



Legislation Related to Cyber Hate

By
Dr. Steffen Eisentraut and Valentín González

INACH



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Executive Foreword

This publication was written within the framework of the *Research – Report – Remove: Countering Cyber Hate Phenomena* project of the International Network Against Cyber Hate (INACH); funded by the European Commission Directorate-General for Justice and Consumers. The duration of the project is 2016-2017, and its aim is to study, document and report on online hate speech in a comparative and comprehensive way; and to establish structures for a transnational complaints system for instances of cyber hate.

Hate speech is intentional or unintentional public discriminatory and/or defamatory statements; intentional incitement to hatred and/or violence and/or segregation based on a person's or a group's real or perceived race, ethnicity, language, nationality, skin colour, religious beliefs or lack thereof, gender, gender identity, sex, sexual orientation, political beliefs, social status, property, birth, age, mental health, disability, disease.

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1. Introduction

Cyber hate is by nature a global threat, therefore it requires global analysis and responses. The measures to take, the legislation to implement and the reach of a consensus on the ethical level are needed in order to deal with crucial matters like liability. However, there are many difficulties to reach such an international approach. All about Internet, including hate speech, is a relatively new phenomenon in a rapid and permanent process of change.

Several transnational organizations such as United Nations (UN), Organization for Security and Cooperation in Europe (OSCE), Council of Europe and the European Union (EU) have expressed their concern for the dramatic growth of hate in the net and its dangerous consequences amongst vulnerable collectives, in terms of intolerance, hostility and violence. Nevertheless, the world is quite far away from a consensus on how to deal with this threat.

Even when it comes to the Western world there are extraordinary differences between the United States and the European Union on such an important value like freedom of expression. The First Amendment to the United States Constitution protects almost unlimited freedom of speech; consequently, hate speech has no legal barriers to be restrained. On the contrary, member states of the European Union and the European Union as such have legislation and jurisprudence to even ban and penalize hate speech. Hence, freedom of speech is protected as an important right but not an absolute one in most democratic societies.

In spite of different criteria, the international community has reached some agreements in the past in terms of putting limits to freedom of speech in order to avoid damages on human rights and human dignity. For instance, article 3 of the *Convention on the Prevention and Punishment of the Crime of Genocide*, adopted by the General Assembly of the United Nations in 1948, states that public and direct incitement to commit genocide must be punishable. Another example is the *International Convention on the Elimination of all Forms of Racial Discrimination* of 1965 (also adopted by the UN), which calls for a ban of expressing ideas of superiority of people and categorizing by race.

In the current days, cyber hate is growing exponentially. Transnational institutions and governments have produced several compilations of treaties and legislation to tackle it. Despite the lack of international consensus, a sense of urgency seems to emerge in Europe within civil society and public institutions to have an updated and applicable legislation to reach the balance between protection of freedom of speech and protection of human dignity. Assuming that having a more decent and tolerant Internet brings forth a more decent and tolerant society, it is clear that the unprecedented impact of social media needs legal regulation.

The next pages intend to be a compilation and analysis of legal frameworks, jurisprudence and measures to deal with cyber hate, placing a focus on Europe.

2. International Legislation, Treaties and Recommendations

2.1. United Nations (UN)

Obviously cyber hate is a relatively young phenomenon, which emerged in the last decade of the 20th century and spread in the 21st century with the appearance of Social Media. But still the consequences of hate speech were already highly suffered in former times of human history. The unprecedented magnitude of Second World War atrocities and the ‘radical evil’ of the perpetration of the Shoah were surely the pillars of the construction of human right values and law against hate speech at global level – one of the main goals of the United Nations, which was established in 1945.

Following there is a compilation of UN Declarations, Conventions and Treaties related to the subject of this document.

The 1948 Declaration of Human Rights, in its 7th article proclaims:

“All are equal before the law and are entitled without any discrimination to equal protection of the law. All are entitled to equal protection against any discrimination in violation of this Declaration and against any incitement to such discrimination”.

Along with the *Convention on the Prevention and Punishment of the Crime of Genocide* in which article 3 proposes to punish "direct and public incitement to commit genocide", it might be considered as the roots of the international law concerning hate speech prevention, even though the Declaration of Human Rights is not binding.

However, in the years to come after the first impulse, some binding treaties were passed in order to offer a stronger protection against discrimination and intolerance. Such as the *International Covenant on Civil and Political Rights (1966)* that includes provisions to address hate speech. Article 19 containing the right to freedom of expression, has limits expressed in the article immediately following, with the prohibition of "any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence”. This is the legal instrument more often used when it comes to hate speech prevention even though hate

speech is not explicitly mentioned. It makes clear that freedom of speech is not an absolute right.

The UN High Commissioner for Human Rights presented the so called *Rabat Plan* in 2012 in order to have a better implementation of the *International Covenant on Civil and Political Rights* in the aspects related to hate speech since many signatory States were not applying it properly. The plan proposed seven specific recommendations including the adoption of comprehensive legislation against incitement to hatred.

United Nations Committee on the Elimination of Racial Discrimination, General Recommendation No. 35, Combating racist hate speech

"I. Introduction

[...] Following the discussion, the Committee expressed its intention to work on drafting a general recommendation to provide guidance on the requirements of the Convention in the area of racist hate speech in order to assist States parties in discharging their obligations, including reporting obligations. The present general recommendation is of relevance to all stakeholders in the fight against racial discrimination, and seeks to contribute to the promotion of understanding lasting peace and security among communities, people and States. [...]

II. Racist hate speech

[...] While the term hate speech is not explicitly used in the Convention, this lack of explicit reference has not impeded the Committee from identifying and identifying hate speech phenomena and exploring the relationship between speech practices and the standards of the Convention. The present recommendation focuses on the ensemble of Convention provisions that cumulatively enable the identification of expression that constitutes hate speech. [...]

IV. General

[...] The relationship between proscription of racist hate speech and the flourishing of expression should be seen as complementary and not the expression of a zero sum game where the priority given to one necessitates the diminution of the other. The rights to equality and freedom from discrimination, and the right to freedom of expression, should be fully reflected in law, policy and practice as mutually supportive human rights [...]

The Committee regards the adoption by States parties of targets and monitoring procedures to support laws and policies combating racist hate speech to be of the utmost importance. States

parties are urged to include measures against racist hate speech in national plans of action against racism, integration strategies and national human rights plans and programmes."

http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CERD%2fC%2fGC%2f35&Lang=en

2.2. Organization for Security and Cooperation in Europe (OSCE)

The OSCE is the biggest international governmental structure after the UN. In 2009 it held a Ministerial Council in Athens to adopt the *Decision No. 9/09 on Combating Hate Crimes*. It addresses Internet related issues in the articles 11 and 12 and calls on the participating States to deal with "the increasing use of Internet to advocate views constituting an incitement to bias-motivated violence including hate crimes, and, in doing so, to reduce harm caused by the dissemination of such material".

Besides, *Decision No. 9/09* tasks the Organization for Democratic Institutions and Human Rights (ODIHR, the OSCE's main institution to promote tolerance) to explore with participating States and in co-operation with relevant international organizations and civil society partners, the potential link between the use of Internet and bias-motivated violence and the harm it causes.

<http://www.osce.org/cio/40695?download=true>

2.3. Council of Europe

Already in the 1960s the European Social Charter and the Framework Convention for the Protection of National Minorities were created to address the issue of discrimination. The Framework Convention prohibits any discrimination on the basis of belonging to a national minority and obliges the member states to adopt adequate measures in order to promote full and effective equality between persons belonging to a national minority and those belonging to the majority. They are the first stones on which subsequent European legislation was built on this important field.

Many years later the European Commission against Racism and Intolerance (ECRI) would be constituted as human rights body of the Council of Europe in order to monitor situations of racism, xenophobia, antisemitism and other forms of hatred. It is a specialized agen-

cy, very decisive in the launch of proposals that have given great impetus to the fight against hate speech.

Anne Weber's 'Manual on hate speech' (2009), published by the Council of Europe, gives an instructive overview that includes relevant international legislation (treaties, recommendations, resolutions) and case-law of the European Court of Human Rights as well as respective case studies. It can be found under this link:

http://www.coe.int/t/dghl/standardsetting/hrpolicy/Publications/Hate_Speech_EN.pdf

Additional Protocol to the Convention on Cybercrime

The most important treaty of the Council of Europe related to cyber hate is the *Additional Protocol to the Convention on Cybercrime, concerning the criminalization of acts of a racist and xenophobic nature committed through computer systems*, which was adopted in 2003 and entered into force in 2006. The protocol "(...) is of particular importance where it concerns the dissemination of messages of hatred through the Internet." (Weber 2009, p.7) Signatory states have to adopt legislative measures under their domestic law against offences such as:

- making available racist and xenophobic material through a computer system;
- threatening persons distinguished by race, color, descent, religion or national or ethnic origin through a computer system;
- publicly insulting persons as defined above through a computer system;
- denying, grossly minimizing, approving or justifying genocide or crimes against humanity, including the Holocaust.

The States Parties to this Protocol were expected to ratify on 1 January 2014.

Besides treaties, the Committee of Ministers of the Council of Europe has the possibility to make recommendations, being legally non-binding, in order to define guidelines for the member states' policy. One recent compilation in this respect are the *ECRI General Policy Recommendation No.15 on Combating Hate Speech*, adopted in December 2015, with Explanatory Memorandum published in March 2016. One recommendation is that all 47 member states of the Council of Europe shall ratify the *Additional Protocol to the Convention on Cybercrime*.

http://www.coe.int/t/dghl/monitoring/ecri/activities/GPR/EN/Recommendation_N15/REC-15-2016-015-ENG.pdf

Some further relevant instruments from the Council of Europe in this field are listed below, whereas the relation to cyber hate is highlighted in bold type.

- *Recommendation (97)20 on 'hate speech'* (1997) "condemning all forms of expression which incite racial hatred, xenophobia, anti-Semitism and all forms of intolerance. It is pointed out in this document that such forms of expression may have a greater and **more damaging impact when disseminated through the media.**" (Weber 2009, p. 10)
- *Recommendation (97)21 on the Media and the Promotion of a Culture of Tolerance* (1997) points out that "**the media can make a positive contribution to the fight against intolerance**, especially where they foster a culture of understanding between different ethnic, cultural and religious groups in society." (ibid., p. 10)
- *Declaration of the Committee of Ministers on freedom of political debate in the media* (2004) "emphasizes that freedom of **political debate [in the media, S.E.] does not include freedom to express racist opinions or opinions** which are an incitement to hatred, xenophobia, anti-Semitism and all forms of intolerance." (ibid., p. 10)

http://www.coe.int/t/dghl/standardsetting/hrpolicy/Publications/Hate_Speech_EN.pdf

3. European Union legislation

The consolidation of a legal framework within the European Union against cyber hate was a process that started in the nineties when first resolutions and decisions on racism and related intolerance were taken by the European Parliament and the Council of the European Union. The goal was to introduce different levels of responsibility in this struggle. In general, there was nothing related to what nowadays is known as hate speech or incitement to hate against vulnerable collectives, but it was at least the starting point of a process of setting up more robust measures in the future. They focused on discrimination in the field of employment and social affairs, approaches of educational systems, and expressing the political willingness to do more in this matter at European Union level.

Joint Action 96/443/JHA

In 1996 the Council of the European Union adopted the *Joint Action 96/443/JHA* to combat racism and xenophobia in the EU, which says:

“In the interests of combating racism and xenophobia, each Member State shall undertake, in accordance with the procedure laid down in Title II, to ensure effective judicial cooperation in respect of offences based on the following types of behavior [...]

(a) public incitement to discrimination, violence or racial hatred in respect of a group of persons or a member of such a group defined by reference to color, race, religion or national or ethnic origin" [...]

(d) "public dissemination or distribution of tracts, pictures or other material containing expressions of racism and xenophobia".

<http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A31996F0443>

The Tampere Council in 1999, and the European Parliament in 2000, considered that more steps needed to be adopted against racism and xenophobia. The Council implemented The Hague Programme in an attempt to maintain action against racism, xenophobia and anti-Semitism.

Framework Decision 2008/913/JHA on combating certain forms and expressions of racism and xenophobia by means of criminal law

The Framework Decision was adopted in 2008 by the Council of the European Union providing for the harmonization of laws and regulations of Member States with regard to offences involving xenophobia and racism. 28 November 2010 was established as a deadline for Member States to comply with the provisions of this framework decision.

This was a crucial step forward to improve the legal European framework against hate speech but still it was only limited to racism and xenophobia, which means that other forms of hatred and intolerance such as homophobia and others were not part of the regulations.

Most relevant provisions are listed in Article 1:

"1. Each Member State shall take the measures necessary to ensure that the following intentional conduct is punishable are committed to adopt legal measures against:

(a) public incitement to violence or hatred directed against a group of persons or a member of such a group by race, color, religion, descent or national or ethnic origin;

(b) the commission of an act referred to in point (a) by public dissemination or distribution of tracts, pictures or other material;

(c) public condoning, denying or grossly trivializing crimes of genocide, crimes against humanity and war crimes as defined in the statute of the International Crime Court (Article 6, 7 and 8) and crimes defined in Article 6 of the Charter of the International Military Tribunal, when the conduct is carried out in a manner likely to incite violence or hatred against such a group or a member of such group;

(d) publicly condoning, denying or grossly trivialising the crimes defined in Article 6 of the Charter of the International Military Tribunal appended to the London Agreement of 8 August 1945, directed against a group of persons or a member of such a group defined by reference to race, colour, religion, descent or national or ethnic origin when the conduct is carried out in a manner likely to incite to violence or hatred against such a group or a member of such a group."

Moreover, in Article 4, the Member States are obliged "to take the necessary measures to ensure that racist and xenophobic motivation is considered an aggravating circumstance, or, alternatively that such motivation may be taken into consideration by the courts in the determination of the penalties."

<http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv%3A133178>

The Framework Decision is binding so it requires a correct and complete transposition of all its provisions. However, according to the *Report of the United Nations Special Rapporteur on Contemporary Forms of Racism* in 2014, a number of Member States failed in the correct transposition into the national law. Besides, Katharina von Schnurbein, the European Union Coordinator on combating anti-Semitism, pointed out at the INACH Conference in Jerusalem 2016, that up to now, only 13 of 28 EU Member States have implemented laws which criminalize Holocaust denial (cf. Framework Decision, Article 1.1.c).

<http://www.ohchr.org/Documents/Issues/Racism/A-HRC-26-49.pdf>

http://ec.europa.eu/justice/newsroom/fundamental-rights/news/160127_en.htm

E-Commerce Directive

Concerning strategies to tackle cyber hate, the importance of the *Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of infor-*

mation society services, in particular electronic commerce, in the Internal Market ('Directive on electronic commerce') lies in the liability of hosting service providers for illegal content. The e-Commerce Directive "foresees that Internet intermediary service providers should not be liable for the content that they hold and transmit passively. At the same time when illegal content is identified, intermediaries should take effective action to remove it" (European Commission, 2016)

http://europa.eu/rapid/press-release_MEMO-16-1895_en.htm

This limitation of liability that hosting service providers benefit from is restricted to certain conditions in Article 14:

"1. Where an information society service is provided that consists of the storage of information provided by a recipient of the service, Member States shall ensure that the service provider is not liable for the information stored at the request of a recipient of the service, on condition that:

(a) the provider does not have actual knowledge of illegal activity or information and, as regards claims for damages, is not aware of facts or circumstances from which the illegal activity or information is apparent; or

(b) the provider, upon obtaining such knowledge or awareness, acts expeditiously to remove or to disable access to the information.

2. Paragraph 1 shall not apply when the recipient of the service is acting under the authority or the control of the provider.

3. This Article shall not affect the possibility for a court or administrative authority, in accordance with Member States' legal systems, of requiring the service provider to terminate or prevent an infringement, nor does it affect the possibility for Member States of establishing procedures governing the removal or disabling of access to information."

<http://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:32000L0031&from=FR>

The e-Commerce Directive has led to the development of take-down procedures, but does not regulate them in detail. A 'notice-and-action' procedure begins when someone notifies a hosting service provider – for instance a social network, an e-commerce platform or a company that hosts websites – about illegal content on the internet (e.g., racist content) and is concluded when a hosting service provider takes action against the illegal content.

As one result of the EU Internet Forum, which was held since December 2015 between the Commission and Facebook, Microsoft, Twitter and Google/YouTube, the Commission "does not propose any changes to the liability regime in the E-Commerce Directive" and "will not oblige online platforms to generally monitor content" (European Commission 2016).

However, the Commission applies pressure on IT companies as they demand self-responsible behavior and voluntary measures to fight illegal content. The Commission emphasizes that they will "review the need for clarification of the notice-and-action procedures" and "therefore undertake further analysis in the coming year to explore whether EU action is warranted in these areas" (ibid.)

http://europa.eu/rapid/press-release_MEMO-16-1895_en.htm

A new way for tackling cyber hate? The European Code of Conduct

The current political urgency and the consultations between the European Commission and IT companies have to be seen in the context of the terrorist attacks in Brussels and the use of social media to radicalize young people. The central outcome of the EU Internet Forum is a new *Code of Conduct on Countering Illegal Hate Speech Online* (2016). Some of the commitments are listed below:

- "The IT Companies to have in place clear and effective processes to review notifications regarding illegal hate speech on their services so they can remove or disable access to such content. The IT companies to have in place Rules or Community Guidelines clarifying that they prohibit the promotion of incitement to violence and hateful conduct.
- Upon receipt of a valid removal notification, the IT Companies to review such requests against their rules and community guidelines and where necessary national laws transposing the Framework Decision 2008/913/JHA, with dedicated teams reviewing requests.
- The IT Companies to review the majority of valid notifications for removal of illegal hate speech in less than 24 hours and remove or disable access to such content, if necessary.
- The IT Companies to encourage the provision of notices and flagging of content that promotes incitement to violence and hateful conduct at scale by experts, particularly via partnerships with CSOs [civil society organizations, S.E.], by providing clear information on individual company Rules and Community Guidelines and rules on the

reporting and notification processes. The IT Companies to endeavor to strengthen partnerships with CSOs by widening the geographical spread of such partnerships and, where appropriate, to provide support and training to enable CSO partners to fulfil the role of a ‘trusted reporter’ or equivalent, with due respect to the need of maintaining their independence and credibility."

http://ec.europa.eu/justice/fundamental-rights/files/hate_speech_code_of_conduct_en.pdf

Hence, the notice-and-action principle still offers the opportunity for activists combating cyber hate to inform providers about illegal content and now more than ever can call upon the providers' responsibility to take swift action.

4. National legislation (project partner States)

4.1 France

*French legislation on incitement to hatred and violence: Article 24 of the **Law on the Freedom of the Press of 1881** prohibits anyone from publicly inciting another to discriminate against, or to hate or to harm, a person or a group for belonging or not belonging, in fact or in fancy, to an ethnicity, a nation, a race, a religion, a sex, or a sexual orientation, or for having a handicap. Articles 32 and 33 prohibit anyone from publicly defaming or insulting a person or group for belonging or not belonging, in fact or in fancy, to an ethnicity, a nation, a race, a religion, a sex, or a sexual orientation, or for having a handicap.*

*Holocaust denial: **Act 90-615 to repress acts of racism, anti-Semitism and xenophobia of 1990 (The Gayssot Act)** makes an amendment to Article 24 (Law on the Freedom of the Press of 1881): Art. 24 (a). - **those who have disputed the existence of one or more crimes against humanity** such as they are defined by Article 6 of the statute of the international tribunal military annexed in the agreement of London of August 8, 1945 and which were carried out either by the members of an organization declared criminal pursuant to Article 9 of the aforementioned statute, or by a person found guilty such crimes by a French or international jurisdiction [...]*

*Responsibility of ISP: The author of a racist content is not the only one who can be sentenced. Indeed, the **Law on Confidence in the Digital Economy (LCEN)** of 2004 and the Act of 1982 on audiovisual communications have amended the responsibility of the web actors: The ISP and other hosting websites can be considered as responsible of a publication if they have been duly notified (with a formal*

notice to promptly remove the publication). Moreover, the LCEN act has defined the obligation for the ISP and hosting websites to provide an accessible and available device for the reporting of hateful contents.

Criminal intent and publicity: These are key factors for anti-racism legislation in France. If an act is proved to be public, the rules are stricter and the penalties will be longer and aggravated. However, on the internet, the publicity is not always clear in practice. The LCEN has given some clarifications about publicity and responsibility of the web actors.

Relevant laws usually used by the French judiciary in cases of cyber hate are:

- *The offence of making an "insult of a racial, ethnic or religious nature" which can be public or non-public (art. 33 al 3 Law of 1881 and art. R. 624-4 of the Penal Code)*
- *The offence of defamation (art. 32 al. 2 Law of 1881 and R. 624-3 of the Penal Code)*
- *The offence of incitement to racial hatred, discrimination and violence (art 24 (7) of the law of 1881)*
- *The offence of justifying crimes against humanity (art 24 (5) of the law of 1881)*
- *The offence of denying of crimes against humanity (art 24 bis of the law of 1881)*

4.2 Spain

*Spanish legislation on incitement to hatred and violence: **Art. 510 of the Spanish Criminal Code** penalizes*

"Any person who publicly encourages, promotes or incites directly or indirectly hatred, hostility, discrimination or violence against a group or part thereof, or against any person by reason of their membership of that group, for reasons of racism, anti-Semitism or other such ideology, religion or beliefs, family situation, membership of an ethnic group, race or nation, national origin, gender, sexual orientation, gender, illness or disability" [...]

"Any person who produces, develops, possesses for the purpose of distribution, provides access to third parties, distributes or sells written or any other kind of material or medium whose content is able to encourage, promote, or incites hatred directly or indirectly against [repeats categories of the previous paragraph]"

*Holocaust denial: The **Spanish Criminal Code** includes several provisions on Holocaust denial declar-*

ing illegal the following: "Any person who publicly denies or trivializes or seriously exalts any crimes of genocide, crimes against humanity or against persons and protected in armed conflicts or exalts the perpetrators... Any person who infringes the dignity of the person through actions involving humiliation, contempt or damage to the reputation of any of the groups to which the preceding paragraph refers. Any person who exalts or justifies through any published medium or broadcast crimes that had been committed against [repeats the same types of groups as above]"

Art. 607.2: "Diffusion by any means of ideas or doctrines that deny or justify the crimes defined in the preceding Section of this Article, or that aim to reinstate regimes or institutions that protect practices that generate these shall be punished with a sentence of imprisonment from one to two years..."

Another piece of legislation that deals with hate speech online is the Law 19/2007, which focuses on gender though. Its function is to avoid acts of violence, racism, xenophobia and intolerance in sports events. However, it includes two provisions that are useful for dealing with hate speech and cyber hate:

Art. 3 on measures to prevent violent, racist, xenophobic or intolerant behaviour is within the scope of this Law. In section (h) it says: Failure to provide or facilitate people or groups of followers who have committed acts defined in paragraphs one and two of Article 2 of this Act, with transport, local, grants, free tickets, discounts, advertising or broadcasting or any other type of promotion or support of their activities.

Art.23 (b) refers to violations: Conducting statements in the print, audio-visual or online media, which threaten or incite violence or aggression towards participants in meetings or sporting events or people attending them, as well as significant contribution by such statements to the creation of a hostile environment or promoting physical confrontation between those who participate in meetings or sports or among people who attend the same events.

At regional level there are two laws in Extremadura and Cataluña against Homophobia. Both of them include protocols for the police to prevent homophobia online and offline.

4.3 The Netherlands

Dutch legislation on incitement to hatred and violence: The **Dutch Criminal Code** penalizes

Art. 137c. Any person who in public, either verbally or in writing or through images, intentionally makes an insulting statement about a group of persons because of their race, religion or beliefs, their hetero- or homosexual orientation or their physical, mental or intellectual disability [...]

Art. 137d. Any person who publicly, either verbally or in writing or through images, incites hatred of or

discrimination against persons or violence against their person or property because of their race, religion or beliefs, their sex, their hetero- or homosexual orientation or their physical, mental or intellectual disability [...]

Art. 137e. 1. [...]who, for any reason other than the provision of factual information:

1°. makes public a statement which he knows or should reasonably suspect to be insulting to a group of persons because of their race, religion or beliefs, their hetero- or homosexual orientation or their physical, mental or intellectual disability, or incites hatred of or discrimination against persons or violence against their person or property because of their race, religion or beliefs, their sex, their hetero- or homosexual orientation or their physical, mental or intellectual disability;

2°. sends or distributes, without request, an object which he knows or should reasonably suspect to contain such a statement to another person, or has such object in store for public disclosure or distribution; [...]

*Holocaust denial: There is no specific law on Holocaust Denial in the Netherlands, but the Supreme Court ruled in 1995 that Article 137 of the **Criminal Code** (see above), which makes illegal the defamation of groups based on their religion or ethnicity, it also bans Holocaust denial.*

4.4 Austria

*Austrian legislation on incitement to hatred and violence: Section 283 of the **Austrian Criminal Code** prohibits anyone from publicly inciting to hatred or violence against church communities or religious groups, or a group defined by race, skin color, language, religion, ideology, nationality, origin or national or ethnic descent, sex, handicap, age or sexual orientation or individuals because of their belonging to one of the aforementioned groups. Likewise it prohibits anyone from publicly offending and discriminating the aforementioned groups.*

Holocaust denial: The NS Prohibition Act makes activities aimed to restoring or identifying with National Socialism prosecutable; glorification or denial of its crimes is forbidden.

*Definition of 'public': In 2016, an **amendment to the Austrian Criminal Code** improved the provision on incitement. Previous to this reform, agitation against certain groups had to reach a broad public of no less than 150 people. After the reform was introduced incitement to hatred was redefined. The required publicity was reduced to 30 people, and incitement in mainstream media and the internet is now*

subject to a higher penalty. Dissemination of punishable hateful content (approving of this content) on the internet is now a criminal offence itself.

Protected groups: The 2016 **amendment of the Austrian Criminal Code** criminalizes inciting to hatred or violence against groups or individuals defined by certain (lacking) attributes like ethnic or national origin. Therefore 'foreigners', 'migrants', 'refugees' or 'asylum seekers' are now protected groups.

4.5 Belgium

Belgian legislation on incitement to hatred and violence: The **Belgian Anti-Racism Law of 1981** prohibits to publicly incite to hatred, violence, segregation or discrimination against a person or a group based on protected criteria (i.e., race, ethnic origin, national origin, nationality, skin colour, ascendance) (article 20), to spread ideas based on race superiority or racial hatred (article 21) and to incite to hatred, violence, segregation or discrimination against a person or a group based on the protected criteria (among others: sexual orientation, religious conviction, and handicap) (article 22). The law furthermore criminalizes to publicly announce the intention to commit any of the aforementioned offences.

All articles contain the phrase "in the circumstances given in Article 444 of the **Belgian Criminal Code**". Here the definition of 'public' is specified as follows: "either in public meetings or places; or in the presence of several people, in a place that is not public but accessible to a number of people who are entitled to meet or visit there; or in any place in the presence of the offended person and in front of witnesses; or through documents, printed or otherwise, illustrations or symbols that have been displayed, distributed, sold, offered for sale, or publicly exhibited; or finally by documents that have not been made public but which have been sent or communicated to several people."

Another relevant passage is article 442ter of the Criminal Code which refers to harassment, and article 453bis which refers to defamation. In both cases there is a system of aggravating circumstances, if the offences are committed with a biased motivation (racism or any other ground of discrimination).

To sentence someone inciting to hatred, violence, segregation or discrimination, the judge has to prove his malicious/racist intention (so called moral element of the offence). Press related offences based on the anti-discrimination law have to be judged by a jury (the so-called Cour d'Assises), like any other press offence.

Holocaust denial: The **Belgian Holocaust denial law** makes it illegal to publicly "deny, play down,

justify or approve of the genocide committed by the German National Socialist regime during the Second World War". In contrast to offences linked to incitement to hatred and violence, there is no need to prove any malicious/racist intention. Exceptionally, press related offences are judged by a normal criminal court (no jury).

4.6 Germany

*German legislation on incitement to hatred and violence: Section 130 of the **German Criminal Code** criminalizes anyone*

"(1) Whosoever, in a manner capable of disturbing the public peace 1. incites hatred against a national, racial, religious group or a group defined by their ethnic origins, against segments of the population or individuals because of their belonging to one of the aforementioned groups or segments of the population or calls for violent or arbitrary measures against them; or 2. assaults the human dignity of others by insulting, maliciously maligning an aforementioned group, segments of the population or individuals because of their belonging to one of the aforementioned groups or segments of the population, or defaming segments of the population [...]"

*Holocaust denial and glorification of NS regime: Section 130 of the **German Criminal Code** criminalizes anyone*

"(3) Whosoever publicly or in a meeting approves of, denies or downplays an act committed under the rule of National Socialism of the kind indicated in section 6 (1) of the Code of International Criminal Law, in a manner capable of disturbing the public peace [...]"

(4) Whosoever publicly or in a meeting disturbs the public peace in a manner that violates the dignity of the victims by approving of, glorifying, or justifying National Socialist rule of arbitrary force [...]"

*Youth media protection and hate speech: from a youth protection perspective, taking action against cyber hate aims at protecting young people from potential dangers and disturbances. The relevant provision is the **Interstate Treaty on the Protection of Minors in the Media (JMStV)**, which includes section 130 of the Criminal Code (see above). jugendschutz.net notifies ISPs and platform operators in Germany and abroad and asks them to remove content violating the laws. Whenever a responsible person in Germany can be identified, the case is forwarded to the Commission for the Protection of*

Minors in the Media who is able to impose sanctions. If the website or service is hosted abroad and no responsible person in Germany can be identified, offences can be forwarded to the Federal Review Board for Media Harmful to Minors. Content can be entered into the list of media harmful to minors, generally referred to as the 'index'. Distributors of an indexed object are no longer permitted to let minors have access to it or to sell, rent out or even present this object in public or to broadcast it. In case of content severely harmful to minors, the object does not need to be entered into the 'index', as the distribution restrictions mentioned above are effective automatically. Strictly prohibited in Germany – even among people over 18 – are incitement to hatred, the denial of the Holocaust, the spreading of propaganda material by forbidden organizations, the depiction of symbols of the National Socialist regime and the glorification of violence.

*Task Force against hate speech: In December 2015, the so called '**Task Force against illegal online hate speech**' constituted under the leadership of the Federal Ministry of Justice and Consumer Protection together with Twitter, Facebook, and YouTube and NGO's like jugendschutz.net. The first official paper reads as follows: "The participants of the task force are in agreement that all hate speech prohibited under German law shall be reviewed and removed without delay upon notification ('nach Inkennzeichnung'). The companies represented on the task force have agreed on a series of best practices and objectives, outlined below, that should guide internet companies in ensuring expeditious and effective processing of reports concerning illegal content, or content that is in breach of a company's terms and conditions, while also ensuring close collaboration in this regard with the organisations of civil society." (BMJV 2015, p. 1)*

One of the most important outcomes is that illegal content has to be removed by the social media providers after notification and without delay; the majority of notified content has to be reviewed in less than 24 hours and removed, if necessary.

The Task Force paper is similar to the European Code of Conduct (see respective chapter), but in some aspects the agreement goes further than the European counterpart. While the Code of Conduct speaks of 'valid removal notifications', which are supposed to be reviewed against the companies' rules and community guidelines 'and where necessary national law', the Task Force paper sets national law as a clear standard for evaluating the content:

- *"Companies represented on the task force to enforce their terms and conditions by reviewing specific reports of hateful content and incitement to violence against their community guidelines and German law, in particular Section 130 of the German criminal code (StGB Volksver-*

hetzung), once notified ('in Kenntnis gesetzt')."

*The Task Force agreement does not demand 'valid removal notification', but claims to evaluate **every** request, if necessary with help of legal experts:*

- *"Upon receipt of a removal request, companies represented on the task force to review content removal requests in a timely manner, with dedicated teams reviewing requests.*
- *Where necessary in order to make a legal determination, companies represented on the task force to have recourse to German-speaking experts to review removal requests.*
- *Companies represented on the task force to have legal specialists available to provide any required legal analysis.*
- *Illegal content to be removed without delay after notification; the majority of notified content to be reviewed in less than 24 hours and removed, if necessary."*

http://www.bmjv.de/SharedDocs/Downloads/DE/Artikel/12152015_TaskForceErgebnispapier_eng.html

5. Legislation in the USA and Russia

In order to present the most complete picture of legislation related to cyber hate, the legal framework of the USA and Russia will be presented, even though for different reasons. In the case of the US, strong protection of freedom of expression through the First Amendment of the Constitution has led to the fact that many hate mongers allocate content there because it is almost impossible to remove it due to the fact that freedom of expression is an almost non-restricted right. Russia is becoming more and more relevant for extremist communication since VK.com, one of the largest social networks with more than 350 million users worldwide, is used as a safe haven for users who have already been banned from Facebook because of criminal offences like incitement to hatred and violence, glorification of the Nazi regime, dissemination of prohibited symbols or Holocaust denial.

5.1 USA

The First Amendment of the US Constitution protects freedom of expression completely, which means there is not much to do legally against hate speech. However there is some kind of speech that it is unprotected such as 'fighting words', i.e. "face-to-face personal insults addressed to a specific person, of the sort that are likely to start an immediate fight", says Eu-

gene Volokh, an expert of the UCLA School of Law. Other exceptions are "true threats of illegal conduct or incitement intended to and likely to produce imminent illegal conduct" [...] Indeed, threatening to kill someone because he's black (or white), or intentionally inciting someone to a likely and immediate attack on someone because he's Muslim (or Christian or Jewish), can be made a crime. But this isn't because it's 'hate speech'; it's because it's illegal to make true threats and incite imminent crimes against anyone and for any reason, for instance because they are police officers or capitalists or just someone who is sleeping with the speaker's ex-girlfriend."

<https://www.washingtonpost.com/news/volokh-conspiracy/wp/2015/05/07/no-theres-no-hate-speech-exception-to-the-first-amendment/>

In order to illustrate the prominent importance of the free speech clause, it is helpful to take a look at a controversial case: "R.A.V. v. City of St. Paul, 505 U.S. 377 (1992), involved the juvenile court proceeding of a white 14-year-old who burned a cross on the front lawn of the only black family in a St. Paul, Minn., neighborhood. Burning a cross is a very hateful thing to do: it is one of the symbols of the Ku Klux Klan, an organization that has spread hatred and harm throughout this country. The burning cross clearly demonstrated to this family that at least this youth did not welcome them in the neighborhood. The family brought charges, and the boy was prosecuted under a Minnesota criminal law that made it illegal to place, on public or private property, a burning cross, swastika, or other symbol likely to arouse "anger, alarm, or resentment in others on the basis of race, color, creed, religion, or gender." The case went all the way to the Supreme Court, which ruled that the Minnesota law was unconstitutional because it violated the youth's First Amendment free speech rights.

Note that the Court did not rule that the act itself – burning a cross on the family's front lawn – was legal. In fact, the youth could have been held criminally responsible for damaging property or for threatening or intimidating the family. Instead, the law was defective because it improperly focused on the motivation for – the thinking that results in – criminal behavior rather than on criminal behavior itself. It attempted to punish the youth for the content of his message, not for his actions."

http://www.americanbar.org/groups/public_education/initiatives_awards/students_in_action/debate_hate.html

When it comes to establishing the responsibility of the ISP for the content, the Section 230 of the *Communications Decency Act* provides immunity from liability for providers and users of an ‘interactive computer service’ who publish information provided by others: "No provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider."

<https://www.law.cornell.edu/uscode/text/47/230>

5.2 Russia

Although Art. 282 of the Russian Criminal Code deals with "incitement of national, racial, or religious enmity", hate speech is not a well-defined offence in case-law. Lokshina (2002, p. 99f.) states "the publicity of the actions and the need to prove intent are noted; however the *corpus delicti* is still unclear. What kinds of actions incite hostility still needs to be clarified, as well as what actions do not. It is hardly likely that the legislator meant that such utterances as 'All Armenians are stupid', or 'All Jews are traitors' made publicly, in the street should constitute a criminal offence. [...] On the whole, there is no clear-cut solution to the collision between suppressing hate speech and upholding freedom of speech and expression."

Consequentially, ‘hate speech’ or ‘hate crime’ are no relevant concepts when it comes to jurisprudence. "When law enforcement agencies take steps against extremist groups, they try to avoid bringing charges on incitement of ethnic hostility or discrimination. Suits are brought under other articles, such as ‘hooliganism’ or ‘causing bodily injury’. The investigators are usually reluctant to consider the organized nature of such crimes and their relation to activities of extremist groups. Thus, the above-mentioned article 282 is practically dormant." (Lokshina 2002, p. 101).

http://www2.mirovni-institut.si/eng_html/publications/pdf/MI_politike_symposion_xenophobia.pdf

This is in line with statements of the Russian INACH member SOVA. If you want to report hateful or violent content to the General Prosecutor or media authority Roskomnadzor you rather not refer to article 282 but to so called ‘anti-extremism law’ (Federal Law No. 114 FZ on Counteraction of Extremist Activities of 2002). Originally a preventive measure against terrorism, the law criminalizes

- "1) the activity of public and religious associations or any other organisations, or of mass media, or natural persons to plan, organise, prepare and perform the acts aimed at [...]
- the excitation of racial, national or religious strife, and also social hatred associated with violence or calls for violence;
 - the abasement of national dignity;
 - the making of mass disturbances, ruffian-like acts, and acts of vandalism for the reasons of ideological, political, racial, national or religious hatred or hostility toward any social group;
 - the propaganda of the exclusiveness, superiority or deficiency of individuals on the basis of their attitude to religion, social, racial, national, religious or linguistic identity;
- 2) the propaganda and public show of Nazi attributes or symbols or the attributes or symbolism similar to Nazi attributes or symbols to the extent of blending;
- 3) public calls for the said activity or for the performance of the said acts [...]"

With regard to the responsibility of internet service providers, the Russian media authority Roskomnadzor, which is the federal executive body responsible for control and supervision of the media in Russia, plays a crucial role. "For the purposes of restricting access to the Internet websites containing extremist information, the Russian legislature has established a Unified Automated Information System ('UAIS'). This system allows for the identification of Internet sites containing such information. The Roskomnadzor creates, formats, and maintains the Register: the blacklist. The Register includes domain names, pages indicators of such Internet sites, and their IP addresses that include prohibited information. All information is included in the Register based on the court rulings that have labeled information as extremist. Another ground for including such information into the Register, as previously mentioned, is a request by the General Attorney, sent to the Roskomnadzor. In order to gain access to the list of domain names and IP addresses, a connections (*Internet*) services provider is obligated to login to the Roskomnadzor's web service every day. The list is up-dated twice a day. A matching system identifies websites with extremist information. Within 24 hours after update and identification, a communications service provider is required to restrict access to the prohibited Internet websites if it is found in the blacklist; otherwise, the operator will be liable to the Roskomnadzor, which can withdraw the operator's license. This blocking system works automatically." (Dobryakova 2016)

6. Jurisprudence: Case Studies

Jurisprudence is an important element of law as it offers guidance of how legal provisions can be interpreted and applied to concrete cases. When it comes to legal struggles against hate speech it sometimes is not enough to have consistent laws making incitement to hatred illegal, for instance; it is also necessary to have good argumentation before the Court. In the following, some cases from the European Court of Human Rights, France, Austria and Spain are presented on how jurisprudence deals with hate speech in a positive way.

6.1. European Court of Human Rights

The jurisprudence of the European Court of Human Rights in Strasbourg is an important source of legal argumentation very useful in hate speech and cyber hate cases. There are some judgments that are very useful to improve the fight against cyber hate at Court.

For instance, the *Erbakan v. Turkey* judgment of 6 July 2006, § 56 states: "Tolerance and respect for the equal dignity of all human beings constitute the foundations of a democratic, pluralistic society. That being so, as a matter of principle it may be considered necessary in certain democratic societies to sanction or even prevent all forms of expression which spread, incite, promote or justify hatred based on intolerance [...], provided that any 'formalities', 'conditions', 'restrictions' or 'penalties' imposed are proportionate to the legitimate aim pursued."

http://www.echr.coe.int/Documents/FS_Hate_speech_ENG.pdf

Here, we present two cases that help to understand how the European Court of Human Rights is dealing with cyber hate. These cases have been extracted from a fact sheet on hate speech provided by the European Court of Human Rights (2016).

Delfi AS v. Estonia, 16 June 2015 (Grand Chamber)

This was the first case in which the Court had been called in to examine a complaint about liability for user-generated comments on an Internet news portal. The applicant company, which runs a news portal on a commercial basis, complained that it had been held liable by

the national courts for the offensive comments posted by its readers below one of its online news articles about a ferry company. At the request of the lawyers of the owner of the ferry company, the applicant company removed the offensive comments about six weeks after their publication.

The Court held that there had been no violation of Article 10 (freedom of expression) of the Convention. It first noted the conflicting realities between the benefits of Internet, notably the unprecedented platform it provided for freedom of expression, and its dangers, namely the possibility of hate speech and speech inciting violence being disseminated worldwide in a matter of seconds and sometimes even remaining online forever. The Court further observed that the unlawful nature of the comments in question was obviously based on the fact that the majority of the comments were considered an incitement to hatred or to violence against the owner of the ferry company. The Court considered that the rights and interests of others and of society as a whole may entitle Contracting States to impose liability on Internet news portals without contravening Article 10 of the Convention, if they fail to take measures to remove clearly unlawful comments without delay, even without notice from the alleged victim or from third parties.

Some of the elements that the Court considered important to take its decision were: the extreme nature of the comments in question, the fact that they had been posted in reaction to an article published by the applicant company, the lack of diligence to remove without delay, among others.

The Court found that the Estonian courts' finding of liability against the applicant company had been a justified and proportionate restriction on the portal's freedom of expression.

Magyar Tartalomszolgáltatók Egyesülete and Index.hu Zrt v. Hungary, 2 February 2016

This case concerned the liability of a self-regulatory body of Internet content providers and an Internet news portal for vulgar and offensive online comments posted on their websites following the publication of an opinion criticizing the misleading business practices of two real estate websites. The applicants complained about the Hungarian courts' rulings against them, which had effectively obliged them to moderate the content of comments made by readers on their websites, arguing that these had gone against the essence of free expression on the Internet.

The Court held that there had been a violation of Article 10 (freedom of expression) of the Convention. It reiterated in particular that, although not publishers of comments in the tradi-

tional sense, Internet news portals had to, in principle, assume duties and responsibilities. However, the Court considered that the Hungarian courts, when deciding on the notion of liability in the applicants' case, had not carried out a proper balancing exercise between the competing rights involved, namely between the applicants' right to freedom of expression and the real estate websites' right to respect for its commercial reputation. Notably, the Hungarian authorities took at face value that the comments had been unlawful as being injurious to the reputation of the real estate websites. It is to be noted that the applicants' case was different in some aspects from the *Delfi AS v. Estonia* case (see above) in which the Court had held that a commercially-run Internet news portal had been liable for the offensive online comments of its readers.

The applicants' case was missing the pivotal elements in the *Delfi AS* case of hate speech and incitement to violence. Although offensive and vulgar, the comments in the present case had not constituted clearly unlawful speech. Furthermore as Index is the owner of a large media outlet and must be regarded as having economic interests. This judgment will become final in the circumstances set out in Article 44 § 2 (final judgments) of the European Convention on Human Rights. (Factsheet 13 on Hate speech.)

Magyar Tartalomszolgáltatók Egyesülete is a non-profit self-regulatory association of Internet service providers, with no such known interests.

http://www.echr.coe.int/Documents/FS_Hate_speech_ENG.pdf

6.2 Member States Case Studies

France: Union of French Jewish Students (UEJF) and Twitter

On 12 June 2013, the French Court of Appeal rejected Twitter's attempt to shield the identities of those responsible for anti-Semitic posts made during 2012 with the hashtag #un-bonjuif (a good Jew) which contravened French laws on hate speech.

The UEJF and four anti-racism organizations had asked Twitter to reveal the identities of the posters and to make it easy for its users to flag messages which contravene French hate speech laws. In March 2013, faced with Twitter's reluctance to hand over the names, UEJF filed a criminal complaint against the company. Twitter appealed the initial ruling, which the court rejected on 12 June, ordering it to pay compensation and costs.

<https://www.theguardian.com/technology/2013/jul/12/twitter-data-french-antisemitic-tweets>

Austria: Austrian Facebook conviction

A court in Feldkirch, Austria sentenced a neo-Nazi to 18 months for posting pictures of Hitler, swastikas and other material banned in Austria, in June 2013. He admitted the offence but added that he did not intend to glorify Nazism. However, the court pointed out that his computer contained other neo-Nazi material and that he was active on the skinhead scene.

<http://www.eurojewcong.org/austria/9743-austrian-neo-nazi-jailed-for-posting-hitler-pictures-on-facebook.html>

Austria: Online hate speech against Roma

Seven men were convicted, and received probationary sentences of between three and four months, for making abusive comments and calls for a 'final solution' to the Roma presence in Austria, on the so called 'Rennleitung Pongau' Facebook page.

Following clashes between local residents and a legally settled Roma community in Bischofshofen, Salzburg, and the men were said to have deliberately incited violence against the Roma.

<http://www.thelocal.at/20140731/seven-convicted-of-incitement-against-roma>

Spain: Online hate speech against homosexuals

A man was sentenced to prison for two years and a fine for hate incitement against homosexuals, migrants and anti-racist activists, including direct threats in application of article 510 of the Penal Code. The content on his website www.faction.org was banned after the verdict. The complaint at court was made by Movement against Intolerance doing the case on the grounds of article 510 of the Penal Code.

Spain: Holocaust denial

The owner of the bookshop "Librería Europa", Pedro Varela, edited, published and distributed diverse material denying Holocaust. He was denounced on several occasions and condemned by the Provincial Court of Barcelona in 1998 under the articles 510 and 607.2 of the Penal Code, regulating incitement to hatred and genocide denial respectively.

The lawyers of Pedro Varela appealed the judgment and after a long process it reached the Constitutional Court in 2007 which ruled that the expression "whoever denies the genocide"

(607.2 Penal Code) could not be considered as a crime since freedom of expression should prevail and that denying genocide is an opinion without significance.

Three of the twelve votes of the Constitutional Court were contrary to that resolution, understanding that genocide denial is the beginning of hate speech and racism, as the European Court of Human Rights in Strasbourg has established.

One year later, the Provincial Court of Barcelona sentenced Pedro Varela for a crime of Holocaust denial consistent with the dissemination of ideologies that seek to rehabilitate regimes or institutions that shelter genocidal practices. He also was convicted of incitement to hatred.

A similar case was the prosecution against those responsible for the "Kalki" bookstore, which distributed the same kind of material like "Librería Europa".

<http://www.movimientocontralaintolerancia.com/html/admin/verNoticia.asp?cod=1665&esBusq=True>