

Legislating *against* Internet race hate

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The development of the Internet provides social spaces that enable users to promote race hate. It is argued that race hate hurts but its victims are relatively powerless in the face of this growing problem, and states do not appear to be effective in the light of jurisdictional restrictions. In addressing these concerns the Council of Europe has adopted the Additional Protocol to the Convention on Cybercrime, Concerning the Criminalisation of acts of Racist and Xenophobic Nature Committed through Computer Systems (2003) ('the Protocol'). Its remit obliges States to legislate or otherwise prohibit the use of computer systems for the dissemination of racist materials. This paper argues that on a number of grounds the Protocol does not stand up to the test of effectiveness. This is because it is couched in terms that prioritise freedom of speech over freedom from racial discrimination. A preferable approach would give more weight to equality and non-discrimination which states are required to defend. Furthermore, since the prohibition of the proliferation of race hate is the Council of Europe's main concern it must make the case for this in the context of institutional racism, rather than as an element in the juggling of rights.

Keywords: race; racial discrimination; institutional racism; hate; hate crime; cybercrime; law; human rights; Internet

Introduction

The international discourse surrounding legislating against race hate on the Internet tends to concern itself with a balancing exercise.² That is striking the equilibrium between freedom of expression and the 'pursuit of racial, religious and communal justice and harmony'.³ However, it would appear that recent legislative efforts on the part of the Council of Europe (CoE)⁴ to criminalise cyber race hate⁵ have been thwarted through the compromise they have made to concerns⁶ about freedom of expression⁷ and resistance to state interference of the same.⁸ It is argued that such a compromise comes at the expense of effective legislative protection of racial, ethnic and other minority groups⁹ from cyber race hate. And therefore it is incumbent upon us to ask the question, what if we were to consider the question of legislating from another standpoint? That position might be one that 'favours equality and non-discrimination over freedom of expression.'¹⁰ This paper understands the concept of equality as one with a chequered past which assumed the right to equal treatment did not include 'women, slaves and others by definition deemed to be irrational'.¹¹ These groups have struggled to get a foothold on the ladder of equal treatment, using the

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right to non-discrimination as a legislative tool to combat racism for instance.¹² Despite the limitations that have flowed from the use of non-discrimination legislation,¹³ this article suggests that the underlying principles that place anti-racism at the pinnacle of the mark of a decent society, is preferable to that which regards freedom of expression as sacrosanct, particularly where such freedom is used as a vehicle to vent racial hatred on the Internet.

This paper argues that given the 'Reality Check'¹⁴ on the implementation of the Universal Declaration of Human Rights that has been part of its 60th anniversary, there are strong grounds for a starting point of equality and non-discrimination as the priority when it comes to regulating cyber race hate. In this context freedom of expression should be made subject to and not compete with equality and non-discrimination. The justification for taking this position relates to institutional racism. Institutional racism has been defined as:

... the collective failure of an organisation to provide an appropriate and professional service to people because of their colour, culture, or ethnic origin. It can be seen or detected in processes, attitudes and behaviour which amount to discrimination through unwitting prejudice, ignorance, thoughtlessness and racist stereotyping which disadvantage minority ethnic people.¹⁵

Institutional racism is not just a play on words. It provides a paradigm through which to view the world of racial discrimination because it asks fundamental questions as to why racism is still prevalent in our society. The USA¹⁶ and the UK¹⁷ have been asked to address this question since the 1960s and the World Conference against Racism, Xenophobia and Intolerance¹⁸ raised specific concerns about racism with respect to the Internet.¹⁹ To date relatively little has been achieved.

It is argued that institutional racism operates on a number of levels in the contemporary debate over the regulation of cyber race hate. The first is at the stage of the failure of states and other key stake holders to take the appropriate action to prohibit its promulgation on line. In *Yahoo Inc*²⁰ the state placed responsibility for addressing the issue on the Internet Service Provider (ISP). By then the damage was already done, the stable door was shut after the horse had bolted. The second juncture where institutional racism is manifest relates to the current legislative provision from the CoE in the form of the Additional Protocol to the Cybercrime Convention²¹ (Protocol). This is evident in the framework that has been used to develop this legislation. Freedom of expression is the 'sacred cow' against which the legislation seeks to justify its apparent encroachment for the sake of providing a measure to prohibit cybercrimes motivated by race hate. Thus the legislation is couched in terms that are apologetic. Furthermore, the content of the measure steers a pathway for the prohibition of race hate crime that lacks logic, clarity and comprehensiveness. This concession to freedom of expression does not provide an appropriate service to racial and ethnic minorities because it does not accord sufficient value to equality and non-discrimination.

This paper maintains that any 'real' challenge to cyber race hate crime must begin with an examination of the institutional racism inherent in a system which currently limits its own potential to bring about change. This perspective should consider the possibility that cyber race hate constitutes a violation of human rights for instance, where it is used to pursue 'incitement to racial hatred, to produce racist propaganda and xenophobia'²² and that reparations²³ should be sought for this violation. That reparations remedy would be to seek a change in the regulations governing

cyber-race crime so it is shaped by the tenets of equality and non-discrimination, rather than hedged in terms that accord freedom of expression priority. Legislation fashioned in this way demands of key stake holders that they use their powers to address the *mischief* and this includes a change in their behaviour whether they are Internet Service Providers, states or international entities. Moreover, a lead from the front by example is required if the most important stake holders – our citizens – are to adjust their behaviour also. This paper suggests that if we are to tackle the problem of race hate as it occurs in cyberspace we must all re-consider how we perceive race hate on the Internet and its effect on our fellow human beings, refashion the tools we have developed to deal with it and, fundamentally, consider the Internet in a different way.

Legislating against cyber-hate crime

The Convention on Cybercrime (Convention)²⁴ and its daughter Protocol with regard to racist and xenophobic crime are concerned with preventing a ‘dark side’²⁵ to the Internet taking hold. This is described as ‘the emergence of new types of crime as well as the commission of traditional crimes by means of new technologies’.²⁶ This includes conduct of a racist or xenophobic nature ‘committed through computer systems’.²⁷ Specifically the Additional Protocol to the Convention on Cybercrime, Concerning the Criminalisation of acts of Racist and Xenophobic Nature Committed through Computer Systems 2003 (‘Protocol’) seeks to restrict access to cyberspace for those who wish to use it to commit racist and xenophobic crimes.²⁸ Member States²⁹ are required to harmonise computer related offences in their national legal systems in order to attain a common minimum standard of relevant offences.³⁰

The Protocol is of particular importance for states. It supplies them with a new or additional tool in an armoury used to fight racism and xenophobia on line. The Protocol also recognises the need for the harmonisation of the substantive law of Member States to provide for more effective legislation in the prosecution of those who perpetrate racist and xenophobic crimes in cyberspace³¹ because it is clear that in the world of global communication networks piecemeal and solitary national regulation can be thwarted where the perpetrator resides in a jurisdiction different from that in which the offence is committed.³² Kaplan et al. (2003)³³ surmise that Internet hate crime offenders surf the Internet highway without fear of physical boundaries – they are non-existent; which means ‘it is at least possible that a perpetrator of a threat or harassing speech need not be at the actual scene of the crime (or within 5,000 miles, for that matter) to prey on his or her victim’.³⁴ The Protocol thus supplements the Convention by providing for a number of matters: a definition of racist and xenophobic material as the representation of ideas or theories ‘which advocates, promotes or incites hatred, discrimination or violence, against any individual or group of individuals, based on race, colour, descent or national or ethnic origin, as well a religion if used as a pretext for any of these factors’,³⁵ the criminalisation of conduct that is intentional with respect to the distribution of or otherwise making available, racist or xenophobic material to the public through a computer system,³⁶ intentional threats to persons or groups on the basis of race, colour and so on, intentional insults in public with respect to the same where this is committed through a computer system,³⁷ the intentional denial of genocide or crimes against humanity.³⁸

On reading the Protocol a number of issues become apparent. There is no real explanation as to why race hate as opposed to hate more generally, is given priority. There are definitional problems in the way race-hate crime is defined, particularly when linked to religion. The fault requirement for cyber-race crime relies on a loose definition of intention which is itself subject to national variation and the conduct element needs elaboration.³⁹ Fundamentally however the power of the Protocol is undermined by its own legislative ‘get out clause’ by virtue of Article 3(3). This provision accords a ‘reservation possibility’⁴⁰ to states where ‘due to established principles of its legal system concerning freedom of expression, it may reserve the right’ not to ‘criminalise distributing or otherwise making available racist and xenophobic material to the public’⁴¹ over the Internet. Since the central tenet upon which the Protocol stands is the protection of human rights including the right to be protected from racial discrimination, this reservation is problematic. It allows states to use the mantle of freedom of expression as a barrier to their powers to counter cyber race crime. More importantly this fundamentally undermines the CoE’s own position that racism and xenophobia pose a threat to the rule of law, and so must be prohibited.⁴² It is argued that this is the most troubling issue with respect to concern over institutional racism. That is that the very mechanism used by institutions to counter racist activity is itself constructed in a way that unwittingly and unconsciously fails to provide an appropriate service to people on the basis of their racial and ethnic origin. These issues will be considered in more detail in the discourse that follows.

Why should the Council of Europe act to outlaw cyber-race hate?

The general position is a political one. The CoE⁴³ has a mandate to ‘protect human rights ... promote Europe’s cultural identity and diversity ... to find common solutions to challenges facing European society: such as discrimination against minorities, xenophobia, intolerance ... and ... cybercrime [and] to [back] ... legislative reform’.⁴⁴ It has committed itself to the development for the first time of an international treaty concerning crimes committed on line. Furthermore its main purpose here is to follow a common criminal policy that aims to protect society from cybercrime generally, and acts of a racist and xenophobic nature committed on the Internet. The underlying concern is that, left unchecked, this phenomenon will cause instability in society which could prove the nemesis to the CoE’s historic mission – to create out of the destructive forces of war a Europe dedicated to unity.⁴⁵ Racism on the Internet is clearly a problem in this architecture. It is divisive, not all states have sufficiently clear legislative strategies to deal with it and, in the context of cyberspace, racist propaganda can avoid the reaches of those states that outlaw cyber-race crime.⁴⁶ There is also the recognition that race hate words cause injury in the sense that they can constitute a violation of human rights. How does this square with hate per se and how well has the articulation of race hate criminality been made in the Protocol itself?

(a) Race hate words hurt

The old saying that ‘sticks and stones may break my bones but words will never hurt me’⁴⁷ can be taken to refer to the erection of a barrier to insults which may cause psychological injury. Whether these ‘injurious’ words in fact cause hurt is a moot

point.⁴⁸ Neu argues that the answer to this (if there is *an* answer) is made complex by the intricacies of the meaning of words, to whom the words are said, who uses them and how the words are received.⁴⁹ Thus the words ‘welshing’,⁵⁰ ‘gyp’,⁵¹ ‘hunk’,⁵² and ‘niggardly’⁵³ may or may not be insulting words depending on time, geographical space, speaker, listener and context.

There is a school of thought⁵⁴ which adheres to the view that race hate words and images hurt. Matsuda⁵⁵ argues for us to understand these words as a form of assault or injury. Thus in *Virginia v. Black*⁵⁶ the opinion of the US Supreme Court on race hate messages was ‘while a burning cross does not inevitably convey a message of intimidation, often the cross burner intends that the recipients of the message fear for their lives. And when a cross burning is used to intimidate, few if any messages are more powerful’.⁵⁷ Similarly, under English law an assault can be committed by words, thus in *Ireland and Burstow*⁵⁸ Lord Steyn was of the opinion that ‘a man accosting a woman in a dark alley saying “come with me or I will stab you”’,⁵⁹ would constitute an example of assault by words. The essence of this type of assault is the apprehension of fear or injury that is generated by the words used towards the intended victim.⁶⁰ However there is a potential problem with treating race hurt words in cyberspace in the same category as those conveyed through vocal means or cross burning. The sight of a cross burning on someone’s front lawn is clearly frightening and meant to elicit fear in the mind of the individual. A crowd of white people estimated at between 1500 and 4000 shouting, ‘let’s get the blacks’,⁶¹ similarly terrifying. Such incidents, in the context of the US and UK have a particularly despicable history,⁶² rooted in hate, discrimination and exploitation. In cyberspace the distance between the perpetrator and potential victim is, however, separated by technology. The victim can choose not to use such sites and the perpetrator is never a ‘real’ threat since the latter could not effectively be carried out.⁶³

There are criminal sanctions in some jurisdictions for dealing with on line communications where the evidence is that it has an impact in real space. Reed⁶⁴ points out that where content constitutes a criminal offence the law can deal with it under the Malicious Communications Act 1988⁶⁵ and the Protection from Harassment Act 1997. Section 2(1) (PHA)⁶⁶ has been used to lay charges against those who have used the Internet to harass their victims.⁶⁷ It is possible therefore to bring cases against those who harass their victims on-line where that harassment is related to race. However, the PHA requires a course of conduct which occurs on more than one occasion⁶⁸ in order for the conduct to constitute harassment, furthermore it is not clear precisely what content would be sufficient to bring a case of racial harassment since the essence of harassment is ‘psychological damage’⁶⁹ on the victim. What is the position where the harassment is aimed at a group of people but the language used is general, e.g., the Black Diaspora should repatriate? Or a more general question asked on a blog site being ‘why can’t white people use the ‘N’ word?’⁷⁰ A further problem here is that UK law on racial and religious hostility has been used in an intra-racial context to capture arguments between person of the same racial group *Pal*⁷¹ and *White*,⁷² yet failed in the prosecution of Far Right propaganda.⁷³ The symbolic message that underwrites these laws can lead to mistrust by those who believe the law is there to protect them, racial minorities and that its impact is not taken sufficiently seriously.

Orwick and Settles⁷⁴ suggest the culture of hate speech is prevalent on the Internet, it provides another ‘venue for bullying behaviour’⁷⁵ and its propensity to injure its victims should not be underestimated. It is the content of the message and

the context in which such messages are generated that needs to be focused on. Lawrence⁷⁶ argues for bias crimes⁷⁷ to be understood as more than a 'personal predilection of the perpetrator'.⁷⁸ Its' dangerous nature lies in the social context within which such messages are portrayed, rooted in particular histories of discrimination and hatred against particular groups. Furthermore, the aim of the perpetrator⁷⁹ is to use the stereotyped characteristics of individual victims as a stepping stone to attack on the general community to whom that victim belongs or is perceived to belong.⁸⁰

(b) *Not hate per se*

Curiously the Protocol targets racist and xenophobic crimes as *the* hate crimes to be targeted. Why? The document is keen to emphasise that these crimes constitute 'a violation of human rights and a threat to the rule of law and democratic stability'.⁸¹ But since 'all human beings are born free and equal in dignity and respect',⁸² why should racism or xenophobia alone attract the status of an internationalised cybercrime? Lawrence⁸³ argues that a bias crime, 'is a crime committed as an act of prejudice'⁸⁴ because the perpetrator targets 'distinct identifying characteristics of the victim'⁸⁵ and the crime is committed 'not because the victim is *who* he is, but rather because the victim is *what* he is'.⁸⁶ That point is critical to recognising why there is a fight to combat such crimes whatever medium is used to commit them. It is the antipathy expressed towards the victim because they are presumed to represent a group within society, that they are said to share in the culture of a group perceived by the perpetrator as a pathology, moreover, that group suffers from discrimination in society more generally and the perpetrator either knows or is reckless to that fact. To target the victim is to target the group, to make that group feel vulnerable and persecuted. Several have attested to how crimes committed against an individual because of *what* she is presumed to be send a chilling message to members of the victims' community. The European Commission against Racism and Intolerance reports⁸⁷ that Muslims face religious discrimination in Liechtenstein, irregular migrants, asylum seekers and refugees experience racism in Malta, in Moldova there is troubling extremist racist activity, whilst in San Marino and Serbia racism and intolerance remain an issue. However, Human Rights First (HRF)⁸⁸ provide concrete evidence that religious and homophobic hatred poses a threat to social cohesion. In HRF's 2007 hate crime survey they report the increase in violent crimes against Muslims and Muslims institutions such as mosques. They are singled out for attack on the basis of both racism and religious discrimination because of their apparel, or because the individual is presumed to represent the Muslim community.⁸⁹ Race is not the exclusive determinant of discrimination, religion counts too. The incidents occurred in several countries such as Austria, France, the Netherlands, Spain, Russia and the UK demonstrating the extra-territorial nature of such occurrences. Similarly, it is 'lesbians, gays, bisexuals and those who are transgender'⁹⁰ who are targeted in homophobic attacks on those who have the temerity to speak out against their oppression and, once again, society is witness to the hatred meted on individuals in order to intimidate the group.

Statistics from Canada, Sweden, the USA, UK, Northern Ireland, Germany, Bulgaria, Croatia and the Russian Federation indicate that assaults against people on the basis of their sexual orientation is more general than we would care to admit.⁹¹ An important aspect of these incidents (since they are not recognised in all

countries as crimes)⁹² is the social context they inhabit. Like those forced to wear the Star of David⁹³ during the Jewish Holocaust era, homosexual people had to wear pink triangles and were also targeted for extermination.⁹⁴ Today homophobia is a form of discrimination based on the desire to oppress and to stigmatise a minority group through attacking individuals. In that sense it is no different from discrimination as a manifestation of hatred based on racism. In their Ten-Point Plan,⁹⁵ HRF call for the recognition of hate crimes which cover offences committed against a person on the basis of race, religion, ethnicity, gender, sexual orientation, mental and physical disabilities 'or other similar forms of discrimination',⁹⁶ by all governments. It is argued that if the justification for the focus on race hate to the exclusion of other types of hate constitutes a serious failing in the Cybercrime Convention. This is because it is unclear why race is dominant factor.

It is suggested that justification for singling out race is tied to a social and historical context not made clear in the provision or explanatory papers – institutional racism. Institutional racism is the persistent failure to provide a service to people on the basis of their race or ethnic status.⁹⁷ This failure consists of unwitting or unconscious prejudice in the way things are done, the way service provisions are understood, the context in which such provision is delivered. Legislation is an instrument through which the service of the legislature, police, judges and others combine to provide a service to the public. Situating cyber hate in this context indicates why the focus on 'privileging' race may be necessary, particularly in the context of the global threat posed by a subculture of race hate on line.

The troubling definition of race hate cybercrime

The Protocol seeks to criminalise 'acts of a racist and xenophobic nature committed through the use of computer systems'.⁹⁸ This measure is admirable in its attempt to capture the type of offending behaviour that should be prohibited when using the Internet since such conduct serves to undermine social stability. The fabric with which the provision is concerned relates to written material, any image or other representation of ideas of theories which are of a racist or xenophobic nature.⁹⁹ The requirement is that these materials advocate, promote or incite hatred, discrimination or violence against any individual or group based on race, colour, descent or national or ethnic origin.¹⁰⁰ Religion is included for good measure but only in so far as religion is used as a pretext for the factors mentioned.¹⁰¹ The type of conduct the Protocol seeks to criminalise is the use of the Internet to disseminate racist or xenophobic materials,¹⁰² threats of a racist or xenophobic nature¹⁰³ and racist or xenophobic public insults.¹⁰⁴ Finally, Article 6 of the Protocol seeks to criminalise the denial, gross minimisation, approval or justification of genocide or crimes against humanity.

The Protocol reads like an umbrella provision with very little guidance on the fault element required to bring a case. The words 'advocate', 'promote', or 'incite' hatred, discrimination or violence are elaborated on in the Explanatory Report. Paragraph 14 of the Report provides guidance on the meaning of these terms¹⁰⁵ which is fairly vague in the sense that 'a plea in favour of hatred',¹⁰⁶ 'encouragement or advancing of hatred'¹⁰⁷ and 'urging others to hate'¹⁰⁸ are meant to provide some sense of what it means to advocate, promote and incite respectively. Not only are these definitions unclear, Member States are not bound to refer to them in deciding

criminal culpability since ‘the text of this Explanatory Report does not constitute an instrument providing an authoritative interpretation of the Protocol’.¹⁰⁹ Nevertheless, it may be asking too much to expect these provisions to meet anything other than some general sense of the ingredients of bad behaviour and leave it to the good sense of prosecuting authorities to converse with and learn from each other in terms of their respective practices.

However, many prosecutorial systems consist of several key actors. This includes the gatherers of evidence (police), the parties to the dispute (advocates), those that give directions (judges) and those that make the ultimate decision (the public as jury). Do we have sufficient confidence in the system seized with the job of delivering on the Protocol? Work on the problems with the jury system¹¹⁰ and the decision in the Griffin case¹¹¹ suggests that we may need to consider whether race hate cases should go before juries at all. The Protocol, however, assumes that the infrastructure required to deliver on cyber race crime is in place.

(a) Race hate

Several references are made to hate as the underlying concept to which the Protocol is concerned. Article 2 refers to ideas or theories of hate, Article 5 is concerned with exposure to hate and Article 6 recognises that hate plays a role in holocaust denial. But what is hate? Some light is shed on this term in Paragraph 15 of the Explanatory Memorandum which refers to ‘intense dislike or enmity’ (hostility). This raises a number of problems in terms of its troubling subjectivity, vagueness and standard of proof.

Would this definition catch material such as *Danish Cartoons*¹¹² or ‘Satanic Versus’?¹¹³ Should it? Might material that discusses ‘England for the English’ or work on investigating the psyche of Adolf Hitler be treated in much the same way? These are questions that are not easy to answer and for which the Protocol appears to be silent.¹¹⁴ Unless the underlying message is made explicit, this unspoken position is likely to remain so. It is argued that an articulation of institutional racism as a tool by which to get institutions to see that they have, hitherto, paid scant attention to the weakness of their approach to race hate crime, and thus their obligations towards racial minority, is the key. It is not clear that the Council of Europe have grasped this nettle.

(b) Racial and other distinctions

Race

States are required to put in place measures that punish the intentional dissemination of racist or xenophobic materials or threats or public insults of a xenophobic nature. This is to protect potential victims ‘based on race, colour, descent, or national or ethnic origin as well as religion if used as a pretext for these factors’.¹¹⁵ The term race is to be understood by reference to its national and international law and practice.¹¹⁶ This is of great concern since it is not immediately obvious that all national systems subscribe to the theory that race is not a biological or genetic reality but a social construction, and the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD) makes it clear that there is no science in the drawing of racial distinctions in order to claim supremacy.¹¹⁷ Solomos¹¹⁸ argues that whilst

race does not exist in an objective sense, a number of societies act as though this were a foregone conclusion.¹¹⁹ Consequentially, some human beings are negatively constructed as the Other¹²⁰ which Fanon¹²¹ equates with the ‘experience of his being through others’¹²² by the accentuation of difference based on association of somatic factors such as skin colour, clothing, language, diet and religion with racism, that is ‘mental states of individuals or groups, of ideologies, of social practices of institutions’¹²³ that maintain ‘relationships of domination and subordination’,¹²⁴ that perpetuate hatred of the “Other” in defence of “Self”.¹²⁵ At the extreme these differences have been used to exploit and sometime exterminate people, notably the Transatlantic Slave trade,¹²⁶ the Jewish Holocaust,¹²⁷ American ‘lynch laws’,¹²⁸ Apartheid South Africa¹²⁹ and institutional racism in Britain.¹³⁰ The fact the European Union has stated publicly that it, ‘rejects theories which attempt to determine the existence of separate human races’¹³¹ affords little guarantee that national legal systems will follow suit, since an alternative was not provided for in this instrument.

Ethnicity

Judicial dicta in *Saint Francis College v Al-kharaji*¹³² and *Mandla v Dowel Lee*¹³³ suggests that scientifically based racial classifications are not a sensible way to classify human beings. As Lord Fraser said in the House of Lords, there would be practical difficulties of proof and ‘the briefest glance at the evidence . . . is enough to show that, within the human race, there are very few, if any, distinctions which are scientifically recognised as racial’.¹³⁴ However, recent public fury that surrounds fortress Europe and its enemies within serves as a reminder that these notions of difference are never far from the surface and serve to create ‘the newer categories of the displaced, the dispossessed and the uprooted . . . beating at western Europe’s door, the Europe that helped to displace them in the first place’.¹³⁵

The term ethnicity suffers from similar problems in so far as there is no definition in the Protocol and no generally agreed definition, moreover, there are those who consider themselves as an ethnic group who are not recognised as such.¹³⁶ Indeed for some countries such as Germany¹³⁷ and France¹³⁸ where there is a tradition of adherence to nationhood and notions of citizenship rather than ethnicity. The presence of ethnic or minority groups may be seen to constitute a threat to the idea of the liberal nation state, not conducive to the public good and a cause of social tensions due to the perceived failure to assimilate with the majority culture. There are those who express a desire to retain their cultural/ethnic identity but suffer from a castigation of the very things they hold dear, as Silverman¹³⁹ points out a ‘simple piece of cloth on someone’s head could send a whole country into a prolonged frenzy’.¹⁴⁰ As with race the failure to provide guidelines on the meaning of the term ethnic will not lend itself to consistent discourse that seeks to internationalise the fight against hate crime and the education of Internet users and regulators as to what constitutes acceptable and responsible behaviour in cyberspace.

Religion

Article 2(1) of the Protocol refers to racist and xenophobic material aimed at religious groups if the prohibited conducted is ‘used as a pretext for any of these factors’ – namely fabric that: ‘advocates, promotes or incites hatred, discrimination

or violence, against any individual or group of individuals, based on race, colour, descent or national or ethnic origin . . .'.¹⁴¹ The reason religion is incorporated in this way is to avoid going outside the remit of the Protocol¹⁴² that aims to prohibit racist and xenophobic acts on line whilst recognising that religious hostility could be used as a proxy for racial discrimination or racial hatred.¹⁴³ There are two related concerns here, that which relates to the definitional element of cyber-race crime and that to do with the danger of dilution if the terms are drawn so wide as to be meaningless in terms of racial hatred.

The idea is to capture that conduct that uses religion as a proxy for race. In other words the perpetrator's real intention is to attack the individual or group on the basis of their racial, ethnic, nationality or descent by hiding this attack behind the use of religious language. The Council of Europe expects states to recognise this problem. However, there are issues with this area. How to work out from a defendant's conduct that material has a racist message is going to be difficult. What kind of tests are going to be applied? What is the position where the perpetrator and the 'victim' are of the same racial group say white and the content of the message relates to Muslims? Would that message get caught? It would depend on the way in which that message was constructed but constructions are ambiguous. The tension here is to catch those messages that aim to undermine communities and possibly the social cohesion of society more generally.

It is argued that if that is the underlying symbolic message it must come with a warning. It is contended that such a warning must give more credence to the understanding of Islamophobia. The concept of Islamophobia has been developed in work of the produced by the Commission on British Muslims, a body established by the Runnymede Trust.¹⁴⁴ This work challenges stereotypical notions of Islam as Monolithic without internal diversity, as a separate non-interacting religion that seeks to repress criticism. Moreover, it is argued that the idea of Islam is inferior to the West, politically manipulative and the hostility towards Islam is used as a precursor for discriminatory, harassing and violent treatment of Muslims.¹⁴⁵ The report points to the need to address freedom of expression, particularly in the media with the 'distorted' messages used by the media. These ideas reinforce negative stereotypes and indirectly support a climate of fear and hostility that confronts Muslims on a daily basis. Given the extent of research and evidence of this phenomenon available it might have been preferable for the Council of Europe to use the term Islamophobia when referring to religion as a pretext for race.

The restrictive nature of the Protocol must be understood in the light of the weakness occasioned by those in power who fail to understand the impact of hate, in its various manifestations on the community at large and not just its victims. Cyberspace can never be a safe place for the conveyance of ideas if we concur in allowing offending behaviour to taint its engaging and creative potential, and the fight to combat cyber-hate crime will be one of frustration if prosecutors have to walk a tight rope between different types of hate. Given the European Union's commitment to combat various forms of discrimination and hatred this game of chess without all the pieces is at least problematic

The fault element

The racist or xenophobic conduct with which the Protocol is concerned consists of the use of computer systems to disseminate materials; to threaten and to insult

publicly. The provision targets holocaust or genocide denial¹⁴⁶ and those aid and abet the commission of these behaviours.¹⁴⁷ There are exemptions for those who have the rights recognised by legislative authority, national security or for the purpose of criminal investigation.¹⁴⁸ The trigger for these acts is the notion of intention. The perpetrator must ‘intentionally’ commit a cyber race crime or ‘intentionally’ aid or abet the commission of such an offence. The word intention is referred to in Article 25 of the Explanatory Memorandum:

All the offences contained in the Protocol must be committed ‘intentionally’ for criminal liability to apply. In certain cases an additional specific intentional element forms part of the offence. The drafters of the Protocol, as those of the Convention, agreed that the exact meaning of ‘intentionally’ should be left to national interpretation. Persons cannot be held criminally liable for any of the offences in this Protocol, if they have not the required intent. It is not sufficient, for example, for a service provider to be held criminally liable under this provision, that such a service provider served as a conduit for, or hosted a website or newsroom containing such material, without the required intent under domestic law in the particular case. Moreover, a service provider is not required to monitor conduct to avoid criminal liability.

Immediately apparent are three issues; domestic based control over the fault element, the requirement of intention and the exclusion of a duty of care on the part of ISPs.

(a) Domestic based control over fault

The Protocol requires that cyber-race crimes must be committed ‘intentionally’ albeit the meaning of intention is to be determined by the law of Member States.¹⁴⁹ This is likely to raise issues regarding the variation of standards applied at national level. The obvious result of the application of national standards to the meaning of intentional cybercrime is that depending on the jurisdiction different standards will apply putting the claim for the provision of a minimal base point in jeopardy. The Convention aims to cover the mens rea of an offence with respect to cybercrime at the most basic or obvious level by providing that all Member States encompass as a bare minimum offences that are committed intentionally. This bare minimum requirement is no bar to raising the definition to include crimes committed with a state of mind less than intention. But since this approach by the CoE is to alleviate, ‘the fight against such crimes on the national level and on the international level as well’¹⁵⁰ which makes sense if a country is to prosecute a person who commits a cybercrime offence abroad when they are domiciled or a foreigner in the prosecutorial country,¹⁵¹ how is this minimum to be assured when countries can determine the content of the requirement with respect to an offenders’ state of mind? Prosecuting authorities could pursue defendants who have committed cyber race crime offences in their jurisdictions *from* other jurisdictions thus using their applicable law and working around the normal rules relating to territorial scope however, this does not get around the notion of setting international standards for global hate crimes on race hate.

Intention defined at the national level will surely re-manufacture the problem that the Convention was designed to avoid – that the definition of such crimes by reference to national standards fails to provide a standard by which to prosecute cybercrime committed across territorial boundaries for which perpetrators have no

respect. Stein and Hubbard argue that ‘in order to establish standards in cyberspace, penal laws must be enacted with as much clarity and specificity as possible, and not rely on vague interpretations in existing legislation’.¹⁵² This is particularly important for hate crime where the channel through which such messages are spread and minorities targeted is the Internet.¹⁵³

(b) Requirement of intention

It is argued that the use of the concept of intention exclusive, to determine criminal liability is problematic. Under English Criminal law the concept of intention has raised difficult questions of interpretation and what are the boundaries to be drawn between the meaning of intentional and reckless conduct.¹⁵⁴ The concept of intention may be understood as a person’s ‘aim, objective or purpose’¹⁵⁵ but has also been determined in the context of ‘virtual certainty’ in *Nedrick*.¹⁵⁶ Furthermore the term intention and reckless are not clear on the borderline, moreover, under German law the concept of intentional criminal conduct includes not only knowledge and desire but also recklessness.¹⁵⁷ Danner¹⁵⁸ has argued that hate crimes (or bias crimes as she calls them) can be committed intentionally or recklessly by the perpetrator. The term recklessness has come to take on two meanings determined in the English cases of *Cunningham*¹⁵⁹ and that of *Caldwell*.¹⁶⁰ *Cunningham* recklessness is said to arise when the perpetrator foresees the risk of a prohibited result and goes on to take that risk without necessarily intending that result, whilst a *Caldwell*¹⁶¹ reckless defendant incurs criminal liability because she does an act which creates an obvious risk and either gives no thought to the possibility of the risk of damage or has recognized some risk and has gone on to do it.¹⁶² Should cyber-race crime law also include those who take risks?

(c) Dealing with ‘risk-takers’

In *Belanger*¹⁶³ a permanent injunction was successfully issued against a defendant that required him to desist from threatening student groups posting Internet messages that was motivated by hate of gay/lesbian and bisexual students. Although this was a civil case it makes the point that those who take the risk of causing harm should face the consequences. By the same token in the *Tadic*¹⁶⁴ case the International Criminal Tribunal for the former Yugoslavia (ICTY) found the defendant was guilty of a crime against humanity regardless of his personal motives provided the crime was ‘related to an attack on a civilian population and that he knew his crimes were so related’.¹⁶⁵ It is argued that the focus on these provisions with respect to hate crime should be on the social context in which such crimes may have been committed. This puts the perpetrator to account to the Criminal Justice system. As Danner¹⁶⁶ points out *context* rather than motive forms the ingredient for culpability. If the context is prioritised it is argued that a preferable way of dealing with the fault based regime in cyber-race hate crime is to capture both intentional conduct and risk-takers. That the Council of Europe restricts the law in this way sends the wrong message to those who show complete disregard for the consequences of their action, and those who are potential victims that regard the criminal justice system as failing to bring race hate crimes to the door of the courts. This is not only the case with perpetrators but also with Internet Service Providers.

(d) Exclusion of the duty of care

Persons cannot be held criminally liable for any of the offences in this Protocol, if they have not the required intent. It is not sufficient, for example, for a service provider to be held criminally liable under this provision, that such a service provider served as a conduit for, or hosted a website or newsroom containing such material, without the required intent under domestic law in the particular case. Moreover, a service provider is not required to monitor conduct to avoid criminal liability.¹⁶⁷

Should Internet Service Providers and/or website hosts owe a duty of care to prohibit the use of their computer systems/websites for the transportation of cyber hate crime material? Under the Protocol it would appear that criminal liability would only arise where there was evidence of intention to commit cyber race crime or to aid or abet the commission of such an offence.

Litigation at domestic level suggests that there is lack of clarity in the area. In *Sigler v. Kobinsky*¹⁶⁸ the Winconsin Court of Appeal held that¹⁶⁹ a company was not responsible for the misuse of its computers by an employee. The facts did not show that the company could have foreseen that its technology would have been used for the purposes of harassment. What if the company/ISP could foresee harm? Should they be held criminally responsible? The problem is where to place the blame when an unauthorised act is committed through the use of Internet technology controlled by another. In the context of tort the English courts have been reluctant to hold third parties responsible for the wrongful acts of others where, as in *Trotman*,¹⁷⁰ a thirty party merely provided the opportunity for harm to be committed but did not authorise it. The traditional position that assumes 'conduit immunity'¹⁷¹ for ISPs is being eroded in the face of argument that they are 'gate keepers' who have the power to control offensive material. The Yahoo¹⁷² litigation is a case in point. The heart of the matter is the applicable law but it raises the question that if liability is determined domestically without comprehensive guidance from the CoE then global standards with respect to the Internet are unlikely to be achieved.

In the English case of *Godfrey v. Demon*¹⁷³ the defendants sought to rely on the 'defence of innocent dissemination'¹⁷⁴ of materials that were produced by another and appeared in their on-line newsgroup. The court held that as soon as the defendants became aware of the unlawful content and did not remove it they were liable under common law. The European Union position can be found in the Copyright and Related Rights in the Information Society 2001 and the Electronic Commerce Directive, 2000/13/EC (ECD). Article 12 of ECD provides for conduit immunity where the ISP is a mere conduit and does not initiate transmission, select receivers or modify the information. However, by Article 14 of the Directive liability for hosting information is limited to the situation where the ISP does not have actual knowledge of illegal content, or where there is knowledge, acts promptly to remove it. A general obligation to monitor is not imposed by the provision (Article 15). What emerges is that the notion of ISPs as mere passive recipients of information has been challenged in a number of jurisdictions, albeit in the context of civil liability. The virtual exclusion of ISP providers from the ambit of cyber race crime (unless they are intentionally involved) seems to run contrary to other developments.

(e) The purpose of fault-based liability

The Internet is social space where we should all be free to communicate with others and spread ideas. It is also, the medium used to harass and intimidate individuals on the basis of their race, religion, sexual orientation or national origin.¹⁷⁵ It is submitted that cyber-hate crimes should be prohibited on the basis of recklessness as well as intention and that there should be an international standard by which such conduct should be judged. This international standard should have at its forefront the desire to ensure that the social context where such offending behaviour takes place should be a determinant of culpability since society wishes to protect minorities from discrimination. This contextualised understanding to the culpability of perpetrators would also discount those who have given no thought to the consequences of their conduct because they do not have the capacity to do so due to lack of maturity or competence¹⁷⁶ and bring into the equation those legal persons who, reap the benefits of providing Internet access to others but avoid the burden of regulating users. This would help us to move forward, not only in the pursuit of the freedoms with regard to opinions, expressions and the imparting of ideas but deal in a more appropriate way with respect to discriminatory conduct that seeks to, or has the effect of, promulgating contempt for human life which is contrary to the Universal Declaration of Human Rights (UDHR).¹⁷⁷

Competing rights

Fans of the current Dr Who series will understand the analogy regarding the fight between the freedom of thought for the individual and usurping this freedom by the Cybermen – a breed of human being devoid of emotion programmed to think only for and on behalf of the collective.¹⁷⁸ Whilst controlling cyberspace in this way would be undesirable, does it follow that freedom to promote hate on the basis of free speech on the Internet is something we should protect regardless of the harm it might cause? Let us look at the arguments. The Convention and the Protocol are at pains to stress that everyone has the right ‘to hold opinions without interference, as well as the right to freedom of expression, including the freedom to seek, receive, and impart information and ideas of all kinds, regardless of frontiers and the rights concerning the respect for privacy’.¹⁷⁹ This statement is said to accord with the various international instruments.¹⁸⁰ But the question is whether this right to freedom includes the right to use the Internet to push hate. Is it the case that freedom of expression guarantees freedom to use the Internet as a medium for this purpose, furthermore, if that is the case should limits be placed on the kinds of expression used in cyberspace. In other words, since cyberspace was not in existence when we carved out the rights enshrined in international instruments, why should it follow that we simply transfer the exercise of those rights to any medium scientific technology provides for our use within the sphere of caution on the exercise of those rights that have been established in real space?¹⁸¹

(a) Freedom of expression

It is argued that the *use* of the medium of the Internet to *exercise freedom* of expression do not go hand in hand, however, there is an assumption that the two

things are one and the same. The Council of Europe refers to Article 10 of the European Convention on Human Rights (ECHR)¹⁸² as the provision which incorporates 'the freedom to hold opinions and to receive and impart information and ideas'.¹⁸³ The Council of Europe advocates that the Protocol is not motivated by a desire to control national legal systems freedom of expression principles,¹⁸⁴ whilst requiring states to adopt legislative and other measures to criminalise racist and xenophobic material disseminated through computer systems.¹⁸⁵ Clearly at this juncture there is an encroachment on state discretion and thus on freedom of expression since states are required to control the content of material through the Internet if it is in nature racist or xenophobic. Moreover, the Explanatory Memorandum points to Article 10(2)¹⁸⁶ of the ECHR as a provision that gives states the right to regulate the freedom of expression where necessary to protect the rights of others not to be discriminated against.¹⁸⁷ The requirement to criminalise this conduct is undermined by Article 3(3) of the Protocol which provides the State can constrain itself where 'due to established principles in its national legal system concerning freedom of expression, it cannot provide for effective remedies'.¹⁸⁸ Presumably if there are no established principles states cannot make use of Article 3(3) to get out of compliance with Article 3(1) of the Protocol but that requires reading the provision only with respect to what has already been established and not with what is likely to come.

What could these 'established principles' be? In *Handyside v. United Kingdom*¹⁸⁹ the ECHR was of the opinion that freedom of expression constitutes one of the fundamental elements of a democratic society which includes the moral fibre to tolerate ideas that might 'offend, shock or disturb the State or any sector of the population'.¹⁹⁰ However, the ECHR also took the view that where the State sought to regulate this freedom it must be 'proportionate to the legitimate aim pursued'. This is not the same thing as saying States do not have to criminalise the dissemination of racist materials on the Internet rather the ECHR requires that States exercise their powers proportionately. The idea of not interfering with established principles must also surely take into account another established fundamental principle, globally agreed that 'steps [should] be taken to put an end to racism, racial discrimination, xenophobia and related intolerance to prevent their future occurrence'.¹⁹¹

A number of cases brought under Article 3¹⁹² of the European Convention on Human Rights show that the European Court of Human Rights is alive to the racial discrimination in the context of inhuman and degrading treatment. Cahn¹⁹³ points out that the jurisprudence of the court on this subject can be traced in the cases such as *Nachova v. Bulgaria*,¹⁹⁴ the court's first finding of racial discrimination regarding treatment of Roma by state officials. Furthermore, the European Race Directive¹⁹⁵ obligates states to implement measures that prohibit harassment on racial or ethnic grounds,¹⁹⁶ in the access to and supply of goods and services available to the public.¹⁹⁷ Given that the ECHR and the European Union have moved in the direction of developing the law on the prohibition of racial discrimination, and taking into consideration that race hate messages can have disastrous results (e.g., Jewish Holocaust, Rwanda) why has the CoE insisted on the reservation? Why is freedom of expression balanced with racial hate, rather than second place to it?

(b) Freedom from racial discrimination

McGonagle¹⁹⁸ argues that currently the ‘balancing of the rights’ of free speech with that of ‘regulating ‘hate speech’, i.e., racist or otherwise identity-assailing expression’¹⁹⁹ has so far eluded the realms of international law. In part this appears due to the ‘outer definitional demarcations of the right’²⁰⁰ to free speech with the right to protection from racial discrimination with which hate speech might tussle. Both the UN Human Rights Committee (HRC) and the European Court of Human Rights (ECtHR) have been put to task regarding these issues. In a number of cases²⁰¹ the HRC have not provided the detail that might constitute guidance as to the point reached where free speech constitutes hate speech making the latter an abrogation of international law principles regarding racism.²⁰² Similar criticism has been levied against the court in the cases where the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD)²⁰³ has been raised. Article 4 of ICERD provides that racial propaganda and organisations based on such misinformation should be condemned, moreover, the dissemination of racist materials should be criminalised, organisations that promote racism should be declared illegal and the promotion of racism by public authorities should be prohibited. In *Jersild v Denmark*²⁰⁴ the Court found a violation of Article 10 (freedom of expression) of the ECHR when the national court convicted a journalist of aiding and abetting the broadcast of racist views through the television. Whilst the Court considered ICERD to be of great weight in the analysis of the issue and said that there was no conflict between ICERD and Article 10 holding that ‘the potential impact of the medium concerned was an important factor’,²⁰⁵ however the Court would not give guidance on what techniques of reporting should be adopted by journalists and said that this was not a matter for national courts either.

McGonagle²⁰⁶ suggests the Court’s failure to deal with the relation between freedom of expression and the regulation of racist speech with regard to Articles 10 of the ECHR and Article 4 of ICERD is regrettable. Similar comments have been made of the *Glimmerveen*²⁰⁷ and *Feldek*²⁰⁸ cases.²⁰⁹ The ECtHR treads carefully with respect to national state restrictions on the exercise of freedom of expression under Article 10(2) requiring that if, an applicant is dismissed from employment because of membership of extremist political parties, for instance, that the sanction must be proportionate to the legitimate aim to be achieved; *Vogt*,²¹⁰ and necessary in a democratic society *Wille*.²¹¹ In *Aslef v. United Kingdom*²¹² the European Court of Human Rights took the view that a Trade Union’s expulsion of a member with views contrary to its principles because he was a member of the British National Party (an extreme right wing organisation) was within its constitutional powers, moreover the UK’s statutory limitations on the right to expel members constituted a violation of Article 11 of the ECHR related to freedom of association. The Article 10(1) point raised by the UK government in the proceedings before the Court referred to the consequences that would attach to expulsion of members – that this would have a bearing on freedom of expression were trade unions entitled to expel members who held contrary views to that of the organisation. The Court took a ‘common sense’ approach in holding that ‘where associations are formed by people, who, espousing particular values or ideals, intend to pursue common goals, it would run counter to the very effectiveness of the freedom at stake if they had no control over their membership’.²¹³ The illumination provided by these cases is that we are none the wiser as to what is tolerable with respect to the hate/free speech divide, only that the

approach taken is that of a conflict of rights approach coupled with the balancing of those rights through the lens of human rights discourse.²¹⁴ Article 10(2) of the ECHR is clearly important in ensuring that those who seek to regulate the freedom of expression do not usurp their powers or abuse the margin of discretion, however, it is argued that it is not the answer if we are to address the question of the criminalisation of hate speech on the Internet. That is because these provisions assume free speech as a fundamental right and they are less concerned with the question of the medium through which this might take place.

(c) *The fallacy of equilibrium*

In *Jersild*²¹⁵ the ECtHR raised the subject matter of the vessel through which freedom of expression is exercised. In this case the relationship between Article 10 and ICERD was raised and the Court took the view that ‘in considering the ‘duties and responsibilities’ of a journalist, the potential impact of the medium concerned was an important factor’.²¹⁶ It is this aspect of the discourse on free speech and the regulation of hate speech that concerns this paper. The two levels this arguments wishes to explore relates to whether, given the potential impact of the Internet it is a medium for which we should exercise more vigilance, and in that sense ask for firmer guidance from the court and/or international policy forming bodies that influence lawmaking. The other point is whether we cannot answer that question within the current human rights discourse because it falls outside, by this I mean to raise the spectre that the Internet needs to be imagined in a different way and that currently we have not fashioned the tools to deal with it because we have framed our understanding of it with lenses that do not fit the frame.

A general approach detected in *Aslef*²¹⁷ was that in the spirit of a democratic society, that is one of ‘pluralism, tolerance and broadmindedness’,²¹⁸ group interests may be more important than those of individual ones so that the right of individuals to express hate may not always be guaranteed where this is outweighed by societies’ need to protect itself from that which might threaten it. Just as a union of members who have agreed to commit to the fight against racial discrimination should be allowed to expel those who transgress that rule (regardless of the right to free speech advocated), surely there should be some general international agreement that creates sanctions against those who engage in hate-related activities on the Internet. Whilst it may be argued that the European Convention on Human Rights provides an appropriate legal tool for dealing with such matters, there are equally well reasoned arguments that the Convention is a “‘rogues” charter, there to protect those who have deliberately transgressed society’s laws or morals’.²¹⁹ This criticism is levelled at the Court in particular because in its concern to achieve balance between what looks like competing interests, it may fail to protect the interests of innocent victims of hate. Webb²²⁰ contends that there is compelling evidence that the internet ‘is giving the far- right a new lease of life.’²²¹ Some countries have legislation to deal with certain kinds of hate activity on the Internet such as holocaust denial and overt racism. In Germany,²²² Austria²²³ and Switzerland²²⁴ for instance there are measures that ban the denial of the Holocaust as well as the use of the media to disseminate racist and anti-Semitic data.²²⁵ However, the adequacy of provisions at a national level particularly with respect to the use of ‘the Internet as a means of covert communication’²²⁶ and issues of territorial control provide hate related activity with some of the ingredients needed to multiply. Hence the need for the Cybercrime

Convention but we have already seen that it fails to jump a number of hurdles not least that its sister, the Protocol, only deals with race hate not hate per se, there is the inevitable get out clause built into the legislation and states do not have to be bound by the Protocol if they ratify the Convention itself.²²⁷ We appear to be in a never ending web of freedom versus regulation and one wonders whether it is time to reconsider how we understand the Internet. Hitherto it has been assumed that the Internet is like any other medium of communication and we merely adapt our legislative tools and our policy-making machinery to regulate it in much the same way as we might regulate broadcasting or publishing, it has been argued that national attempts to do this shows them to be the 'village idiot of the Internet world'²²⁸ making the argument for effective global regulation more attractive, but we have already seen some of the cracks in the attempt to fine tune regulation in this way. What if we were to imagine cyberspace in another way? Would this imagining provide us with answers to the problem this paper is trying to resolve?

Cyberspace is not 'real' space

Knowing the nature of the beast as it were forearms us to deal with what, at least, may be predictable. But far too many of us go in headfirst without understanding what we are dealing with or assuming that we know. Defined as 'the use of electronics and electromagnetic spectrum to store, modify, and exchange data via networked systems and associated physical infrastructures',²²⁹ as an information highway that merely 'enables information spaces created by the technology of digital networked computer systems, most of which ultimately connect with the mother of all networks, the Internet'²³⁰ the Internet can, it may be argued, be seen as akin to any other 'broadcasting' mechanism in the sense that it puts information into the public domain much as does a radio or television show or a book. We are at liberty to switch the machinery through which this information comes on or off (or not purchase it in the case of a book), we can filter the information as we choose and put in place regulation to control the harm that some of this information might cause, by preventing it, restricting access to it or grading the content. The view that the Internet can be seen in this way was rejected in *Reno I*.²³¹ Sourced in a military programme called ARPANET 'designed to enable computers operated by the military, defense contractors, and universities conducting defense related research to communicate with one another by redundant channels',²³² Justice Stevens observed that 'the Internet is a unique and wholly new medium of worldwide human communication'.²³³

It is argued that the Internet is more than a broadcast medium. The Internet merges the functions that were previously associated with 'previously distinct media of telephony, TV, publishing and computing'.²³⁴ There is an immediate difference in that one can access and engage in these distinct media in one place and evidence from the work of James and others²³⁵ suggests this use reduces the time spent on other medium such as TV, phone and books. Apparently coined by Gibson²³⁶ cyberspace was described as 'a consensual hallucination experienced daily by millions'.²³⁷ It is this disembodied faceless form which creates communities that communicate with each other over thousands of miles'. Like global backpackers the disembodied can hitch lifts into cyberspace by using the World Wide Web as a transporter.²³⁸ As a social realm cyberspace needs to be understood not only as a place where information is obtained but where

information is created²³⁹ and transported without geographical boundary,²⁴⁰ thus it is not a physical entity in the same way as traditional broadcasting mechanism are, there are not the various levels in place by which one could hold those who publish content accountable, there is not the editorial mechanisms that attract responsibilities for control. An individual can engage with the world instantaneously from the privacy of their bedroom with anonymity, they can avoid jurisdictional controls by engaging in ‘regulatory arbitrage’²⁴¹ to steer clear of national restrictions. We are faced with trying to imagine a space hard to define by reference to the property of physical boundaries, where borders may be articulated as domains with technical specifications, moreover, these ‘boundaries in cyberspace are still linked to real effects in physically bounded realspace’.²⁴² Chon²⁴³ suggests that cyberlaw has to acknowledge, make coherent and demarcate ‘these rezoned spaces’ if we are to deal with its effects.

*Reno I*²⁴⁴ was the first American case to deal with the question of the nature of the Internet. As well as its evolving methods of communication and retrieval of information via word, sound picture and moving video images, the Internet has the capacity to connect individuals to other individuals and groups, and for individuals to enter chat rooms ‘to engage in real time dialogue’.²⁴⁵ For consumers the Internet is ‘a vast library including millions of readily available and indexed publications and a sprawling mall offering goods and services’.²⁴⁶ Moreover it ‘constitutes a vast platform from which to address and hear from a world wide audience of millions of readers, viewers, researchers, and buyers. Any person or organization with a computer connected to the Internet can ‘publish’ information’.²⁴⁷ It this unbridled capacity to reach so many with few strings attached that warrants an approach which does not walk on eggshells to cherry pick what types of hate to regulate, rather we need regulation that subjects hate speech to international examination before it is allowed to wander out into the corridors of cyber space, that assessment involves asking through the ‘social contract’ what kind of contemporary society and governance²⁴⁸ we want to see in cyberspace which, although it has been argued is a reflection of society, I would argue is more than that since it consists of disembodied, faceless and anonymous consciousness, one and the same time a place of beauty and human creation as well as a place of dangerous destructive forces that ‘stretches our common sense notions of law’ – we need to seek alternatives. It is my contention that the Additional Protocol does not achieve this because there is a failure to appreciate that the Internet is a very different animal from that we are used to, which requires handling in a different way and not *just* in terms of nation state cooperation based on principles that are not clearly defined hedged in through the balancing act caused by the concern with the freedoms alluded to and the worry that regulation will destroy the uniqueness of the Internet. This does not follow. There is the further problem that without detailed international consensus on the meaning of race hate it comes as no surprise that this ambivalence is reflected in international covenants dealing with such matters. In this our 60th anniversary of the UNDHR it is time that we take seriously the threat that race hate poses, particularly on line, to the safety of our multi-various societies and agree on at least this principle. That racial and ethnic minorities have suffered the legacy of racially discriminatory practices in the past, be they holocaust, slave trade or other forms of inhuman treatment. A comprehensive definition of race hate crime that focuses on the legacy of racism – institutional racism – will surely go some way to remedying the untold harm that has been caused to part of humanity.

Setting standards for us all

We understand that the Internet is a place of ‘global immigration’²⁴⁹ which has created new ways of communicating and arguably a new culture. Like all social spaces there has to be some kind of agreement that fashions both users and the ‘gatekeepers of communication’.²⁵⁰ Prior to cyberspace we have tended towards agreement that hate speech is to be tolerated because free speech is a sign of modern democratic societies and we do not want the heavy hand of the state policing the expression of our thoughts unless, perhaps they are too extreme. We have, to put it quite simply transposed these ideas into cyberspace without giving sufficient thought to what relationship the law has with this new culture and how it might work with it. Choon explores some interesting varieties for possible regulation and points to the interesting idea of a default cookie setting on Internet browsers, which is a technical device to track the journey of one’s movement through the website,²⁵¹ but apart from the concerns over privacy,²⁵² what moral code would be used to govern this type of regulation and at what point would it bite? What we have is essentially a moral dilemma which is what moral values are we asking the law to enforce.²⁵³

Let us start from the well known position that governance of private conduct should only occur where that conduct is likely to cause harm to others.²⁵⁴ This underlies the view that the arena of the migration of millions of disembodied private individuals surfing the Internet is ‘not the law’s business’.²⁵⁵ However, there is compelling evidence that hate does cause harm to vulnerable communities and on that basis the law should be concerned with behavioural standards.²⁵⁶ The second matter of course is that the Internet is not a ‘private space’. It is public in the sense that we can all use it. Cyberspace has become a virtual society which has real consequences for realspace. It is argued that we cannot raise the flag of freedom of expression in this context with respect to the peddling of hate because the harm to others and the consequences for societal cohesion far outweigh individual desires to express hatred of others. Freedom to surf and communicate must surely belong to all members of society and vulnerable minorities should not be barred from free movement because of the barriers that come with the language of hate. We have a code by which we are governed which is fairly well developed with respect to the social contract. That includes the protection of minorities from the damage that can be caused through the expression of hate. Mills refers to the present social contract as a ‘racial contract’ in the sense that it is an ‘obfuscation of the ugly realities of group power and domination’.²⁵⁷ Whilst we fight to dismantle this we must pay attention to its duplication in attempts to regulate cyberspace. If all the law does is replicate what it does in realspace it is argued that the law is not doing its job. It is my contention that the law can shape and change behaviour in a way that does not repeat the mistakes it has made in society thus far. Law is not simply a reflection of society although it tends to react to some societal problems. We have a cocktail of laws that are messy and have not signalled to members of society that hate is not an acceptable commodity. We need to examine the contents of this social contract with respect to the commodification of hate, the vulnerable and the responsibility of gatekeepers. Members and potential members of the cyberspace need to have a realspace dialogue where the rules with respect to hate speech are fashioned, where we articulate how those rules are to be enforced and where we agree the sanctions for breaking those rules.

Conclusion

The danger of welcoming more state/super state regulation is that we are opening the door to the use of human rights instruments to control our freedoms, rather than to liberate us from state control. Furthermore a plea for state regulation of hate speech moves us into the potential arena that only one opinion can be expressed. That people will accept and only follow (eventually) the official line and lose the power to follow their own judgment. On the other hand there is an issue here to be addressed which is how we deal with those who expressly or by complicity support race hate. Human rights instruments enable us to have mechanisms that allow for the measurement of what is done in our name and to ask that what is done is proportionate to the task. I argue that currently the Protocol does not measure up to what should be done to protect people from race hate on the Internet, if that is its aim. It remains for those who are concerned, particularly civil society and NGO's, to ensure that this instrument is upgraded and its implementation at state level is effective. This means that we who form the regions and municipalities of Europe must ensure that the voice of these entities the Congress of Local and Regional Authorities reflect our concerns in the machinery that comprises the Council of Europe. Moreover we should engage with our politicians at the national level to bring into force the Protocol despite its apparent weaknesses, whilst at the same time keeping a check that outside the arena of race hate, the state takes a back seat.

Notes

1. I wish to thank the anonymous reviewers for their comments on this paper. All mistakes remain with the author.
2. Hence the Committee of Experts on Crime in Cyberspace set up in the Council of Europe to design the Cyber-Crime Convention (Convention), decided that concerns expressed by delegates who advocated that freedom of expression would be hampered by content-related offences aimed at the distribution of racist propaganda militated against its inclusion in the Convention. See *Explanatory Report of the Additional Protocol to the Convention on Cybercrime, concerning the criminalisation of acts of a racist and xenophobic nature committed through computer systems, as adopted by the Committee of Ministers on 7 November 2002*, at <http://conventions.coe.int/Treaty/en/Reports/Html/189.htm>, para. 4.
3. Boyle, K. (1992), p. 1.
4. ETS, No. 189, The Additional Protocol to the Convention on Cybercrime Concerning the Criminalisation of acts of a Racist and Xenophobic Nature through Computer systems 2003. See <http://conventions.coe.int/treaty/Commun/QueVoulezVous.asp?NT=189&CM=8&DF=10/29/2008&CL=ENG>
5. Cyber-race hate is not specifically referred to in the Protocol. The term used in Article 1 is 'acts of a racist or xenophobic nature'. Article 2 puts the emphasis on '*racist and xenophobic material*' means any written material, any image or any other representation of ideas or theories, which advocates, promotes or incites hatred, discrimination or violence, against any individual or group of individuals, based on race, colour, descent or national or ethnic origin, as well as religion if used as a pretext for any of these factors. The notion of Internet race hate has been discussed in *Jones v. Toben* [2002] FCA 1150, an Australian case that for the first time applied its Racial Discrimination Act 1975 successfully to the request for removal of Holocaust denial websites constructed by the director of the Adelaide Institute, Frederick Toben. S.18C(1)(a) and (b) refers to an act reasonably likely to offend, insult, humiliate or intimidate another person or groups of persons, that is done on the basis of race, colour, or national or ethnic origin of the person/group.

6. Akdeniz, Y. (2008); on the USA's constitutional position, see Akdeniz, Y. (2006), pp. 10–11.
7. The Explanatory Report, para, 11 (see <http://conventions.coe.int/Treaty/EN/Reports/Html/189.htm#FN1>) with reference to the Protocol explains that the Council of Europe takes the meaning of freedom of expression from Article 10 of the European Convention on Human Rights. Article 10 states that: '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 and regardless of frontiers. This article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises'. Moreover, Article 10 of the ECHR is applicable not only to information and ideas that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb the State or any sector of the population. *Handyside v UK* [1976] Series A, No. 24, para. 49. Nevertheless, Article 10(2) does make possible the limitations on freedom of expression where it is contrary to the European Convention on Human Rights under certain conditions.
8. See *League Against Racism and Antisemitism (LICRA), French Union of Jewish Students, v. Yahoo! Inc. (USA)*, Yahoo! France, Tribunal de Grande Instance de Paris (The County Court of Paris), Interim Court Order, 20 November, 2000, where Yahoo! Inc who took the view that the Tribunal de Grande Instance de Paris decision that they prohibit access to a Nazi auction website could not apply to their services in the USA. Yahoo held to this argument on the basis that the USA Constitution guarantees that Congress will not make law, 'abridging the freedom of speech,' according to the First Amendment.
9. *World Conference against Racism* (2002) refers to victims of racial discrimination as Africans and those of African descent, Asians and those of Asian descent, indigenous peoples, migrants, refugees and asylum seekers, returnees and internally displaced persons, mixed ethnic and racial origin, religious groups such as Jewish and Muslim peoples, Arabs, linguistic minorities and those who suffer from discrimination because they are infected or affected by HIV/AIDS, paras. 31–75. Article 4 ICERD refers to race, colour or ethnic origin, whilst Article 1 includes descent and national origin (albeit in the context of defining racial discrimination). Article 2 of the Universal Declaration of Human Rights refers to race, colour, language, religion, national or social origin and birth or other status.
10. Boyle, K. (1992), p. 1. In the context of racial discrimination Article 1(1) of ICERD 'any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life'.
11. Fredman, S. (2001), p. 14.
12. For example the use of non-discrimination legislation to challenge rules that are racial discriminatory in impact, see *Griggs v. Duke* 401 US 424 (1971) and *Mandla v. Lee* [1983] IRLR 209 HL.
13. Fredman, S. (2001) writes that equality as consistent treatment between groups 'does little to address the redistributive and restructuring goals of equality', p. 23.
14. Brennan, F. (2008).
15. Macpherson, W., Sir (1999), para. 6.34.
16. Carmichael, S., & Hamilton, C. (1967), p. 4.
17. See recommendations of Sir William Macpherson in the Stephen Lawrence Inquiry, chapter 47.
18. *The World Conference Against Racism* (2002), para. 145 reads 'Urges States to implement legal sanctions, in accordance with relevant international human rights law, in respect of incitement to racial hatred through new information and communications technologies, including the Internet, and further urges them to apply all relevant human rights instruments to which they are parties, in particular the International Convention on the Elimination of All Forms of Racial Discrimination, to racism on the Internet'.

19. Ibid.
20. *League Against Racism and Antisemitism (LICRA), French Union of Jewish Students, v. Yahoo Inc. (USA), Yahoo France*, Tribunal de Grande Instance de Paris (The County Court of Paris), Interim Court Order, 20 November, 2000.
21. The Additional Protocol (2003).
22. General Assembly, *Consultation on the use of the Internet for the purpose of incitement to racial hatred, racial propaganda and Xenophobia*, A/CONF.189PC.1/5, 5 April 2000. Systematic discrimination can be seen as a violation of human rights, this could include 'persecution on social, racial, religious or cultural grounds in a systematic manner or on a large scale', such discrimination could also be seen as a 'Crime against the Peace and Security of Mankind, which can be perpetrated by officials or private individuals'. See Economic and Social Council, Commission on Human Rights (1999).
23. See para. 19 of the Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, Adopted and proclaimed by General Assembly resolution 60/147 of 16 December 2005, which includes restitution e.g., 'the enjoyment of human rights, identity, family life and citizenship ...'
24. The Convention was opened for signature in Budapest on the 23 November 2001, Treaty Office <http://conventions.coe.int>
25. Council of Europe (2003). Retrieved August 2, 2008, from <http://conventions.coe.int/Treaty/en/Reports/Html/185.htm>
26. Ibid. 'Cyber-stalking' as both a traditional form of harassment and cyber harassment where the perpetrator remains anonymous. This is a 'shield' the Internet provides for cyber-stalkers, Salter & Bryden (in press).
27. Council of Europe, *Additional protocol to the convention on cybercrime, concerning the criminalisation of acts of racist and xenophobic nature committed through computer systems 2003*. Retrieved August 5, 2008, from <http://conventions.coe.int/Treaty/Commun/QueVoulezVous.asp?NT=189&CM=8&DF=&CL=ENG>, hereinafter Protocol.
28. Para. 3 of the Explanatory Report of the Additional Protocol. Retrieved August 5, 2008, from <http://conventions.coe.int/Treaty/en/Reports/Html/189.htm>
29. At the time of writing there are 47 Member States, 1 applicant country (Belarus) and 5 observer countries of the Council of Europe. See http://www.coe.int/T/e/Com/about_coe/
30. Articles 2–13 of the Convention.
31. Para. 7 of the Protocol.
32. The question of jurisdiction is discussed later in this paper.
33. Kaplan et al. (2003).
34. Ibid, pp.12–13.
35. Article 2(1) of the Protocol.
36. Article 3(1) of the Protocol.
37. Articles 4(1) and 5(1) of the Protocol.
38. Article 6 of the Protocol includes grossly minimising, approving or justifying such acts constituting genocide or crimes against humanity.
39. *Explanatory Report* available at <http://conventions.coe.int/Treaty/en/Reports/Html/189.htm>, para. 32.
40. Ibid.
41. Ibid, para. 27.
42. See the preamble to the Protocol at <http://conventions.coe.int/Treaty/en/Treaties/Html/189.htm>
43. The CoE comprises of a number of elements that drive its work. Decision-making is maintained by the Committee of Ministers which consists of 47 Foreign Ministers, 636 members of the Parliamentary Assembly represent the 47 national parliaments as the core motivating power for cooperation at the European level. Furthermore, the Congress of Local and Regional Authorities form the 'voice of Europe's regions and municipalities'. See *About the council of Europe*. Retrieved January 3, 2008, from http://www.coe.int/T/e/Com/about_coe/

44. *About the council of Europe*. Retrieved January 3, 2008, from http://www.coe.int/T/E/Com/about_coe/. This political mandate was defined by the third Summit of Heads of State and Government, Warsaw 2005.
45. *A short history of the council of Europe*, see http://www.coe.int/T/E/Com/About_Coe/10_points_intro.asp
46. See preamble to the Protocol.
47. This is a phrase used in school playgrounds to establish that words do not hurt. According to Neu, this is a fallacy. For many people insults cause pain and injury, see Neu, J. (2009).
48. See Neu, J. (2009).
49. See Kennedy, R. (2002).
50. To 'Welsh' is to refuse payment but the word has come to mean a denigrating word for the Welsh. See <http://www.etymonline.com/index.php?search=welch&searchmode=none>. Retrieved November 3, 2008.
51. The word 'gyp' means to cheat or swindle. 'Gyp' has its origins in the word Gypsy, a word originated from Egyptian, <http://www.etymonline.com/index.php?search=gyp&searchmode=none>. Retrieved November 3, 2008.
52. The word 'hunk' means sexually appealing, see <http://www.etymonline.com/index.php?search=hunk&searchmode=none> but was used as hate speech against Hungarians according to Neu, J. (2009), p. 23.
53. The word 'niggardly' appears to have its origins in the meaning for stingy or tight-fisted, see <http://www.etymonline.com/index.php?search=niggardly&searchmode=none>. Retrieved on November 3, 2008.
54. Critical Race Theory appears to have originated in the United States through the work of academic scholars like Bell, D. (2008), whose work first appeared in the 1970s, here he took a critical look at issues of race and racism in the USA and the relationship between this and the law.
55. Matsuda et al. (1993).
56. *Virginia v. Black US Supreme Court* April 7 [2003].
57. Justice O'Connor in *Virginia v. Black US Supreme Court*, see <http://www.law.cornell.edu/supct/html/01-1107.ZO.html>, Cornell University Law School, Supreme Court Collection.
58. [1998] AC 147.
59. *R v Ireland and Burstow* [1998] AC 147, at 162.
60. Ashworth, A. (1999), pp. 326–329.
61. Bowling writes that in Nottingham (UK) in 1958 a crowd descended on the streets shouting this, whilst the people to whom these words were aimed stayed inside their houses. See Bowling, B. (1999), p. 30.
62. Bullard, S. (1996); Blee, K.M. (2005), pp. 421–433.
63. It has been argued that an Internet surfer must actively seek information, see Orwick, B., & Settles, D. *The schools' response to online bullying*. Available at: <http://www.kysafeschools.org/pdfs&docs/clearpdf/issuesbriefs/onlinebullying.pdf>
64. Reed, C. (2008).
65. Which covers indecent or grossly offensive messages, section 1(1)(a) of the Act.
66. Provides that a person who 'pursues a course of conduct' (that amounts to harassment, s.1.) is guilty of a criminal offence.
67. In *R v. Debnath* [2005] EWCA Crim 3472. Also see *Lowde The Times, 29 June 200*.
68. Section 7(3). Conduct includes 'speech', s. 7(4).
69. Reed, C. (2008), p. 2.
70. This is an extrapolation from an incident where a teacher allegedly asked a black school child of 10 years old to read out a poem entitled 'Niggah' and asked him to explain why black people could use the word but white people could not, see *The Voice Online*, 15 December 2008. Retrieved 19 December, 2008, from <http://www.voice-online.co.uk/content.php?show=14836>
71. [2000] Div CT LTL 7/2/2000 (Feb. 3).
72. [2001] CA ECWA, [2001] 1WLR 1352.
73. Nick Griffin of the British National Party was acquitted of inciting racial hatred under the Public Order Act 1986, see The Crown Prosecution Service at: http://www.cps.gov.uk/news/pressreleases/archive/2006/165_06.html. Retrieved December 19, 2008.

74. Orwick, B., & Settles, D.
75. *Ibid.*, p. 1.
76. Lawrence, F.M. (1999).
77. Defined as a 'crime committed as an act of prejudice.' see Lawrence, F.M. (1999), p. 9.
78. *Ibid.*, p. 11.
79. Research on the use of potential racial incitement on the Internet reveals that the host sites are mainly outside the UK, Internet Watch Foundation, Corporate Plan 2005–2007. Available at http://www.iwf.org.uk/corporate/page.128.275.htm#Trends_in_criminally_racist_content_allegations
80. Lawrence, F.M. (1999), p. 9.
81. See preamble to the Protocol.
82. Universal Declaration of Human Rights 1948–1998.
83. Lawrence, F.M. (1999).
84. *Ibid.*, p. 9.
85. *Ibid.*
86. *Ibid.*
87. Human Rights and Legal Affairs (29 April 2008). *The European Commission against Racism and Intolerance Publishes News Reports on Liechtenstein, Malta, Moldova, San Marino and Serbia, Press Release*. August 12, 2008, Council of Europe. Available at http://www.coe.int/t/e/human_rights/ecri/1-ECRI/5-Current_events/51-eng_29_04_2008.asp#TopOfPage
88. Human Rights First, retrieved August 12, 2008, from <http://www.humanrightsfirst.org/>
89. Human Rights First, *2007 Hate Crime Survey – Companion Survey on Islamophobia*. Retrieved August 12, 2008, from <http://www.humanrightsfirst.org/>
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91. Human Rights First. *2007 Hate Crime Survey – Companion Survey on Homophobia – Statistics on Violence Based on Sexual Orientation*. Retrieved August 12, 2008, from <http://www.humanrightsfirst.org/>
92. Human Rights First, *A Ten-Point Plan for Reducing Hate Crimes*. Retrieved August 12, 2008, from <http://www.humanrightsfirst.org/discrimination/hate-crime/topten.asp>
93. The Star of David, also known as the 'Magden David' is linked with Judaism, this symbol was worn by Jewish people at the insistence of the German state during the Nazi era as a way to both identify and persecute Jews, see the Jewish Virtual Library. Retrieved August 28, 2008, from <http://www.jewishvirtuallibrary.org/jsource/Judaism/star.html>
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95. Human Rights First, *A Ten-Point Plan for Reducing Hate Crimes*. Retrieved August 12, 2008, from <http://www.humanrightsfirst.org/discrimination/hate-crime/topten.asp>
96. *Ibid.*
97. Macpherson, Sir W. (1999), para. 6.34.
98. Article 1 of the Protocol.
99. Article 2(1) of the Protocol.
100. *Ibid.*
101. *Ibid.*
102. *Ibid.*, Article 3.
103. *Ibid.*, Article 4.
104. *Ibid.*, Article 5.
105. Explanatory Report of the Additional Protocol.
106. *Ibid.*
107. *Ibid.*
108. *Ibid.*
109. *Ibid.*
110. Brennan, F. 'Ethnic minority representation on juries – A missed opportunity', *Internet Journal of Criminology*. Retrieved December 12, 2008, from <http://www.Internetjournalofcriminology.com/ijcarticles.html>

111. The Crown Prosecution Service, see http://www.cps.gov.uk/news/pressreleases/archive/2006/165_06.html
112. Jenkins, S. (2006, February 5), *The Times* (online), where he critically engages with the narrative over the publication of cartoons in a Danish newspaper that sought to ridicule the Prophet Mohammad.
113. Gledhill R. (2006, May 23), *The Times* online, discusses the legacy of this book which took a critical view of Islam.
114. However there is a 'defence' of right where material is used for legitimate purposes such as under legislative authority, see para. 24 of the Explanatory Report to the Protocol.
115. Article 2(1) of the Protocol.
116. *Ibid.*, para. 18.
117. See the Recital to ICERD that states: 'Convinced that any doctrine of superiority based on racial differentiation is scientifically false, morally condemnable, socially unjust and dangerous, and that there is no justification for racial discrimination, in theory or in practice, anywhere'.
118. Solomos, J. (1993).
119. *Ibid.*, pp. 8–9.
120. Wistrich, R.S. (1997–1998); The Stephen Roth Institute for the Study of Contemporary Antisemitism and Racism, see <http://www.tau.ac.il/Anti-Semitism/articles.htm>
121. Fanon, F. (2000), pp. 257–66.
122. *Ibid.*, p. 257.
123. Petrova, D. (2001), pp. 45–76, at p. 45).
124. Fredman, S. (2001), p. 10.
125. *Ibid.*
126. Hochschild, A. (2006); Williams, E. (1994).
127. Holocaust Memorial Centre. *History of the Holocaust*. Retrieved August 18, 2008, from <http://www.jewishvirtuallibrary.org/jsource/Holocaust/history.html>
128. Cutler, J.E. (1905).
129. Dubow, S. (1995).
130. Macpherson, Sir W. (1999); Bowling, B. (1999); Hall, N. (2005).
131. Recital 6 of the Council Directive 2000/43/EC, 29 June 2000 (Race Directive). However, unlike the Race Directive the Protocol goes further by including categories that go beyond merely racial and ethnic origin.
132. 481 US 604 (Sup Ct 1987).
133. [1983] A.C. 548, HL.
134. *Mandla v. Dowell Lee* [1983] 2 A.C. 548, HL, p. 562.
135. Fekete, L. (2001), pp. 22–23.
136. *Crown Suppliers v. Dawkins* [1993] ICR 517, Rastafarians were not recognised by the English courts as an ethnic group because they were not perceived to have a sufficiently long history. In *Harris v. NKL, Automotive* 3 October 2007, UKEAT/1034/07/DM, the appellate court found that Rastafarians could be protected from discrimination on the grounds of religion under the Employment Equality (Religion and Belief) Regulations 2003 on the basis that Rastafarianism constitutes a philosophical belief similar to a religious belief.
137. Koopmans, R. (1999), pp. 625–696.
138. Silverman, M. (1992).
139. *Ibid.*
140. *Ibid.*, p. 1.
141. Article 2(1) of the Protocol.
142. Paragraph 21 of the Explanatory Memorandum.
143. *Ibid.*
144. The Runnymede Trust 'is an independent research and social policy agency', Runnymede Trust, *Islamophobia: A Challenge for us All*, Summary, 1997.
145. *Ibid.*, p. 2.
146. Articles 3–6 of the Protocol.
147. Article 7 of the Protocol.
148. Paragraph 24 of the Explanatory Report on the Protocol.

149. Paragraph 39 of the Explanatory Report, Article 3 (1) of the Protocol and Article 25 of the Explanatory Report.
150. Paragraph 33 of the Explanatory Report.
151. Schjolberg, A., & Hubbard, M. (2005).
152. *Ibid.*, p. 5.
153. Leahy, P. (1999)
154. Ashworth, A. (2006), p. 181.
155. *Ibid.*, p. 175.
156. *R v. Nedrick* [1986] AC 455, approved by the House of Lords in *R v. Woollin* [1999] AC 82.
157. Taylor, G. (2004), pp. 99–127.
158. Danner, A.M. (2002).
159. *R v. Cunningham* [1982] AC 566, HL.
160. *R v. Caldwell* [1981] 1 All ER 961.
161. *Ibid.*
162. Ashworth, A. (2006), p.185. This version of recklessness has attracted wide criticism for its harshness on defendants because it is an objective test that takes little account of the frailty of the human condition, see *R v. G* [2004] 1 AC 1034.
163. *State v. Belanger* (1997), see Kaplan et al (2003), p. 8.
164. Case No. IT-93-1-T *Prosecutor v Dusko Tadic a/k/a 'Dule'*, 7 May 1997, International Tribunal for the Prosecution of Persons Responsible for Serious Violations International Humanitarian Law Committed in the Territory of Former Yugoslavia since 1991.
165. Danner, A.M. (2002), p. 24.
166. *Ibid.*
167. Paragraph 25 of the Explanatory Report to the Protocol.
168. State of Wisconsin Court of Appeal Decision, Appeal No2008AP29, 6 November 2008.
169. See <http://www.wicourts.gov/ca/opinion/DisplayDocument.html?content=html&seqNo=34520>
170. *Trotman v. North Yorkshire County Council* [1999] IRLR 98.
171. See 'The general issues of Internet Service Providers liability'. Retrieved December 22, 2008, from http://www.jislegal.ac.uk/pdfs/isp_liability.pdf
172. *League Against Racism and Antisemitism (LICRA), French Union of Jewish Students, v Yahoo! Inc. (USA), Yahoo! France*, Tribunal de Grande Instance de Paris (The County Court of Paris), Interim Court Order, 20 November, 2000.
173. [1999] 4 All ER 342, [2001] QB 201.
174. See 'The general issues of Internet Service Providers liability'. Retrieved December 21, 2008, from http://www.jislegal.ac.uk/pdfs/isp_liability.pdf. The defendants sought to rely on provision of the Defamation Act 1996.
175. Marcus, B. (16 June, 2004). *Meeting on the Relationship between Racist, Xenophobic and Anti-Semitic Propaganda on the Internet and Hate Crimes*. Paris: OSCE, PC.DEL/503/04, p. 1.
176. *R v G* [2004] 1 AC 1034.
177. 1948–1998.
178. McRae, T. (2005), *Rise of the cybermen*. BBC News, available at <http://www.bbc.co.uk/doctorwho/news/cult/news/drwho/2005/11/10/26933.shtml>
179. See the preambles to both instruments.
180. Such as the 1950 Council of Europe Convention for the Protection of Human Rights and Fundamental Freedoms; the 1966 United Nations International Covenant on Civil and Political Rights; the United Nations International Convention on the Elimination of All Forms of Racial Discrimination of 21 December 1965; the European Union Joint Action of 15 July 1996, adopted by the Council on the basis of Article K.3 of the Treaty on European Union.
181. The European Convention on Human Rights and the International Covenant on Civil and Political Rights contain provisions that contain limits to freedom of expression.
182. Paragraph 11 of the Explanatory Report of the Additional Protocol.
183. *Ibid.*
184. *Ibid.*
185. Article 3(1) of the Protocol.

186. 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 the rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.
187. Paragraph 11 of the Explanatory Report of the Additional Protocol.
188. Article 3(1) of the Protocol.
189. *Handyside v. United Kingdom* (5493/72) [1976] ECHR 5 (7 December 1976), Series A, No. 24, the ECHR found that the UK had violated the applicants right to freedom of expression under Article 10 of the ECHR when a prosecution was brought against him under the obscene publications provisions for the publication of a book entitled 'The Little Red School Book', that advocated that the young should adopt a liberal attitude towards sex, para. 49.
190. *Handyside v. United Kingdom*, para. 49.
191. United Nations, *World Conference Against Racism, Racial Discrimination, Xenophobia and Related Intolerance, Declaration and Programme of Action*, foreword by Mary Robinson, New York, 2002, also see the United Nations Declaration on the Elimination of all forms of Racial Discrimination of 20 November 1963 (General Assembly resolution 1904 (XVIII)).
192. No one shall be subject to torture or to inhuman or degrading treatment or punishment.
193. Cahn, C. (August 2005). 'Roma rights, racial discrimination and ESC rights'. Retrieved December 23, 2008, from http://www.coe.int/t/dg3/romatravellers/Documentation/discrimination/RomaESC_en.asp
194. *Ibid.*
195. Council Directive 2000/43/EC.
196. Article 2(3) Council Directive 2000/43/EC.
197. Article 3(1)(h) Council Directive 2000/43/EC.
198. McGonagle, T. (2001), see <http://www.ivir.nl/publications/mcgonagle/difficultsymbiosis.html>, pp. 135–136.
199. *Ibid.*, p. 135.
200. *Ibid.*
201. *Faurisson v. France* decision of 8 November 1996, Communication No. 550/1993, *Ross v. Canada* decision of 18 October 2000, Communication No. 736/1997 and *J.R.T. and the W. G. Party v Canada* decision of 6 April 1983, Communication No. 104/1981.
202. McGonagle, T. (2001), pp. 135–136.
203. 21 December 1965 (entry into force on 4 January 1969).
204. 23 September 1994, Series A, No. 298.
205. See Summary, 23 September 1994, Series A, No. 298. August 22 2008. Available at <http://sim.law.uu.nl/SIM/CaseLaw/hof.nsf/1d4d0dd240bfee7ec12568490035df05/ac6f5011c933625bc1256640004c2957?OpenDocument>
206. McGonagle, T. (2001), pp. 135–136.
207. *Glimmerveen & Hagenbeek v. Netherlands*, Appn. Nos. 8348/78 & 8406/78, ECommHR, Decision 11 October 1979, Decision and Reports 18, 187, a case where racist leaflets were distributed but the case was declared inadmissible under Article 17 (the prohibition of abuse of rights).
208. *Feldek v. Slovakia* Decision of 12 July 2001, where the national authorities restrictions on the activities of a journalist's reference to an official's fascist past was held to be a breach of Article 10 ECHR.
209. McGonagle, T. (2001), p. 135.
210. *Vogt v. Germany* [1995], App. No. 17851/91, publication no. A323.
211. *Wille v. Liechtenstein* [1999], 593 EHHR.
212. C1102/05, 27 February 2005.
213. *Aslef v UK* C1102/05, 27 February 2005, para. 39.
214. Foster, S. (2008).
215. *Jersild v. Denmark*, 23 September 1994, Series A, No. 298.
216. *Ibid.*

217. *Aslef v. UK*, C1102/05, 27 February 2005, para. 43.
218. *Ibid.*
219. Foster, S. (2008), p. 31.
220. Webb, R. (2001).
221. *Ibid.*, p. 10.
222. Article 194, 21st law modifying the Criminal Code.
223. Law no.148 amendment of the 1945 law prohibiting the National Socialist German Workers Party and the advocacy of Nazi objectives.
224. Article 261*bis* of the Swiss Penal Code 1994.
225. Also see Belgium – la loi anti-negationiste 1995; France – Article 24b, la loi Gaysot 1990; Israel – Prohibition Law no. 1187, 1986.
226. Webb, R. (2001), p. 9.
227. Article 9 provides for states to express consent to be bound by the Additional Protocol.
228. Penfold, C. (2001), 2.
229. See http://searchsoa.techtarget.com/sDefinition/0,,sid26_gci211883,00.html
230. Chon, M.
231. *Reno v. ACLU*, 521 U.S. 844 m(1997) U.S. Supreme Court.
232. *Ibid.*, per Justice John Paul Stevens, p. 850.
233. *Ibid.*
234. Atkin et al. (1998), 470–490, at 475.
235. James et al. (1995), 30–50.
236. Gibson, W. (1984); see Chon, M.
237. *Ibid.*
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239. Chon, M.
240. *Ibid.*
241. *Ibid.* Although in *Yahoo v France* [2000] and in *R v Smith* [2004] ECWA Crim 631.
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245. *Ibid.*
246. *Ibid.*
247. *Ibid.*
248. Mills, C.W. (1997), p. 3.
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251. Chon, M.
252. *Ibid.*
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