which was among the emblems of the previously totalitarian Hungarian regime, might have created turmoil among the past victims and relatives, who could clearly judge such displays inappropriate. Despite these being right sentiments, they did not serve as a sufficient base to limit freedom of expression. In addition to that, Fáber did not behave in a disorderly way. Hence, considering his non-inciting behaviour, the distance between him and the demonstration and the lack of posing any risk to public order security, the Court decided that the Hungarian courts had not reasonably prosecuting and mulcting the applicant for his insistence of not taking down the flag. In fact, the simple showing of the flag was not a cause of public disorder neither impeded to the demonstrators their right to assemble, as it was not threatening nor able to raise incitement.⁴²⁵

The following case will be about incitement to ethnic hatred and regards Balsytė–Lideikienė, director of a publishing company, versus Lithuania.⁴²⁶ In March 2001 the Polish courts affirmed that she violated the Code on Administrative Offences due to putting to press and distributing the ‘Lithuanian Calendar 2000’, which was valued by political science experts as a source of promotion of ethnic hatred. She received an administrative warning and the copies not sold were sequestered. She

⁴²² Ibid., the law 94-140.

⁴²³ Eur. Court HR, Fáber versus Hungary of 24.07.2012 application number 40721/08.

⁴²⁴ Ibid., the facts para. I 5-7.

⁴²⁵ Ibid., the law 19-26, 56-58, 42, 47, conclusion.

⁴²⁶ Eur. Court HR, Balsytė–Lideikienė versus Lithuania of 04.11.2008, application number 72596/01.

claimed that the requisition of the calendar and the prohibition of distributing it constituted a breach of her right on freedom of expression.⁴²⁷

As far as the Court was concerned, there has been no breach of article 10, as the Court found that the applicant voiced her opinions about nationalism and ethnocentrism and inciting hatred statements against Polish and Jewish people. This very same act created a severe concern among Lithuanian authorities. As already mentioned, in such circumstances Member States have a margin of appreciation, in this case the Court agreed with the decision made by the domestic courts which affirmed that there had been a pressing social need and it was inevitable to take measures against the company owner. The Court underlines that even if the confiscation of the copies could have appeared a severe punishment, she did not have to pay a fine, but just received a warning, which is the lightest administrative measure available. As a result, the Court found that the State interference with the applicant right to free speech could be valued as needed in a democratic society for the reputation of the rights of others.⁴²⁸

Hereafter, incitement to national hatred will be dealt with. The case concerns *Hösl-Daum and Others versus Poland* and it is a decision on the admissibility of 2014.⁴²⁹ The applicants were found guilty of insulting Poland as a nation and inciting national hatred. They questioned the limitation imposed on their freedom of expression as being condemned for putting up posters written in German statements on the brutal actions that the Polish and Czechs Governments had done after the Second World War.⁴³⁰

As to the Court, the application was unacceptable, it was presented without exhausting the democratic remedies. The Court decided that 'by falling to lodge a constitutional complaint against the Criminal Code, the applicant had failed to exhaust the remedy provided for the Polish law'.⁴³¹

⁴²⁷ Ibid., the facts para. 9, 15, 16 18-20, 24.

⁴²⁸ Ibid., the law para. 44, 76, 79, 80.

⁴²⁹ Eur. Court HR, *Hösl-Daum and Others versus Poland*, decision on admissibility of 07.10.2014, application number 10613/07.

⁴³⁰ Ibid. para. 2-10, 14.

⁴³¹ Ibid., para. 39-49.

Among the last analyzed topics there will be incitement to racial discrimination or hatred. The case sees *Jersild versus Denmark*⁴³², the applicant is a journalist who created a documentary in which there was a piece of the interview he had conducted to three associates of the youth group 'Greenjackets'. These young men did offensive and depreciatory commentaries about immigrants and ethnic groups living in Denmark. The journalist was accused of helping and assisting the widespread of racist opinions. The applicant claimed that his freedom of expression had been violated.⁴³³

First of all the Court underlined the difference between the young members of the Greenjackets, who openly shared their racist ideas, and the journalist who showed the ideals of this group of youths. In addition, such opinions were already acknowledged as being of great public concern. Hence, it was valued that the documentary on its own was not aimed at spreading racist messages, rather to inform the public about a social trend. Consequently, the Court affirmed that there had been a violation of article 10 of the European Convention.⁴³⁴

On the same issue, there was another case that saw the involvement of France, this time against *Soulas and Others*.⁴³⁵ The case is about criminal actions decided against the applicants, after the publication of the book 'The Colonization of Europe' with the subtitle 'Truthful remarks about immigration and Islam'. The following proceeding was the condemnation for inciting hatred and violence against Muslim communities from Northern and Central Africa. The applicants affirmed that their right to free speech had been violated.⁴³⁶

According to the Court, article 10 had not been breached. As it noted that the wording used in the book had the intention to make rise in the readers the feelings of antagonism, increased by the usage of military language against the targeted communities considered the enemy. The purpose was also to encourage the reader to share and seek the solution provided by the writer, respectively, an ethnic war of reconquest. The Court agreed on the grounds on which the domestic courts decided to declare the applicants convicted sufficient to evaluate them guilty. It moreover

⁴³² Eur. Court HR, *Jersild versus Denmark* of 23.09.1994, application number 15890/89.

⁴³³ *Ibid.*, para. 9, 10, 11, 13.

⁴³⁴ *Ibid.*, para. 25-35.

⁴³⁵ Eur. Court HR, *Soulas and Others versus France* of 10.07.2008, application number 15948/03.

⁴³⁶ *Ibid.*, para. 5, 6, 13, 15.

believed necessary interfering with the applicants' right to freedom of expression to safeguard the milestone values of a democratic society.⁴³⁷

The applicant of this case is *Féret*, who was a Member of the Belgium Parliament and the leader of the political party *Front National* as well.⁴³⁸ While running for the elections, many flyers were given to citizens with written on them statements as 'Stand up against the Islamification of Belgium', 'Stop the sham integration policy', 'Send non-European job-seekers home'. The applicant was condemned for incitement to racial discrimination. He was punished with community service and banned from holding parliamentary office for ten years.⁴³⁹

As stated by the Court, freedom of expression of the applicant had not being violated, in fact, it found that the commentaries made by the applicant were responsible for raising feelings of discredit, scepticism, refusal and even hatred toward people coming from outside national borders. Moreover, his speech delivered during his electoral campaign earned greater resonance and was clearly had to be considered as racial hatred. In the end, the politician punishment was justified to prevent public disorder and safeguard the rights of others, in this case, immigrant groups.⁴⁴⁰

In the case of *Le Pen versus France*, the applicant was the leader of the French political party called Front National.⁴⁴¹ He had been condemned for incitement to discrimination, hatred and violence against a community of persons due to their origin, membership or non-membership to ethnic group, nation, race or religion, specifically considering the numerous statements he has said about Muslims. He said that, 'the day there are no longer than five million but twenty-five million Muslims in France, they will be in charge'. Clearly, he had said that he did not deserved being deprived of his right to freedom of expression.⁴⁴²

The Court considered his complaint unacceptable as manifestly ill-founded. The Court studied the context in which the statements had been made and found that

⁴³⁷ Ibid., para. 23, 25, 28, 43, 48.

⁴³⁸ Eur. Court HR, *Féret versus Belgium* of 16.07.2009, application number 15615/07.

⁴³⁹ Ibid., para. 6, 9, 25.

⁴⁴⁰ Ibid., para. 54-57, 78, 93.

⁴⁴¹ Eur. Court HR, *Le Pen versus France*, decision on the admissibility of 20.04.2010, application number 19788/09.

⁴⁴² Ibid., the facts para. A.

they were delivered during a public debate about the settlement and integration of immigrants in France. The national courts deeply reasoned to understand whether such forms of expression could have created misunderstandings and incomprehension among the French society, and therefore deserved being suppressed. In such circumstances Le Pen's remarks had the clear aim of depicting the Muslim community as a disturbing element of the French society to make rise feelings of refusal and enmity. Moreover, in doing so, he put his nation against a community condemning its religious traditions, without considering that this group had been rapidly increasing in number and this very same fact was seen as a menace to the pride and protection of French people. All these are the bases on which the domestic courts had decided to limit Le Pen freedom of expression and they have been found sufficient and relevant by the European Court.⁴⁴³

In the *Perincek versus Switzerland* case the applicant, a Turkish policeman, had been condemned for expressing his opinion, on Swiss soil, about Armenian people mass deportation and massacres in 1915 and for negating the Armenian genocide.⁴⁴⁴ According to the Swiss courts, his statements were racist and nationalistic in character and were not part of the historical debate. The policeman claimed that his punishment represented a breach of his right to freedom of expression.⁴⁴⁵

As reported by the Court, article 10 of the Convention had been violated. Knowing the great importance that Armenian people put in the recognition of that systematic deportation and massacres of people as genocide, the Court considered that the dignity of both the victims and nowadays Armenian citizens were safeguarded under article 8 of the Convention, which guarantees the respect for private life. Hence, the Court had to take into consideration two of its provisions, article 8 and article 10; in addition, it considered the particular situation and the proportionality between the means used and the aims pursued. In the end, the Court asserted that it was not necessary, in a democratic society, to pose on a person a criminal penalty to protect the rights of the Armenian community in this case of Perincek. Specifically, the Court

⁴⁴³ Ibid., the law para. 1, 2.

⁴⁴⁴ Eur. Court HR, *Perincek versus Switzerland*, Grand Chamber of 15.10.2015 applicant number 27510/08.

⁴⁴⁵ Ibid., para. 13, 16, 17, 22-25.

counted on the fact that: the statement was made on a subject of public interest and was not charged with hatred or nationalism; the context was not delicate or with possible heightening tensions; the consequences of such speech were not valued as striking the dignity of Armenian community to the point of making necessary a criminal law sanction; Switzerland was not obliged by any international provisions to ban such speech; their courts seemed to have precluded the applicant of his right to free speech only for voicing his opinion on the issue of Armenian genocide, because it was different from the Swiss opinion; therefore, the hamper with his right to free speech was considered taken the severe form of criminal condemnation.⁴⁴⁶

This section of cases will be about incitement to religious hatred. The first is about *İ. A. versus Turkey*.⁴⁴⁷ The applicant is the possessor and director of a publishing company that distributed two thousand copies of a book which dealt with theological and philosophical matters in form of a novel. For this reason, the publisher was accused of insulting 'God, the Religion, the Prophet and the Holy Book'.⁴⁴⁸

The Turkish court of first instance condemned the applicant to two years of jail and the payment of a mulct; the imprisonment was immediately changed with a smaller fine. The publisher made appeal to the Court of Cassation, which upheld the sentence. Nevertheless, the applicant strongly believed that his judgement contrasted with his right to freedom of expression.⁴⁴⁹

As far as the European Court is concerned, article 10 had not been breached. It reaffirmed that people who deliberately decide to manifest their religion, regardless if they are members of a religious majority or minority, have to face criticism. They have to handle any form of disapproval coming from their proper co-believers and accept them with those coming from other religions as well. Even so, in this case there were not only annoying comments, but sharply offences towards the Prophet of Islam. Despite the fact that there was a certain degree of tolerance of religious forms of expression within the Turkish society, believers could with reason perceive some parts of the books as an unjust and disagreeable assault on them. Considering all this

⁴⁴⁶ Ibid., para. 95, 148, 180, 200, 228, 251.

⁴⁴⁷ Eur. Court HR, *İ. A. versus Turkey* of September 2005, application number 42571/98.

⁴⁴⁸ Ibid., para. 5, 7, 11.

⁴⁴⁹ Ibid., para. 9-15.

reasoning, the Court valued that the punishment was apt to ensure protection against odious offences on issues considered sacred by Muslims. Hence, such punishment met a 'pressing social need'. Moreover, the Court saw that the Turkish authorities decided not to censor the book, hence it found the paltry mulct the applicant had to pay proportionate to the aim pursued by the measure in question.⁴⁵⁰

Carrying on with the reasoning about incitement to religious hatred, the following case involves *Erbakan versus Turkey*.⁴⁵¹ While he was Prime Minister of Turkey he was leader of *Refah Partisi* as well. The party was forced to dissolve in 1998 as its activities were considered contrary to secularism. He was condemned due to commentaries he had made during a public speech, which had been considered as incitement to hatred and religious intolerance. He rejected such accusation.⁴⁵²

The Court affirmed that article 10 of the Convention had been breached. He affirmed that Erbakan comments were delivered by a famous politician during a public meeting of a society based on religious values and his speech was difficult to adjust to the pluralism that constitutes modern societies. In the end the Court, taking into consideration that eliminating any form of intolerance is inherent to human rights, resolved saying that the rationale given to support the applicant prosecution was not satisfactory and noticed that the interference with his freedom of expression had been necessary in a democratic society.⁴⁵³

Spain saw itself involved in a case of insulting of State officials which had as a petitioner Otegi Mondragon.⁴⁵⁴ The applicant is the spokesman of the left-wing Basque separatist parliamentary group (guilty of being linked to ETA), who was explaining during a press conference that the Basque daily newspaper was about to close and made reference to the illegal treatment that people arrested received during the police operation as well. In such claim he made reference to the King of Spain as the person who commands Spanish armed forces and ordered the massacres and the tortures. The spokesperson was incarcerated with the accusation of severe insult

⁴⁵⁰ Ibid., para. 22-32.

⁴⁵¹ Eur. Court HR, *Erbakan versus Turkey* of 06.07.2006, application number 59405/00.

⁴⁵² Ibid., 8, 11-15, 47.

⁴⁵³ Ibid., para. 56, 62.

⁴⁵⁴ Eur. Court HR, *Otegi Montedragon versus Spain* of 15.03.2011, application number 2034/07.

against the King. The petitioner claimed for a breach of his right to freedom of expression.⁴⁵⁵

The Court agreed with the violation of article 10 and retained the applicant's condemnation disproportionate. It continued affirming that on one side it was true that the wording used by Otegi Mondragon might have appeared provocative, however, even impolite in nature, such words were not accountable of inciting hatred or leading to hate speech. Moreover, these words were just orally, hence the applicant could not have rephrased his speech before making it public.⁴⁵⁶

A becoming relevant topic is hate speech on the net. In this case the applicant is *Delfi versus Estonia*, sentenced by the Grand Chamber on 16 June 2015.⁴⁵⁷ This was the first time in which the European Court was asked to analyse a complaint about responsibility for Internet comments made by Internet users. The applicant runs a commercial portal and had been accused by the domestic courts due to the disagreeable comments posted by his followers below one of its articles about a ferry company. The lawyers of the ferry company asked him to remove such comments and the applicant company cancelled them six weeks after they have been posted.⁴⁵⁸

The Court found out that there had been no breach of article 10. To begin its analysis it underlined the contradictory characteristics of Internet, which on one side is a wide means that gives space to freedom of expression and on the other it increases the probability of hate speech and speech inciting violence diffusion. Messages on the net hold the ability of becoming viral in a bunch of seconds and can remain online forever.⁴⁵⁹

The Court noticed that the illicit nature of the commentaries was due to the fact that they incited violence against the ferry company. Following this, the Court reasoned around the obligations and responsibilities of Internet platforms, under article 10 paragraph 2 of the Convention, which allowed for commercial purposes a

⁴⁵⁵ Ibid., para. I 6-25.

⁴⁵⁶ Ibid., para. 32-62.

⁴⁵⁷ Eur. Court HR, *Delfi versus Estonia* judgment of Grand Chamber of 16.06.2015, application number 64569/09.

⁴⁵⁸ Ibid., para. I 10-32.

⁴⁵⁹ Ibid., para. 66.

platform basis for unlawful commentaries and harmful for others' peoples' rights, which that additionally incited violence against ferry company owner. In cases like this, where third-party users made hate speech and undermine the physical integrity of individuals, the Court found that Member States are allowed to pose responsibility on Internet platforms, without being against article 10.⁴⁶⁰

Considering all this of above and especially the sharply nature of the commentaries made, the circumstance in which they appeared (following the applicant posted an article on his portal); the delay of the company to cancel such infamous commentaries; the Courts thought that the Estonian courts' decisions of responsibility against Delfi company was a justified and proportionate limitation on the portal's freedom of expression.⁴⁶¹

The last European focus will be about Lesbian, Gay, Bisexual, Transgender and Intersexual. The topic presented hereafter is about circulating homophobic leaflets and the case concerns *Vejdeland and Others versus Sweden*.⁴⁶² This was among the first times in which the Court was asked to judge an issue related to hate speech in the context of sexual orientation. In this circumstance the applicant was condemned for dispensing in an upper secondary school one hundred leaflets found reprehensible to homosexuals. These flyers had been created by the organization National Youth and left by the applicant in teenagers' lockers. The statements reported on the leaflets claimed about 'deviant sexual proclivity' which had 'a morally disruptive effect on the substance of society' and was liable for the spreading of HIV and AIDS. The applicant said that their aim was not to harass homosexuals and incite violent behaviour against them, rather to raise a debate about the lack of objectiveness on the educational system in Sweden.⁴⁶³

According to the Court, these flyers had constituted harmful and biased assertions, although they did not directly call for hateful acts. The Court also reiterated the already cited principle by which freedom of expression extends to those forms that "offend, shock or disturb". The Court also observed that the aim of starting a debate

⁴⁶⁰ Ibid., para. 67, 72, 77, 78.

⁴⁶¹ Ibid., para. 131, 143.

⁴⁶² Eur. Court HR, *Vejdeland and Others versus Sweden* of 09.02.2012, application number 1813/07.

⁴⁶³ Ibid., 3, 8, 10, 15.

about the lack of objectivity of education in Swedish schools is an acceptable one. Looking at the content of the leaflets, the Court declared that: ‘these statements did not directly recommend individuals to commit hateful acts’. The Court underlined as well that discrimination based on sexual orientation had to be considered as severe as discrimination based on race, origin or colour. In the end, it decided that article 10 had not been breached, as the blocking of the applicant right to free speech had been reasonably regarded by Swedish judges as necessary in a democratic society for the protection of the rights of others.⁴⁶⁴

3.5.2 Inter-American Court of Human Rights

According to a study made after the Special Rapporteur wrote his report in 2004⁴⁶⁵ hate speech is presented as such form of speech with the aim of intimidating, maltreating or inciting hatred or violence against a person or a group of persons due to their race, religion, nationality, gender, sexual orientation, disability or other human beings characteristics which have no space or place limits. In many historical events, Nazi Germany, Ku Klux Klan, Bosnia, Rwanda, hate speech served to vex, victimize and support the deprivation of human rights and the justification of systematic killings. In the wake of Internet and other new media of virtual communication, the propagation of hate speech has increased and the expression of violent forms of speech has become easier. Thus, many Inter-American States and organization have implemented policies and plans of actions to stop hate speech expression. Clearly, these strategies contrast with the right to free speech, ensured by the American Convention itself and other international human right treaties.⁴⁶⁶

In the American Convention, freedom of expression is regulated under article 13. Paragraph 5 well portraits that freedom of expression is not completely free and unlimited, in fact it is subject to restrictions, in agreement with international and other regional standards. It considers hate speech outside the protection of article 13 and empowers Member States to restrict it. In addition, article 13 prohibits prior

⁴⁶⁴ Ibid., 52-54.

⁴⁶⁵ 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.

⁴⁶⁶ Hate Speech and the American Convention on Human Rights. Available at <http://www.oas.org/en/iachr/expression/showarticle.asp?artID=443&IID=1>, last accessed on 25.01.2016.

censorship and indirect limitations, except imposing direct responsibility in some matters such as the protection of 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 been developing its jurisprudence and case law in the recent decades.⁴⁶⁷

The Special Rapporteur for Freedom of Expression of the Inter-American Commission on Human Rights at the Organization of American States voiced his opinions on the subject as well. 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 he expressed his viewpoint asserting that any form of speech that incites and fosters 'racial hatred, discrimination, violence, and intolerance' is injurious and evil and that crimes against humanity are often anticipated or followed by these forms of speech. The Joint Statement also declared that as norms disciplining hate speech they interfere with the full accomplishment of individuals' freedom of expression, then they should at least respect some minimum features, defined hereafter: 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.⁴⁶⁸

Inter-American Court and Inter-American Commission have not yet well developed jurisprudence and case law regarding article 13 and freedom of expression. Considering this lack, the Special Rapporteur made a comparative study of the case law of the United Nations Human Rights Committee and the European Court of Human

⁴⁶⁷ Hate Speech and the American Convention on Human Rights.

⁴⁶⁸ 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>.

Rights, taking their quasi-jurisprudence and jurisprudence as precious sources to better interpret the right of free speech in the Inter-American System.⁴⁶⁹

Such technique employed by the Special Rapporteur, the Inter-American Commission and the Inter-American Court of drawing guidance from other juridical systems holds advantages and drawbacks. It is highly valuable on one side, however with intrinsic limitations on the other. In fact, the Court underlined that the core principles guaranteed by the American Convention must not be scratched by others' standard and jurisprudence.⁴⁷⁰ In particular, the Inter-American Court declared that such approach should never be used to try and find out Convention restrictions that are not grounded in its text. This principle has to be applied even if these restrictions exist in others international treaties.⁴⁷¹ It continued affirming that if both the American Convention and other international treaties are applicable, 'the rule most favourable to the individual must prevail'. Moreover, it added that the American Convention ruled that its norms must not have a 'restrictive effect', meaning that '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.' The Court concluded adding that article 13 on its own already includes limitations and its provisions take precedence over the conclusions driven from foreign jurisprudence.⁴⁷²

3.5.3 United States Supreme Court

As already mentioned, among Inter-American Member States there is United States of America, which with its First Amendment guarantees a solid range of protection to free speech. United States Supreme Court has developed its jurisprudence on cases of freedom of expression and hate speech as well. Hereafter, its point of view through its case law studies will be examined.

⁴⁶⁹ Hate Speech and the American Convention on Human Rights.

⁴⁷⁰ Hate Speech and the American Convention on Human Rights.

Available at <http://www.oas.org/en/iachr/expression/showarticle.asp?artID=444&IID=1>, last accessed on 25.01.2016.

⁴⁷¹ 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 N° 5 [hereinafter Advisory Opinion OC-5/85], para. 51.

⁴⁷² Ibid., para. 52.

The first case to be analyzed will be about *Elonis versus United States*.⁴⁷³ This is the first circumstance in which the Supreme Court agreed to hear a case involving the constitutionality of prosecuting potential threats in a social media context. The applicant is Elonis who had been convicted on 10th December 2008 with the accusation of five counts of violating a federal anti-threat statute, 18 U.S.C. paragraph 857 c.⁴⁷⁴ The charge was intimidation of his ex-wife, co-workers, a kindergarten class, the local police and an FBI agent. The applicant had been through some important life changing: his wife and family left him, he was made redundant and he released his anger on his Facebook page, posting statements that were then valued as forms of threats. In front of the judges he declared that his conviction was unfair as he did not have the aim of threatening anyone. He added that he was to become a rap artist and his statements were only an artistic form of expression and a therapeutic remedy to help him face the tough moment he was in. To make more effective the fact that his statements were completely harmless he increased his online activity posting on You Tube videos parodied by him underlining that a famous rap singer often used the same language in his songs. Despite the fact that, his ex-wife, an FBI agent and other Facebook users viewing his statements felt the message threatening, the applicant kept on affirming that his intention was not delivering injurious messages. In fact, he did not literally mean what had written on Facebook.⁴⁷⁵

In the end, the Court evaluated the applicant guilty and confirmed his conviction. The Court used a proper legal test to decide whether or not such statements carried violence and threats: it made them read to five people, four of which felt menaced. Elonis presented his case to the following grades of Court and in the end to the US Supreme Court, which on 1st June 2015 reserved and remanded the case.⁴⁷⁶

In the case *Johnson versus Texas* the applicant had been considered guilty for having burned an American flag outside a convention centre where in 1984 the

⁴⁷³ US Supreme Court, *Elonis versus United States*, application number 13/983.

⁴⁷⁴ Federal Anti-Threat Statute, 18 U.S.C. § 875(c). Available at <https://www.law.cornell.edu/uscode/text/18/875>, last accessed on 26.01.2016.

⁴⁷⁵ *Ibid.*, para. I A-B.

⁴⁷⁶ *Ibid.*, para. II A-C .

Republican National Convention was on in Dallas.⁴⁷⁷ The applicant burned the Union banner to protest against President Reagan policies. Consequently, he was imprisoned by Texan authorities with the accusation of violating the Texas statute which clearly bans the desecration of a hallow object, including the American flag, if such action were likely to incite violent reactions. A Texan Court condemned Johnson, however he appealed claiming that his action was a form of ‘symbolic speech’, hence lied under the protection of First Amendment.⁴⁷⁸

Afterwards, the Supreme Court agreed to hear his case. The majority of the Court assent with the applicant, considering the act of flag burning a form of ‘symbolic speech’, which deserved the protection of the First Amendment. The majority shared as well the opinion by which freedom of speech safeguards actions that public opinion can regard as injurious, however, society indignation alone is not enough to excuse limitation to free speech. In the end, the majority affirmed that the Texan government should not judge the question based only on his discriminate viewpoint, in this specific case that such action had to be banned because it might have caused anger in others.⁴⁷⁹

Last analyzed case of the US Supreme Court concerns *Snyder versus Phelps*.⁴⁸⁰ Phelps belongs to the religious Westboro Baptist Church group that believes that God punishes the United States for tolerating homosexuality, especially within the armed forces. Phelps and his followers often voice their beliefs picketing at military funerals. They participated at Albert Snyder’s son Funeral as well. The young marine had been killed in the line of duty in Iraq in 2006. Westboro group displayed its ideas and signs at Matthew funeral, with sentences such as: ‘God Hates the USA, Thank God for 9/11,’ ‘Thank God for Dead Soldiers’ and ‘Don't Pray for the USA’. The Church had notified to local authorities that there their manifestation would take place, with sings and Church members singing Bible verses. Albert, the father and the applicant, during the funeral could see the demonstrators and their signs, however he became aware of the statements only afterwards, watching a news story about the funeral.⁴⁸¹

⁴⁷⁷ United Nations Supreme Court, Johnsons versus Texas, application number 88/155.

⁴⁷⁸ Ibid., para. 1.

⁴⁷⁹ Ibid., para. 2.

⁴⁸⁰ US Supreme Court, Snyder versus Phelps of 02.03.2011, application number 09/751.

⁴⁸¹ Ibid., para. I A.

Hence, Snyder senior sued Phelps and his religious group, affirming, among other things that their behaviours provoked him emotional distress. To defend himself, Phelps claimed that his speech, expressed through picketing and signs, was permitted by the First Amendment, as it was not less than an expression of his free speech.

A jury in the United States District Court for the District of Maryland agreed with Snyder and awarded him \$10.9 million, which have been reduced to \$5 million. The Fourth Circuit Court of Appeals reversed the judgment, stating that Phelps and followers' free speech was allowed by First Amendment, and clearly recognizing picketing and sings at the marine's funeral as lawful forms of expression.⁴⁸²

The matter was whether Westboro's signs and comments at Matthew Snyder's funeral were an issue of public concern and if it were, whether it deserved greater protection under the First Amendment. The Supreme Court held that the religious group was speaking about 'matters of public concern' as opposed to 'matters of purely private significance.' The Court went on explaining when a form of expression is of public concern, respectively when it can 'be fairly considered as relating to any matter of political, social, or other concern to the community' or when it 'is a subject of general interest and of value and concern to the public.' Furthermore, expressing opinions about public matters requires a special protection under US First Amendment, as it serves 'the principle that debate on public issues should be uninhibited, robust, and wide-open.' To decide whether a speech regards issues of public concern, the Court analyses the 'content, form, and context' of the speech. After taking this test, the Court found out that its results were not determined for the case and passed to the examination of all the circumstances of the speech, 'including what was said, where it was said, and how it was said'.⁴⁸³

Not all the signs were about Snyder family, the majority went beyond and touched US morality, fate and homosexuality in the army. Considering the meaning of the messages as a whole, they definitely concerned public matters. In addition, the manifestation took place on a public land. Finally, there was none previous contact between Westboro's speech and Snyder that might suggest that the speech on public matters was intended to dissimulate an attack on Snyder over a private matter. In the end, the Court held that Phelps and his followers dealt with matters of public concern

⁴⁸² Ibid., para. II.

⁴⁸³ Ibid., para. II.

on public property and thus they were under the protection of the First Amendment.⁴⁸⁴

3.6 Conclusion

In the third chapter I focused on a specific form of expression, hate speech. I chose the issue of hate speech as it particularly matters to the international community. In fact, some problems of our societies, such as racial discrimination, gender discrimination, migration crisis and terrorist threats are related to hate speech.

My goal was to analyze the relation between freedom of expression and hate speech, to understand the border between right and unlawful behaviour. To do so, I examined how international and regional authorities have managed to find outline this unclear border.

To begin with, I have tried to frame a definition of hate speech, however, it resulted that there is no a universally shared notion. This is due to the fact that the concept has cultural origins, hence what can be considered offensive for a group of people that share the same values may not be for others.

The research went beyond the mere description of the term, as I discovered how human rights defence mechanisms decide when a form of freedom of expression crosses the line and becomes hate speech.

As far as the international level is concerned, it is relevant the quasi-jurisprudence of the Human Rights Committee. In fact, this UN body receives individual complaints and expresses its views on issues of hate speech as well. In addition, on the regional level, the European Court case law on hate speech is developed as it provides many examples on how to identify hate speech and a special system to verify whether the States apply its decisions, namely the Committee of Ministers. As far as the other regional areas, they have not developed a jurisprudence on hate speech yet.

⁴⁸⁴ Ibid., para. IV.

CONCLUSION

At the beginning of this research I did not understand how it could be possible to limit and restrict an inherent human right as freedom of expression. Throughout the research conducted, I discovered that in spite of the vast scope of freedom of expression, constraints to its exercise may in some circumstances be needed.

To begin with I studied freedom of expression provisions, from the international and regional point of view. In particular, I have examined, on the international level, article 19 of the Universal Declaration on Human Rights, articles 19 and 20 of the International Covenant on Civil and Political Rights, articles 4 and 5 of the International Convention on the Elimination of All Forms of Racial Discrimination and articles 12 and 13 of the Convention on the Right of the Child. In addition, on the regional level I have examined article 10 of the European Convention on Human Rights, article 13 of the American Convention on Human Rights, article 9 of the African Charter on Human and Peoples' Rights and article 32 of the Arab Charter on Human Rights. All the provisions are similar to the ICCPR treaty, however, only article 13 of the American Convention under paragraph 5 especially prohibits hate speech. In each agreement it is clear that freedom of expression cannot be absolute, it has to be restricted to safeguard the respect of the rights and reputations of other individuals and national security, public order, public health and morals.

Starting from the provisions' analysis, I wanted to understand how each mechanism involved in the defence of human rights judges a case of human rights restriction. In order to do so, I have analysed Human Rights Committee quasi-jurisprudence, and European, Inter-American and African Courts case law. What emerged from this analysis was that there are three criteria according to which the authorities have to evaluate limitations to freedom of expression. Such criteria are, 'provided by the law', 'necessary' and 'apt to reach the aim purposed'. Hence, every time the Committee or the Court has to analyse a case on freedom of expression, in order to understand whether the act is of 'hate speech', they have to make the three parameters analysis.

However, being aware of the fact that freedom of expression is a vast topic, I have decided to concentrate my research on an issue that can greatly limit it, hate speech.

First of all I tried to define what hate speech is. I discovered that there is not a universally shared definition of hate speech, this is due to the fact that what it is considered as offence varies from culture to culture and from society to society. In fact, many States adopted norms about 'hate speech' providing different descriptions. The Council of Europe's Committee of Ministers furnished a definition of hate speech defining it as follows: 'the term 'hate speech' shall be understood as covering all forms of expression which spread, incite, promote or justify racial hatred, xenophobia, anti-Semitism or other forms of hatred based on intolerance, including: intolerance expressed by aggressive nationalism and ethnocentrism, discrimination and hostility against minorities, migrants and people of immigrant origin.' In such circumstances 'hate speech' lies under comments that are aimed at targeting an individual or a group of people.

The notion of hate speech encloses a great variety of situations, as it can target persons or groups due to their origin and race, or on their religious or cultural basis, which can lead to the distinction between believers and non-believers. Additionally, it can appear in forms of incitement to other forms of hatred on the grounds of intolerance due to nationalism and ethnocentrism. Lately, another form of hate speech has been rising, homophobic speech connected to sexual orientation discrimination.

After having scratched the notion of hate speech, I wanted to verify how the authorities managed to draw the border between freedom of expression and hate speech. I followed the aforementioned scheme, as I first analysed the international level and the Human Rights Committee quasi-jurisprudence and then the European and American case law.

As far as the Human Rights Committee experts are concerned, even if there is a tension between article 19 paragraph 3 and article 20 paragraph 2, the two are compatible. In fact, any norm trying to implement the provisions of article 20 (2) has to respect the scope of constraints allowed by article 19 (3) and article 19 (3) has to be interpreted in the respect of article 20 (2). These two principles are applied in the Committee case law, for example in the *Ross versus Canada* case, the Committee

affirmed that restrictions on racial forms of expression must have grounds on the test of article 19 (3) of the ICCPR.

From the European Court perspective, the notion of hate speech is found in the Court jurisprudence as well, however, it has not provided a precise definition yet. Despite the lack of an outlined definition, the Court in some of its judgements makes reference to 'all forms of expression which spread, incite, promote or justify hatred based on intolerance, religious intolerance included'. It is necessary to highlight that it is an 'autonomous' notion, as the Court is not bound by the national courts definitions or decisions. In fact, sometimes it counters the classifications made by domestic courts or evaluates some statement as 'hate speech', even if national courts did not.

To conclude, it is important to highlight that the scope and balancing of right and limitation to freedom of expression due to hate speech, are different at the international, regional and domestic level. This created problems to those bodies and courts that had to interpret human rights provisions to find where hate speech lies. The interpretation has been chaotic even in cases involving the clear ICCPR. The characteristic of hate speech that most of the others creates problems is 'incitement', the milestone of hate speech. Despite this, it is possible to affirm that those forms of speech that are delivered without the purpose to incite others to hatred, should not be found guilty of hate speech. To be forms of incitement, the connection between the statement and the risk of harm must be clear. It is sufficient if forms of expression instigate others to hatred, even if they do not act on it.

In the end, the European Court remarks a new trend in approaching freedom of expression limitations' cases. Lately the Court has been taking into consideration the fact that some statements do not constitute 'hate speech'. This is a fundamental attitude to be taken into consideration to understand whether the violation of freedom of expression is justified by democratic values.

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