

ARTICLE 19

Prohibiting incitement to discrimination, hostility or violence

2012

Policy Brief

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Executive summary

This ARTICLE 19 policy paper proposes a set of recommendations to be used for interpreting and implementing those international obligations which prohibit all advocacy that constitutes incitement to discrimination, hostility or violence (“incitement” or “incitement to hatred”), as mandated by Article 20(2) of the International Covenant on Civil and Political Rights (“ICCPR”). The recommendations also apply to some of the provisions contained in Article 4 of the International Convention on Elimination of All Forms of Racial Discrimination (“ICERD”).

The interpretation and implementation of these and other related provisions are the subject of a great deal of confusion, globally as well as nationally. This confusion frequently results in vague and overly broad prohibitions of incitement in national law and also in inconsistent and restrictive interpretation.

To dispel this confusion, ARTICLE 19 offers a detailed set of recommendations on how States should interpret their respective obligations. With the aim of moving towards greater consensus on this issue, it also formulates a comprehensive test that can be used to review cases and determine whether certain speech reaches the threshold of incitement to hatred.

ARTICLE 19 believes that the obligations to prohibit incitement require States to introduce a variety of measures as sanctions in cases of incitement. The selection of sanctions in a particular case should be guided by an assessment of the level of severity of the offence. In cases of incitement, States should primarily

employ a range of sanctions within civil and administrative law. Only in the most serious cases, when the authorities conclude that the particular incitement reached the highest level of severity, should criminal sanctions be imposed; criminal law should not be the default response to instances of incitement if less severe sanctions would achieve the same effect. ARTICLE 19 recommends other measures that States should adopt in order to ensure uniform and consistent implementation of their obligations, as well as measures that should be offered to victims of incitement.

ARTICLE 19 hopes that by establishing clear boundaries between permissible and impermissible expression, and by providing robust criteria to assist in this determination, this paper will serve the purpose not only of a legal and policy review but also of contributing to ensuring that all people are able to enjoy both the right to freedom of expression and the right to equality.

Key recommendations

- Key conduct prohibited by incitement clauses should be clearly and uniformly defined;
- The list of prohibited grounds on incitement should be non-exhaustive and should cover grounds not mentioned in Article 20(2) of the ICCPR;
- States should explicitly recognise in domestic legislation the prohibition of all advocacy that constitutes incitement to discrimination, hostility or violence as provided by Article 20(2) of the ICCPR;
- Incitement prohibited by Article 20(2) of the ICCPR and Article 4(a) of ICERD should require the intent of the speaker to incite others to discrimination, hostility or violence.
- Criminal sanctions should not be the only measures used when prohibiting incitement, indeed they should be the last resort when imposing sanctions;
- The criminalisation of incitement to discrimination should be narrowly construed;
- Article 4(a) of the ICERD should be interpreted in the light of Article 20(2) of the ICCPR;
- States should explicitly recognise in domestic legislation the prohibition of all advocacy that constitutes incitement to discrimination, hostility or violence as provided by Article 20(2) of the ICCPR;
- In all incitement cases, States should explicitly recognise that the three-part test of legality, proportionality and necessity applies;
- All incitement cases should be strictly assessed under a uniform six-part incitement test, examining the:
 - Context of the expression;
 - Speaker/proponent of the expression;
 - Intent of the speaker/proponent of the expression to incite to discrimination, hostility or violence;
 - Content of the expression;
 - Extent and Magnitude of the expression (including its public nature, its audience and means of dissemination);
 - Likelihood of the advocated action occurring, including its imminence.
- A variety of civil and administrative remedies should be available to victims of incitement and States should also consider alternative forms of remedy for victims;
- The judiciary, law enforcement authorities and public bodies should be provided with comprehensive and regular training on incitement standards;
- The judiciary, law enforcement authorities and public bodies should consider the perspective of victims when deciding incitement cases.

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Introduction

There is no universally accepted definition of the term “hate speech” in international law, despite its frequent use in both legal and non-legal settings. The term may be broadly characterised as applying to any expression which is abusive, insulting, intimidating, harassing and/or which incites violence, hatred or discrimination against groups identified by a specific set of characteristics¹. At best, the term is legally imprecise.

In the absence of an agreed uniform definition, “hate speech” is the subject of a great deal of confusion, globally as well as nationally. This has resulted in both vague and overbroad prohibitions in national laws and inconsistent, restrictive and counter-productive interpretations. Too often, censorship of contentious issues or viewpoints does not necessarily address the underlying social roots of the kinds of prejudice of which “hate speech” is symptomatic and which undermine the right to equality.

This problem is compounded by the fact that “hate speech” is not always manifested in a clear language of hatred but, instead, is seen in statements that could be perceived differently by different audiences or could even appear rational or normal at first glance.² Evidence also shows that the communication of stereotypes, false accusations or rumours – and not just direct calls to violence – can also trigger violence and harassment.

Under international and regional human rights standards, expression labelled as “hate speech” may be restricted on a number of different grounds, listed in Article 19(3) of the International Covenant on Civil and Political Rights (“ICCPR”). These include respect for the rights of others, public order, prohibition of abuse of rights, or even sometimes national security.

However, under Article 20(2) of the ICCPR and also, in different conditions, under Article 4(a) of the International Convention on Elimination of All Forms of Racial Discrimination (“ICERD”), States are obliged to “prohibit” expression that amounts to “incitement” to discrimination, hostility or violence. At the same time, under international and regional standards, States are also obliged to protect and promote – both in legislation and practice – the rights of equality and non-discrimination. Unfortunately, the interpretation of these standards by international and regional bodies has been both inconsistent and insufficient.

¹ For example, the Council of Europe’s Committee of Ministers has indicated that the term “hate speech” includes: “All forms of expression which spread, incite, promote or justify racial hatred, xenophobia, anti-Semitism or other forms of hatred based on intolerance, including intolerance expressed by aggressive nationalism and ethnocentrism, discrimination and hostility towards minorities, migrants and people of immigrant origin.” *Committee of Ministers Recommendation*, 30 October 1997. This definition was referred to by the European Court of Human Rights in *Gündüz v. Turkey*, Application No. 35071/97, Judgement of 4 December 2004, para 43 and para 22.

² Difficulties in identifying “hate speech” statements have been acknowledged by a number of commentators and authorities. See, for example, Council of Europe, *Manual on Hate Speech*, September 2009; or OSCE, *Hate Speech on the Internet*, July 2011.

In this policy paper, ARTICLE 19 focuses on the kind of “hate speech” described in Article 20(2) of the ICCPR, where it is narrowly defined as “advocacy of hatred on prohibited grounds that constitutes incitement to discrimination, hostility or violence” (in short, “incitement to hatred” or “incitement”).

The aim of this policy paper is two-fold. Firstly, it offers a detailed set of recommendations on how States should interpret their obligations under Article 20(2) of the ICCPR. Secondly, with the aim of moving towards greater consensus on this issue, it proposes a comprehensive test to be used for reviewing cases and for determining whether a particular expression reaches the threshold of incitement to hatred. ARTICLE 19 seeks to establish clear boundaries between permissible and impermissible expression, as well as robust criteria that can be used. Our objective in doing so is to help ensure that all people enjoy the rights to both freedom of expression and equality.

This policy paper builds on the recent foundation work undertaken by ARTICLE 19 on this subject. This includes:

- *The Camden Principles on Equality and Freedom of Expression* (“Camden Principles”)³ developed in 2009 in collaboration with a panel of international human rights legal scholars and experts;
- The one-day expert meeting organised at the end of 2010 by ARTICLE 19 and Columbia University to unpack the elements constitutive to Article 20(2) of the ICCPR and their various interpretations. This meeting allowed a preliminary determination of a threshold test for Article 20(2);
- The five regional analyses of incitement legislation and implementation contributed by ARTICLE 19 as part of a series of expert workshops organised by the Office of the High Commissioner for Human Rights (“OHCHR”) throughout 2011 and 2012.^{4/5} These analyses included an evolving set of criteria to be used to assess whether incitement cases have met the threshold of Article 20(2) of the ICCPR.

³ *The Camden Principles on Freedom of Expression and Equality*, London, 2009; available at: <http://www.article19.org/data/files/pdfs/standards/the-camden-principles-on-freedom-of-expression-and-equality.pdf>

⁴ See UN Treaty Collection http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mdsg_no=IV-4&chapter=4&lang=en.

⁵ ARTICLE 19 participated in all the regional workshops for the European region (Vienna, 9-10 February 2011), for the African region (Nairobi, 6-7 April 2011), for the Asia Pacific region (Bangkok, 6-7 July 2011), and for the Americas region (Santiago, 12-13 October 2011) and presented the proposal for an “incitement test” under Article 20(2). ARTICLE 19’s contributions to the regional workshops are available at: <http://www.ohchr.org/EN/Issues/FreedomOpinion/Articles19-20/Pages/ExpertsPapers.aspx>.

For more information on the OHCHR’s initiative, see: <http://www.ohchr.org/EN/Issues/FreedomOpinion/Articles19-20/Pages/ExpertsPapers.aspx>.

This policy paper offers a final version of this test based on the feedback and critiques offered by participants to the OHCHR workshops. It is divided into four main sections.

- The first section provides an overview of the international standards that apply and the problems related to their interpretation;
- The second section proposes key overriding principles that should guide policy making and interpretation of incitement;
- The third section outlines a six-part test that should be used when assessing whether a particular expression reaches the prohibited threshold under Article 20(2) of the ICCPR;
- Finally, we discuss the range of sanctions and remedies that should be applied in cases of incitement. These should vary according to the level of severity and other measures if State authorities are to apply them consistently and comprehensively.

International and regional standards on freedom of expression

International human rights instruments

Universal Declaration of Human Rights

While the Universal Declaration of Human Rights (“UDHR”), as a UN General Assembly Resolution, is not strictly binding on States, many of its provisions are regarded as having acquired legal force as customary international law since its adoption in 1948.⁶ The right to freedom of expression is guaranteed in Article 19 of the UDHR.

The UDHR does not specifically provide for prohibitions on certain forms of expression. Article 7, however, provides for protection against discrimination, and also against “incitement to discrimination.” Article 29 refers to the duties everyone holds to the community and recognises that it may be necessary and legitimate to secure certain limitations on rights, including “due recognition and respect for the rights and freedoms of others”. Both articles apply in limiting the scope of Article 19.

The International Covenant on Civil and Political Rights

The International Covenant on Civil and Political Rights (“ICCPR”), adopted by the UN General Assembly in 1976, gives legal force to many of the rights contained in the UDHR. All 167 States party to the ICCPR are required to respect its provisions and implement its framework at the national level.⁷

Article 19

Article 19 of the ICCPR protects freedom of opinion and expression. Like Article 19 of the UDHR, it guarantees freedom to seek and receive information. Article 19(3) sets out the test for assessing the legitimacy of restrictions on freedom of expression.

- First, the interference must be in accordance with the law.
- Second, the legally sanctioned restriction must protect or promote an aim deemed legitimate (respect for the rights and reputation of others, and protection of national security, public order, public health or morals).
- Third, the restriction must be necessary for the protection or promotion of a legitimate aim.

⁶ *Filartiga v. Pena-Irala*, 630 F. 2d 876 (1980) (US Circuit Court of Appeals, 2nd circuit).

⁷ Article 2 of the ICCPR, GA res. 2200A (XXI), 21 UN GAOR Supp. (No. 16) at 52, UN Doc. A/6316 (1966); 999 UNTS 171; 6 ILM 368 (1967).

Determining whether a restriction meets this requirement is articulated as a “three-part test.” Any restrictions must be provided by law,⁸ must pursue a legitimate aim⁹ and must conform to the strict tests of necessity and proportionality.¹⁰

Article 20(2)

Article 20(2) of the ICCPR sets limitations on freedom of expression and requires States to “prohibit” certain forms of speech which are intended to sow hatred, namely *“any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law.”*

Article 20(2) does not require States to prohibit all negative statements towards national groups, races and religions. However, States should be obliged to ban any speech that constitutes incitement to discrimination, hostility or violence.

A compromise was reached to formulate a positive obligation upon States, requiring “prohibition by law” rather than specifically requiring “criminalisation.”

It should be noted that the Human Rights Committee (“HR Committee”) has not decisively interpreted these provisions as requiring criminal sanctions either. It has only stated an obligation to “provide appropriate sanctions” in cases of violations.¹¹

The relationship between Article 20 and Article 19

There is strong coherence between Articles 19 and 20 of the ICCPR, as the HR Committee has highlighted.

Any law seeking to implement the provisions of Article 20(2) of the ICCPR must not overstep the limits on restrictions to freedom of expression set out in Article

⁸ To satisfy this requirement, a law or regulation must be formulated precisely and enacted to enable an individual to regulate his/her conduct accordingly, see *Leonardus J.M. de Groot v. the Netherlands*, No. 578/1994, (1995).

⁹ A list of legitimate protective aims is exhaustively enumerated in Article 19 (3)(a) and (b) of the ICCPR. Safeguarding “public order” or “the rights of others” are most frequently cited as the legitimate aims of legislation restricting “hate speech” or when protection the right to life and the right to equality or non-discrimination. The term “others” in this context has been held by the HR Committee to relate to other persons individually or as members of a community (*Ross v. Canada*, CCPR/C/70/D/736/1997, 26 October 2000).

¹⁰ The State must demonstrate in a “specific and individualised fashion the precise nature of the threat, and the necessity and proportionality of the specific action taken, in particular by establishing a direct and immediate connection between the expression and the threat” (*Shin v. Republic of Korea*, No. 926/2000). “Necessity” requires that there must be a pressing social need for the restriction. “Proportionality” requires that a restriction on expression is not overly broad and that it is appropriate for achieving its protective function. Account must also be taken of the form of expression as well as the means of its dissemination. For instance, the value placed by the ICCPR upon uninhibited expression is particularly high in cases of public debate in a democratic society concerning figures in the public and political domain (*Bodrozic v. Serbia and Montenegro*, No. 1180/2003).

¹¹ “For Article 20 to become fully effective, there ought to be a law making it clear that propaganda and advocacy as described therein are contrary to public policy and providing for an appropriate sanction in case of violation. The Committee, therefore, believes that States parties which have not yet done so should take the measures necessary to fulfil the obligations contained in article 20, and should themselves refrain from any such propaganda or advocacy”, HRC, General Comment 11, Prohibition of propaganda for war and inciting national, racial or religious hatred (Art. 20), 29 July 1983, para. 2.

19(3).¹² The HR Committee re-affirmed this in its Draft General Comment No 34 (2011) on Article 19 of the ICCPR, when it stated that Articles 19 and 20 of the ICCPR:

[A]re compatible with and complement each other. The acts that are addressed in Article 20 are of such an extreme nature that they would all be subject to restriction pursuant to Article 19, paragraph 3. As such, a limitation that is justified on the basis of Article 20 must also comply with Article 19, paragraph 3, which lays down requirements for determining whether restrictions on expression are permissible. (See communication No. 736/1997, *Ross v. Canada*, Views adopted on 18 October 2000)

What distinguishes the acts addressed in Article 20 from other acts that may be subject to restriction under Article 19, paragraph 3, is that for the acts addressed in Article 20, the Covenant indicates the specific response required from the State: their prohibition by law. It is only to this extent that Article 20 may be considered as *lex specialis* with regard to Article 19. (paras 52-53)

In this respect, Article 20(2) of the ICCPR constitutes the *lex specialis*, i.e. establishing an *additional* rather than a *substitutive* obligation for States by

prescribing the specific response required to certain forms of expression.

Members of the HR Committee further stated:

[T]here may be circumstances in which the right of a person to be free from incitement to discrimination on grounds of race, religion or national origins cannot be fully protected by a narrow, explicit law on incitement that falls precisely within the boundaries of Article 20, paragraph 2. This is the case where ... statements that do not meet the strict legal criteria of incitement can be shown to constitute part of a pattern of incitement against a given racial, religious or national group, or where those interested in spreading hostility and hatred adopt sophisticated forms of speech that are not punishable under the law against racial incitement, even though their effect may be as pernicious as explicit incitement, if not more so.¹³

The HR Committee has had few opportunities to interpret Article 20(2) of the ICCPR. The three decisions it has issued relate to two complaints against Canada and one against France, each of which concerned prohibitions on anti-Semitic speech.¹⁴ In each the HR Committee took a different approach to Article 20(2), placing a varying degree of reliance on Article 19(3) of the ICCPR.

¹² “[R]estrictions on expression which may fall within the scope of Article 20 must also be permissible under Article 19, paragraph 3, which lays down requirements for determining whether restrictions on expression are permissible.” *Ross v. Canada*, para 10.6.; *op. cit.*

¹³ See Concurring Opinion of Evatt, Kretzmer and Klein, in *Faurisson v. France*, Communication No. 550/1993, 8 November 1996, CCPR/C/58/D/550/1993.

In *Ross v Canada*, however, the HRC did recognise the overlapping nature of Articles 19 and 20, stating that it considered that

[R]estrictions on expression which may fall within the scope of Article 20 must also be permissible under Article 19, paragraph 3, which lays down requirements for determining whether restrictions on expression are permissible.¹⁵

International Covenant on the Elimination of All forms of Racial Discrimination

A different set of requirements prohibiting particular types of speech is included in the International Convention on the Elimination of Racial Discrimination (“ICERD”).¹⁶ This contains much broader

positive obligations on member States to prohibit incitement than those provided in Article 20(2) of the ICCPR.

Article 4(a) of the ICERD requires States to “condemn all propaganda and all organizations which are based on ideas or theories of superiority of one race or group of persons of one colour or ethnic origin, or which attempt to justify or promote racial hatred and discrimination in any form, and undertake to adopt immediate and positive measures designed to eradicate all incitement to, or acts of, such discrimination and, to this end, with due regard to the principles embodied in [the UDHR] and the rights expressly set forth in Article 5 of [the ICERD].”

Article 4(a) of the ICERD requires States to

¹⁴ The decision of the HR Committee in *Ross v. Canada* (op.cit.) offers an indirect insight into possible interpretation of the nature of Article 20(2) of the ICCPR obligations. Ross had been removed from his teaching post in response to various instances of public anti-Semitic expression, including books and media interviews. His removal from office was an administrative sanction and not a criminal conviction. He alleged his rights under Article 19 of the ICCPR had been violated. The State party argued that the case should be deemed inadmissible as the expression fell within the scope of Article 20(2). The HR Committee found no violation of Article 19. It considered the following:

- **Context of the expression:** the HR Committee made it clear that the content of the expression should not be viewed in isolation, as the context was crucial to establishing a causal connection between that expression and an outcome that the State has a legitimate interest in suppressing.
- **Intent:** the HR Committee made a distinction between questioning the validity of Jewish beliefs and teaching and advocating that people should “hold those of the Jewish faith and ancestry in contempt.” The distinction between critical discussion and advocating contempt against a group appeared to be crucial to the finding of no violation.
- **Position of the speaker/proponent of the expression:** the HR Committee stressed that in respect of teachers, the “special duties and responsibilities” that attach to the exercise of the right to freedom of expression are “of particular relevance.” It was stressed that “the influence exerted by school teachers may justify restraints in order to ensure that legitimacy is not given by the school system to the expression of views which are discriminatory.”
- **Importance of causality:** the HR Committee found that “it was reasonable to anticipate that there was a causal link between the expressions of the author and the ‘poisoned school environment’ experienced by the Jewish children in the school district. In that context, the removal of the author from a teaching position can be considered a restriction necessary to protect the right and freedom of Jewish children to have a school system free from bias, prejudice and intolerance.” It is not clear on what basis did the HR Committee reach this conclusion since it did not analyse the facts in this respect. It was apparently sufficient that the causal connection could ‘reasonably be anticipated.’ A similar deficiency is also found in the decision in *J.R.T. and the W.G. Party v. Canada*, where it was concluded that the impugned statements constituted advocacy of hatred without providing any reasoning for that finding (6 April 1983, Communication No. 104/1981, para 8(b).

¹⁵ Communication No 736/1997.

12 ¹⁶ See UN Treaty Collection, <http://www2.ohchr.org/english/law/cerd.htm>.

“declare [as] an offence punishable by law” a set of four expressive conducts:

- All dissemination of ideas based on racial superiority or hatred;
- Incitement to racial discrimination;
- All acts of violence or incitement to such acts against any race or group of persons of another colour or ethnic origin;
- Any assistance with racist activities, including the financing of them.

The ICERD Committee interpreted Article 4 as obliging the States to “penalize” these forms of misconduct, i.e. prohibit them using criminal law sanctions.¹⁷

Further, Article 5(viii) of the ICERD guarantees that a States party must guarantee the right of everyone to freedom of opinion and expression in relation to all conduct described above – except incitement to acts of racially motivated violence, where the right to freedom of expression is not recognised as being applicable.

ARTICLE 19 notes that there is no international consensus on the requirements of Article 4; the inclusion of a “due regard” clause leaves room for discussion about where the balance between the right to freedom of expression and the right to freedom from discrimination should be struck. Furthermore, a number of States have entered reservations to Article 4, meaning that the national implementation of its requirements is subject to the State's own norms regarding the balance between freedom of expression and prohibition of discrimination.¹⁸

The ICERD Committee interpreted Article 4 as obliging States to “penalize” these forms of misconduct, i.e. to prohibit them through criminal law sanctions.¹⁹ Article 4 stipulates that “measures designed to eradicate all incitement to, or acts of, such discrimination” should be undertaken “with due regard to the principles embodied in the Universal Declaration of Human Rights and the rights expressly set forth in Article 5 of this Convention.”

¹⁷ General Recommendation No. 15: Organized violence based on ethnic origin (Art. 4); adopted on 23 March 1993, General Recommendation XV; available at <http://www.unhchr.ch/tbs/doc.nsf/%28Symbol%29e51277010496eb2cc12563ee004b9768?Opendocument>.

¹⁸ It should be noted that in General Comment No. 24, the HR Committee concluded that there are certain provisions in the ICCPR that reflected customary international law and these may not be the subject of reservations by States when they ratify. One such is the duty to prohibit the advocacy of national racial or religious hatred. According to the HRC, customary international law binds all States in most circumstances whether or not they consent, and the prohibition on racial discrimination and the advocacy of hatred are part of customary international law. See General Comment No.24 Issues Relating to Reservations made upon ratification of accession to the Covenant or the Optional Protocols thereto, or in relation to Declarations under Article 41 of the Covenant 52nd Sess., 11 November 1994.

¹⁹ General Recommendation No. 15: Organized violence based on ethnic origin (Art. 4); adopted on 23 March 1993, General Recommendation XV; available at <http://www.unhchr.ch/tbs/doc.nsf/%28Symbol%29e51277010496eb2cc12563ee004b9768?Opendocument>.

²⁰ Convention for the Protection of Human Rights and Fundamental Freedoms, Rome, 4 September 1950.

Regional human rights instruments

The European Convention on Human Rights

The European Convention on Human Rights (“ECHR”)²⁰ guarantees the right to freedom of expression in Article 10(1), with qualifications laid out in subparagraph (2). The ECHR does not place a positive obligation upon States to prohibit expression in the same terms as Article 20(2) of the ICCPR. Nevertheless, the European Court of Human Rights (“ECtHR”) has recognised that certain forms of harmful expression must necessarily be restricted to uphold the objectives of the Convention as a whole:

[A]s a matter of principle it may be considered *necessary in certain democratic societies to sanction or even prevent all forms of expression which spread, incite, promote or justify hatred based on intolerance (including religious intolerance)*, provided that any

‘formalities’, ‘conditions’, ‘restrictions’ or ‘penalties’ imposed are proportionate to the legitimate aim pursued.²¹ [emphasis added].

In its case-by-case approach, the ECtHR uses alternate methodologies to determine whether restrictions on “hate speech” are compatible with the ECHR:

- *Applying Article 17*²² of the ECHR to preclude reliance on Article 10 of the ECHR: This methodology has been used in cases concerning racist and xenophobic forms of expression,²³ as well as instances of Holocaust denial amounting to anti-Semitism.²⁴ In several of these cases, Article 17 was invoked at the admissibility stage, and therefore the judgements do not proceed to an analysis of the merits.²⁵ Although “hate speech” has not been concretely defined, the label has been employed decisively in respect of the application of Article 17. *In the case of Lehideux and Isorni v. France*, it was suggested that for Article 17 to be invoked, “the aim of the offending actions must be to spread violence or hatred, to resort to illegal or undemocratic methods,

²¹ *Erbakan v. Turkey*, No. 59405/00, 6 June 2006, para 56.

²² Article 17 of the ECHR provides that “nothing in this Convention may be interpreted as implying for any State, group or person any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms set forth herein or at their limitation to a greater extent than is provided for in the Convention.”

²³ *Norwood v. the United Kingdom*, No. 23131/03 (2004); also *Jersild v. Denmark*, No. 15890/89, 23 September 1994, [references to Article 17 concerned the expression of the originators of the expression in issue, and these individuals were not party to the complaint]; *Glimmerveen and Hagenback v. the Netherlands*, Nos. 8348/78 and 8406/78, (1979).

²⁴ *Garaudy v. France*, No. 65831/01 (2003); *Honsik v. Austria*, No. 25062/94 (1995); *Marais v. France*, No. 31159/96 (1996).

²⁵ *Garaudy, ibid.*; *Glimmerveen and Hagenbeek, op. cit.*; *Norwood, op. cit.*

²⁶ *Lehideux and Isorni v. France*, Application No. 24662/94, 23 September 1998, concurring opinion of Judge Jambrek, para 2. Article 17 was not successfully invoked in this case and a violation of Article 10 was found.

²⁷ *Thorgeirson v. Iceland*, 25 June 1992, Application No. 13778/88, para. 63.

²⁸ *Handyside v. United Kingdom*, Application No 5493/72, judgement of 7 December 1976, Series A no 24, 1 EHRR 737.

to encourage the use of violence to undermine the nation's democratic and pluralistic political system, or to pursue objectives that are racist or likely to destroy the rights and freedoms of others.”²⁶

- *Applying the three-part test*, the ECtHR has repeatedly asserted that “freedom of expression ... is subject to a number of exceptions which, however, must be narrowly interpreted and the necessity for any restrictions must be convincingly established”²⁷ and that speech that “offends, shocks or disturbs” is protected.²⁸
- *Applying Article 10(2)*: In a parallel series of cases, the ECtHR has accepted that

much harmful expression falls within the scope of the protection of Article 10(1), but is subject to the permissible grounds for restriction under Article 10(2). In the respective jurisprudence, the ECtHR has taken a case-by-case approach to assess the need for the restriction on the expression “in the light of the case as a whole.” From the analysis of the jurisprudence, it appears that the intent of the applicant is central to their determination.²⁹ Intent is assessed by referring to the content³⁰ of the expression and the context³¹ in which it is uttered.

It should also be noted that the ECtHR exercises particularly strict supervision in cases where criminal sanctions have been imposed by the State. In many instances,

²⁹ Whether the individual intended to disseminate “hate speech” or contribute to a debate in the public interest is critical in the analysis. In the absence of other evidence, it can be determined from the content and context of expression.

³⁰ The ECtHR attaches particular importance to political discourse or matters in the public interest, and is reluctant to impose restrictions in this regard (*Erbakan*, op. cit., para 55). In relation to expression of a religious nature, the ECtHR is likely to grant the State a wide margin of appreciation in determining the legitimacy of restrictions on expression that is “gratuitously offensive” to people on account of their religious beliefs (*Gündüz*, op. cit., para 37). The ECtHR also distinguishes between statements of fact and value judgements, as “the truth of value judgments is not susceptible of proof” (*Pedersen and Baadsgaard v. Denmark*, No. 49017/99, 19 June 2006, para 76).

³¹ In the analysis of the context, the ECtHR has noted the relevance of considering the following elements:

- **The speaker's status/role in society**: being a politician does not give an individual absolute free speech rights, as “it is crucially important that politicians avoid disseminating comments in their public speeches which are likely to foster intolerance” (see *Erbakan*, op. cit., para 64). Expression by journalists is likely to have a greater impact given the breadth of their audience; however, the ECtHR distinguished the role of the journalist as author of an impugned statement and their role in disseminating those views as part of a factual broadcast that was in the public interest (see *Jersild*, op. cit., para 31; see also *Sürek v. Turkey*, No. 26682/95, 08 July 1999, para 63). The ECtHR also allows a much broader margin of appreciation when determining limitations on the expression of certain public officials, especially teachers, since they are “figures of authority to their pupils in the educational field” (see *Seurat v. France*, No. 57383/00, 18 May 2004).
- **The status of persons targeted by the remarks in issue**; and
- **The dissemination and potential impact**: In relation to the broadcast media, the ECtHR will consider the type of programme in which the statements were broadcast, the probable impact on the audience, and the way in which the statements were framed in the context of a broader public interest debate (see *Jersild*, op. cit., paras 31 and 34). Other factors include whether the contentious views had been counterbalanced through the intervention of other participants and whether the statements were during live programming or not (see *Gündüz*, op. cit., para 49). In relation to artistic expression, the popularity of the medium has been considered as important (see *Karatas v. Turkey*, No. 23168/94, 8 July 1999, para 29). Similarly, the role of satire in exaggerating and distorting reality to provoke and agitate has also been identified as requiring particular care (*Vereinigung Bildender Künstler v. Austria*, no. 68354/01, 25 January 2007, para 33).

³² *Jersild*, op. cit., para 35.

³³ *Incal v. Turkey*, No. 22678/93, 9 June 1998.

³⁴ *Lehideux and Isorni*, op. cit., para 57.

it has found that the imposition of a criminal conviction, irrespective of the nature or severity of the sentence, is enough to violate the proportionality principle.³² Where administrative sanctions have been imposed, the ECtHR has held that being excluded from the civil service and certain political activities was disproportionate.³³ The ECtHR has also emphasised the availability of alternative sanctions when considering questions of proportionality, for example, the possibility of other means of intervention and rebuttal, particularly through civil remedies.³⁴ Recourse to criminal law should therefore not be seen as the default response to instances of harmful expression if less severe sanctions would achieve the same effect.

The American Convention on Human Rights

The American Convention on Human Rights (“ACHR”)³⁵ protects the right to freedom of expression under Article 13. Article 13(5) sets a positive obligation on States to make an “offense punishable by law” “any propaganda for war and any advocacy of national, racial, or religious hatred that constitute incitements to lawless violence or to any other similar action against any

person or group of persons on any grounds including those of race, colour, religion, language, or national origin.”

The Inter-American Court has not had the opportunity to interpret Article 13(5). However, there are key differences between Article 13(5) and Article 20(2) of the ICCPR and Article 4(a) of the ICERD.

- The obligation to prohibit expression is limited only to incitement to “lawless violence” or “any other similar action”. This implies a much higher threshold than the terms “hostility” or “discrimination” imply in Article 20(2) of the ICCPR. Since the Inter-American Court of Human Rights has not had the opportunity to interpret the provision, it is difficult to determine what would be considered “any other similar action” in this context.
- The protected grounds in Article 13 (5) of the ACHR are expansive, referring to “any grounds including those of race, colour, religion, language or national origin.” The provision is drafted in terms that indicate the list is non-exhaustive.
- The provision requires the creation of “offenses punishable by law”, indicating the use of criminal law to tackle incitement.

³⁵ American Convention on Human Rights, Pact of San Jose, Costa Rica (B-32), adopted 22 November 1969, entered into force 18 July 1978; available at http://www.oas.org/dil/treaties_B-32_American_Convention_on_Human_Rights.pdf.

³⁶ The African (Banjul) Charter on Human and Peoples’ Rights, adopted 27 June 1981, OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982), entered into force 21 October 1986; available at http://www.achpr.org/files/instruments/achpr/banjul_charter.pdf.

The African Charter on Human and Peoples' Rights

The African Charter on Human and Peoples' Rights³⁶ ("the African Charter") guarantees the right to freedom of expression and information under Article 9. The African Charter does not deal directly with the prohibition of incitement and there are no provisions regarding incitement in the African Charter similar to those in Article 20(2) of the ICCPR. However, the African Charter does provide for non-discrimination in the enjoyment of rights, respectively in Articles 2 and 19.

The African Commission is not directly tasked with assessing whether statements qualify as "incitement" to hatred.³⁷ So far, the African Commission has made a decision on only one case of incitement to hatred, discrimination and violence but did not go into any detail about the criteria for assessing whether an expression may be considered incitement to hatred;³⁷ hence it is not possible to conclude whether these factors will guide decision-making in other cases. Recommendations for interpreting and implementing Article 20(2) of the ICCPR.

³⁷ Communication No. 249/02, Institute for Human Rights and Development in Africa (on behalf of Sierra Leonean refugees in Guinea) v. Republic of Guinea (2004) AHRLR 57 (ACHPR 2004).

The Commission found the Guinean government in violation of Article 2 (among others) for "massive violations of the rights of refugees" following a speech by Guinea's president, Lansana Conte, in which he incited soldiers and civilians to attack Sierra Leonean refugees. On 9th September 2000, Guinean President Lansana Conté proclaimed on national radio that Sierra Leonean refugees in Guinea should be arrested, searched and confined to refugee camps/ The analysis of the decision indicates that the Commission considered the following factors:

- The speaker: The speech was delivered by the President;
- The severity of the action called for: In the speech, President Conte called for "large scale discriminatory attacks" against refugees;
- It was possible to establish nexus between the speech and actual attacks: The attacks, that followed, were directly linked to the speech of the President.

Recommendations for interpreting and implementing Article 20(2) of the ICCPR in the light of international standards

Recommendations for interpreting Article 20(2)

Recommendation 1: Definition of key terms

ARTICLE 19 recommends the following definition of the key terms of Article 20(2) – and of Article 4(a) of ICERD.³⁸

- “Hatred” is a state of mind characterised as “intense and irrational emotions of opprobrium, enmity and detestation towards the target group.”³⁹
- “Discrimination” shall be understood as any distinction, exclusion, restriction or preference based on race, gender, ethnicity, religion or belief, disability, age, sexual orientation, language political or other opinion, national or social origin, nationality, property, birth or other status, colour 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.⁴⁰

- “Violence” shall be understood as the intentional use of physical force or power against another person, or against a group or community that either results in or has a high likelihood of resulting in injury, death, psychological harm, maldevelopment, or deprivation.⁴¹
- “Hostility” shall be understood as a manifested action of an extreme state of mind. Although the term implies a state of mind, an action is required. Hence, hostility can be defined as the manifestation of hatred – that is the manifestation of “intense and irrational emotions of opprobrium enmity and detestation towards the target group”.⁴²

A clear, uniform definition of these terms would not only provide the certainty needed for an obligation which prohibits specific conduct in this way, but would also mean that the obligation would be consistently applied in jurisprudence.

Recommendation 2: Non-exhaustive prohibited grounds on incitement

Article 2(1) and Article 26 of the ICCPR guarantee an equal enjoyment of the rights stipulated in the ICCPR and the equal

³⁸ For interpretation of terms “dissemination of ideas based on racial superiority or hatred” and “the provision of any assistance to racist activities, including the financing”, see below, section on interpretation of Article 4(a).

³⁹ *Camden Principles*, op. cit., Principle 12.1.

⁴⁰ This definition is adapted from those advanced by the *Convention on the Elimination of All Forms of Discrimination against Women* and the *Convention on the Elimination of All Forms of Racial Discrimination*.

⁴¹ The definition of violence is adapted from the definition of violence by the World Health Organisation in the report *World Report on Violence and Health*, 2002; available at: http://whqlibdoc.who.int/publications/2002/9241545623_eng.pdf.

⁴² *Camden Principles*, op. cit., Principle 12.1

protection of the law irrespective of “race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.”

However, Article 20(2) of the ICCPR goes on to list three protected characteristics – nationality, race, and religion – as grounds for prohibiting incitement. The HR Committee has not yet addressed the question of whether it should be interpreted expansively to include other recognised characteristics.⁴³

The selectivity of the grounds listed in Article 20(2) of the ICCPR may be a consequence of the political context of the negotiations for the ICCPR and the historical events that it was responding to. The ICCPR entered into force in 1977, having been adopted before equality movements around the world made significant progress in promoting and securing human rights for all. Since then, the ICCPR has come to be interpreted and understood as supporting the principle of equality on a larger scale, applying to other unlisted grounds, in particular sexual orientation, gender identity, and disability.

The object and purpose of international human rights law is often understood as

the protection of individual and collective human rights and the maintenance and promotion of the ideals and values of a democratic society. This focus has encouraged an evolving interpretation of the provisions of international human rights instruments so as to reflect the developments in society over time. In this respect, the ICCPR and other international and regional human rights treaties have been described as “living instruments” that must be interpreted “in the light of present-day conditions”, rather than being viewed as contracts with concrete terms defined by the norms that were prevailing at the moment of their drafting or ratification.⁴⁴ As society’s understanding of equality on grounds such as disability or sexual orientation and gender identity has evolved, so has the understanding of the “object and purpose” of international human rights law.

Furthermore, there is a general principle that legal instruments that give effect to fundamental rights and freedoms should be interpreted “generously,” in order to enable their full realisation. The realisation of rights should not be constrained by an overly formalistic commitment to the original wording of the instrument, or even to the intent of the drafters, if that interpretation would unnecessarily narrow

⁴³ Moreover, Article 4 of the ICERD refers only to “race, colour and ethnic origin” among the prohibited grounds, which is narrower than the grounds covered by the ICERD in general, namely “race, colour, descent, or national or ethnic origin.” In the interpretation of the ICERD, the ICERD Committee did not uphold this narrow list of grounds. For example, in 2004 General Recommendation XXX on “Discrimination Against Non-Citizens”, the Committee recommended that the State parties should “take steps to address xenophobic attitudes and behaviour towards non-citizens, in particular hate speech and racial violence and take resolute any tendency to target, stigmatize, stereotype or profile, on the basis of race, colour, descent and national or ethnic origin, members of “non-citizen” population groups...” General Recommendation No.30: Discrimination Against Non Citizens, Gen. Rec. No. 30. (General Comments), adopted on 1 October 2004, General Recommendation XXX; available at: <http://www.unhchr.ch/tbs/doc.nsf/%28Symbol%29/e3980a673769e229c1256f8d0057cd3d?Opendocument>.

20 ⁴⁴ See, for example, *Tyrer v. the United Kingdom*, A 26 (1978).

the enjoyment of rights and freedoms.

International human rights law further supports these interpretative principles by recognising that existing rights must be understood as creating a permissive space in which new understandings of human rights may be advanced. It is noteworthy in this regard that the Declaration on Human Rights Defenders states at Article 7 that:

Everyone has the right, individually and in association with others, to develop and discuss new human rights ideas and principles and to advocate their acceptance.⁴⁵

ARTICLE 19 believes that a narrow reading of the positive obligations under Article 20(2) of the ICCPR would be at odds with the provisions regarding non-discrimination found in Articles 2(1) and 26 of the ICCPR. These guarantee individuals the equal enjoyment of rights stipulated in the ICCPR and the equal protection of the law irrespective of “race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.”

It would seem incoherent for guarantees against discrimination to be interpreted expansively, and then to arbitrarily restrict the protective function of Article 20(2) of

the ICCPR to only three of those recognised grounds. Moreover, national interpretations of the obligation to protect against incitement have recognised other grounds than the three listed under Article 20.⁴⁶ ARTICLE 19 believes that, as a living instrument, the ICCPR should be interpreted in the light of these developments.

For these reasons, ARTICLE 19 strongly supports an interpretation of Article 20(2) that provides a framework for the prohibition of incitement on all the protected grounds recognised under international law. The provisions of Article 20(2) of the ICCPR and respective regulations in domestic laws should either be seen as non-exhaustive or should be interpreted to include other grounds (e.g. disability, sexual orientation or gender identity, tribe, caste and others). Even without an expansive interpretation of Article 20(2) of the ICCPR, restrictions on “hate speech” targeted at individuals on account of other grounds should be considered legitimate in as much as they comply with Article 19(3) of the ICCPR.

Recommendation 3: Incitement requires intent

ARTICLE 19 believes that a crucial and distinguishing element of incitement as prohibited by Article 20(2) of the ICCPR and Article 4(a) of ICERD is the

⁴⁵ Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms, A/RES/53/144, 8 March 1999, [as affirmed] in General Assembly resolution 64/163 of 17 March 2010.

⁴⁶ For example, in a decision of 24 June 1997, the Criminal Division of the French Court of Cassation made an extensive interpretation of the term “group of persons” used in article 24 of the 1881 Act on freedom of the press, stating that “foreigners residing in France who are singled out because they do not belong to the French nation constitute a group of persons within the meaning of article 24, paragraph 6”, which criminalizes incitement to discrimination, hatred or violence. Cited in Louis-Léon Christians, Study for the workshop on Europe (9 and 10 February 2011, Vienna), 2011.

intent of the speaker to incite others to discrimination, hostility or violence. While many forms of speech might be offensive and shocking, the decisive factors should be that a speaker who incites others to discrimination, hostility or violence intends not only to share his/her opinions with others but also to compel others to commit certain actions based on those beliefs, opinions or positions.

Although a requirement of intent is not explicitly stipulated in Article 20(2) and Article 4(a), ARTICLE 19 believes that the term “advocacy” necessarily implies intention. ARTICLE 19 recommends that domestic legislation should always explicitly state that the crime of incitement to discrimination, hostility or violence is an intentional crime.⁴⁷ Criminal culpability that is less than intent (such as “recklessness” or “negligence”) would not, therefore, meet the threshold of Article 20(2).⁴⁸

International and regional mechanisms have not developed any comprehensive definition of “intent” to incite discrimination, hostility or violence. Equally, there is no

uniform definition of “intent” for criminal offences within international law and jurisprudence. However, a review of various definitions of intentional criminal offences in international treaties⁴⁹ and domestic legislation⁵⁰ shows that a common approach is to ensure liability for offences where the speaker acted with knowledge and with the intention of causing the objective elements of a crime.

ARTICLE 19 is not proposing a uniform definition of intent to incitement. However, we suggest that the definitions of “intent to incite to discrimination, hostility or violence” in domestic legislation should include the following aspects:

Volition (purposely striving) to engage in advocacy to hatred;

Volition (purposely striving) to target a protected group on the basis of prohibitive grounds;

Having knowledge of the consequences of his/her action and knowing that the consequences will occur or might occur in the ordinary course of events.

⁴⁷ In some jurisdictions, also acting “wilfully” or “purposefully.”

⁴⁸ ARTICLE 19 notes that the legislation of many States already recognises intent or intention as one of the defining elements of incitement. These States include the UK, Ireland, Canada, Cyprus, Ireland, Malta, and Portugal.

⁴⁹ For example, Article 30 para 2 of the Rome Statute defines the elements of intent as follows: a) in relation to conduct, that a person means to engage in the conduct; b) in relation to a consequence, that a person means to cause that consequence or is aware that it will occur in the ordinary course of events. See the Rome Statute of the International Criminal Court, adopted by the UN Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court on 17 July 1998, in force since 1 July 2002; available at <http://www2.ohchr.org/english/law/criminalcourt.htm>.

⁵⁰ For example, the UK Criminal Justice Act 1967, Section 8 defines “Proof of criminal intent” as: “A court or jury, in determining whether a person has committed an offence,—(a)shall not be bound in law to infer that he intended or foresaw a result of his actions by reason only of its being a natural and probable consequence of those actions; but (b)shall decide whether he did intend or foresee that result by reference to all the evidence, drawing such inferences from the evidence as appear proper in the circumstances; available at <http://www.legislation.gov.uk/ukpga/1967/80>.”

Recommendation 4: The prohibition of incitement entails a range of measures in addition to criminal sanctions

ARTICLE 19 observes that Article 20(2) of the ICCPR requires States to *prohibit* incitement. However, this Article does not explicitly stipulate that this prohibition should be provided for in criminal law. Article 4(a) of the ICERD, however, specifically calls for the criminalisation of particular conduct.

It is ARTICLE 19's opinion that States should apply a variety of legal means, including civil, administrative and other measures, when prohibiting incitement. The application of criminal law penalties should be limited only to addressing the most severe forms of incitement. In most current instances, this is not the case; States criminalise a broad range of speech in an inconsistent and uneven manner.⁵¹

ARTICLE 19 recommends that States should incorporate their obligations to prohibit incitement through a combination of measures:

- ARTICLE 19 firmly believes that efforts to fight the negative consequences of incitement (as well as lesser, serious forms of

“hate speech”) must be part of a comprehensive policy aimed at promoting both the right to freedom of expression and the right to freedom from discrimination. States must, therefore, adopt a range of positive policy measures that challenge the forms of prejudice and intolerance of which prohibited conduct is symptomatic. In all instances, attention should be focused towards fostering further dialogue and engagement rather than suppressing contentious viewpoints.

- Only where it is strictly necessary and proportionate should these positive policy measures be complemented by any recourse to restrictive legal mechanisms to limit the right to freedom of expression. Any such restrictions, however, must conform to the three-part test under Article 19(3) of the ICCPR; that is, they must be provided by law, must pursue a legitimate aim, and must be necessary and proportionate in relation to the aims pursued. States should consider those restrictions which least limit the right to freedom of expression, such as those found in civil or administrative law. States should provide a range of remedies to victims, such as tort claims, the right of correction and the right to reply.

⁵¹ The Supreme Court of Canada, in *R. v. Keegstra*, stated that the “the mental element [intent] is satisfied only where an accused subjectively desires the promotion of hatred or foresees such a consequence as certain or substantially certain to result from an act done in order to achieve some other purpose.” *R. v. Keegstra*, 3 SCR 697 (1990), para 111

⁵² *R v Keegstra*, the Supreme Court of Canada, [1990] 3 S.C.R. 697, 13/12/90, at 697 (Can.), para. 1

- Only “the most severe and deeply felt form of opprobrium”⁵² should be sanctioned under criminal law. The use of criminal sanctions should be seen “as last resort measures to be applied in strictly justifiable situations, when no other means appears capable of achieving the desired protection of individual rights in the public interest.”⁵³ All such measures should make specific reference to Article 20 of the ICCPR and be based clearly on the prohibitions of the advocacy of hatred that constitute incitement to hostility, discrimination or violence. Moreover, all cases prosecuted under these provisions should be reviewed using the strict six-prong test proposed by ARTICLE 19 below.
- Recourse to criminal law should not be the default response to instances of incitement in cases where less severe sanctions would achieve the same effect. Moreover, the experience of many jurisdictions shows that civil and administrative law sanctions are better suited as a response to “incitement.”⁵⁴ Such sanctions are also important as they presuppose the involvement and participation of victims and make provision for specific redress to them.

At the same time, these sanctions should be measured in order to “avoid an outcome where restrictions, which aim at protecting minorities against abuses, extremism or racism, have the perverse effect of muzzling opposition and dissenting voices, silencing minorities, and reinforcing the dominant political, social and moral discourse and ideology.”⁵⁵

Incitement to discrimination

Incitement to discrimination poses specific problems. ARTICLE 19 observes that States differ in their approach to prohibiting incitement to discrimination and discrimination as such.

In many countries, discrimination is prohibited in criminal law. In others, however, it is only an administrative offence or a conduct that can be addressed within civil law. In countries where acts of discrimination do not result in criminal sanctions, it does not seem logical that incitement to discrimination should be penalised through criminal law. In such countries, incitement to discrimination should not be criminalised.

⁵² Venice Commission, *Report on the Relationship Between Freedom of Expression and Freedom of Religion*, 17-18 October 2008; available at [http://www.venice.coe.int/docs/2008/CDL-AD\(2008\)026-e.pdf](http://www.venice.coe.int/docs/2008/CDL-AD(2008)026-e.pdf).

⁵⁴ For example, it has been documented that in Brazil, criminal law has not been efficient due to institutional bias among law enforcement agencies, while sanctions have been levied in civil proceedings. See, Tanya Hernandez, *Hate Speech and the Language of Racism in Latin America*, 32 U. Pa. J. Int'l L. 805 2010-2011.

⁵⁵ *Ibid.*

⁵⁶ *Vienna Convention on the Law of Treaties*, 1969, Articles 31 and 32; available at http://untreaty.un.org/ilc/texts/instruments/english/conventions/1_1_1969.pdf.

Recommendation 5: Article 4(a) of ICERD should be interpreted in compliance with Article 20(2) of the ICCPR

ARTICLE 19 notes that treaties are to be interpreted in accordance with the *Vienna Convention on the Law of Treaties*.⁵⁶ The Vienna Convention stipulates that “a treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose”⁵⁷ and any subsequent practice or agreement. When the interpretation “leaves the meaning ambiguous or obscure or leads to” a manifestly absurd or unreasonable result, supplementary means of interpretation can be used.

ARTICLE 19 argues that, based on the Vienna Convention, Article 4(a) of the ICERD should be interpreted with “due regard” to the right to freedom of expression (as protected in Article 5 of the ICERD and Article 19 of the ICCPR) and more generally to any agreement that has followed the adoption of the ICERD, including the ICCPR.

ARTICLE 19 also suggests that the provisions of “dissemination of ideas based on racial superiority or hatred” and

“assistance to racial activities” should be interpreted narrowly, according to the level of severity and the threshold set by Article 20(2) of ICCPR. Only the dissemination of ideas or the financing of activities on a very large and serious scale should be prohibited. Moreover, States should ensure that any prohibitions undertaken in law to interpret Article 4 of the ICERD should be necessary and proportionate to a legitimate aim and should include a requirement of intent to bring about a prohibited result.

Recommendations for implementing Article 20(2)

The review of domestic legislation around the world⁵⁸ indicates that States vary greatly in their approach to and interpretation of the obligation set out in Article 20(2) of the ICCPR and – in cases without declarations and reservations – under Article 4(a) of the ICERD. The prescribed wording is rarely, if ever, found enshrined in domestic legislation. Subsequently, the interpretation of these provisions and the legal reasoning applied by authorities in many countries appears *ad hoc*, lacking conceptual discipline or rigour and going beyond what is proscribed by Article 20(2) of the ICCPR and Article 4(a) of the ICERD. Moreover, this overly broad legislation is open to wide-ranging and often abusive interpretation.⁵⁹

⁵⁷ *Ibid.*, Article 31 para 1.

⁵⁸ These conclusions were reached by the regional studies commissioned by the OHCHR available at <http://www.ohchr.org/EN/Issues/FreedomOpinion/Articles19-20/Pages/ExpertsPapers.aspx>.

⁵⁹ *Ibid.*

In order to overcome these inconsistencies, ARTICLE 19 proposes that States should follow the following recommendations when implementing their international obligations under Article 20.

Recommendation 6: Domestic legislation should include specific prohibition of “incitement” as provided by Article 20(2) of the ICCPR

National legislation should include specific and clear reference to “incitement to discrimination, hostility or violence” (instead of a broad range of different and vague prohibitions). The use of broader terms or the mere prohibition of “incitement to hatred” should be avoided or, alternatively, the legislation should specify that they should be interpreted within the meaning of Article 20(2) of the ICCPR. Ideally, there should be an explicit recognition in the drafting of legislation that it is intended to implement Article 20 of the ICCPR.

The right to freedom of expression should be explicitly protected, as required by Article 19 of the ICCPR.

Recommendation 7: The prohibition to incitement should conform to the three-part test of legality, proportionality and necessity

In as much as it restricts freedom of expression, any incitement-related restriction should conform to the three-part test provided under Article 19 (3) of the ICCPR. As *lex specialis*, Article 20(2) provides an additional, rather than a substitutive obligation on States. The implication is that for an incitement-related restriction to be legitimate, it must meet all three parts of the test:

- The interference must be *provided for by law*. This requirement is fulfilled only where the law is accessible and “formulated with sufficient precision to enable the citizen to regulate his conduct.”⁶⁰
- The interference must pursue a *legitimate* aim. The list of aims in the various international treaties is exclusive in the sense that no other aims are considered to be legitimate as grounds for restricting freedom of expression.
- The restriction must be *necessary in a democratic society or must meet a pressing social need*.⁶¹, the word

⁶⁰ *The Sunday Times v. United Kingdom*, 26 April 1979, Application No. 6538/74, para. 49 (European Court of Human Rights).

⁶¹ *Zana v Turkey*, judgement of the Grand Chamber of 25 November 1997, Application No 18954/91 para 51; *Lingens v Austria*, Judgement of 8 July 1986, Application No 9815/82, paras 39-40.

26 ⁶² *Lingens v. Austria*, 8 July 1986, Application No. 9815/82, paras. 39-40 (European Court of Human Rights).

“necessary” meaning that there must be a “pressing social need” for the restriction. The reasons given by the State to justify the restriction must be “relevant and sufficient” and the restriction must be proportionate to the aim pursued.⁶²

ARTICLE 19 believes that the application of the three-part test has an essential part to play in building a more coherent and cohesive legal framework, a framework in which freedom of speech is respected, protected and upheld while allowing for the legitimate restrictions that are needed to limit incitement to hatred.

Recommendation 8: All incitement cases should be strictly assessed under a six-part test

With a view to promoting a coherent international, regional and national jurisprudence relating to the prohibition of incitement, ARTICLE 19 proposes that all incitement cases should be assessed under a robust and uniform incitement test. This test should consist of a review of all the following elements:

1. **Context** of the expression;
2. **Speaker**/proponent of the expression;

3. **Intent** of the speaker/proponent of the expression to incite to discrimination, hostility or violence;
4. **Content** of the expression;
5. **Extent and Magnitude** of the expression (including its public nature, its audience and means of dissemination);
6. **Likelihood** of the advocated action occurring, including its **imminence**.

ARTICLE 19 considers these elements to be essential to the definition of incitement by both Article 20(2) of the ICCPR and, to a large extent, Article 4(a) of the ICERD. Reviewing the cases using such a test would ensure that incitement to hatred is a narrowly confined offence to which States do not resort on too frequent a basis. It would also emphasise the need for other less intrusive measures and sanctions in order to protect freedom of expression.

In the following sections, ARTICLE 19 suggests specific measures that States should undertake for each aspect of the test, as well as other measures that will be needed for its consistent and comprehensive application by the authorities.

Reaching the threshold: Incitement test

At the outset, ARTICLE 19 acknowledges that all incitement cases should be considered on a case-by-case basis. The test is also designed to provide the judiciary and those working on the issues at the heart of the prohibitions with a framework for determining how to draw the line between forms of speech that should be tolerated in democratic society and speech that warrants sanctions under Article 20 of the ICCPR.

Test One: The context

A thorough assessment of the context of the expression should be the starting point when determining whether a particular statement meets the threshold of Article 20(2) and Article 4(a) of ICERD. The context of the communication may have a direct bearing both on the intent of the speaker and/or on the possibility of the prohibited conduct (discrimination, hostility or violence) occurring.

Ideally, any analysis of the context should place key issues and elements of speech within the social and political context prevalent at the time the speech was made and disseminated.⁶³

At one end of the spectrum, the context may be characterised by frequent acts of violence against individuals or groups based on prohibited grounds; regular and

frequently negative media reports against/on particular groups; violent conflicts where groups or the police oppose other groups; reports raising levels of insecurity and unrest within the population.

At the other end of the spectrum, the climate may be one of relative peace and prosperity, with little or no indication of any conflict and potential for discrimination, hostility or violence occurring. In this respect, an important aspect of the context would be the degree to which opposing or alternative ideas are present and available.

Overall, a context analysis should include considerations of the following elements:⁶⁴

- **Existence of conflicts** within society. Issues to be examined include the existence of previous conflicts between relevant groups; outbreaks of violence following other examples of incitement; the presence of other risk factors for mass violence, such as weak democratic structures and rule of law.
- **Existence and history of institutionalised discrimination:** Are there structural inequalities and discrimination against a group or groups? What is the reaction to hateful statements targeting the group/groups? Is there broad social condemnation of such statements?

⁶³ As noted by Toby Mendel, "it is extremely difficult to draw any general conclusions from the case law about what sorts of contexts are more likely to promote the proscribed result, although common sense may supply some useful conclusions. Indeed, it sometimes seems as though international courts rely on a sample of contextual factors to support their decisions rather than applying a form of objective reasoning to deduce their decisions from the context. Perhaps the impossibly broad set of factors that constitute context make this inevitable". Toby Mendel, *Study on International Standards Relating to Incitement to Genocide or Racial Hatred* (2006).

⁶⁴ See also, Susan Benesh, *Vile Crime or Inalienable Right: Defining Incitement to Genocide*, *Virginia Journal of International Law*, Vol. 48, No.3, 2008.

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- **History of clashes and conflicts** over resources between the audience to whom the speech is targeted and the targeted groups: Was the audience suffering economic insecurity, e.g. lacking in food, shelter, employment, especially in comparison with its recent past? The issue of whether the audience was fearful of further clashes should also be examined. Fear might be objectively reasonable or not; its impact may be equally large and equally well exploited by a compelling speaker.
 - **The legal framework**, particularly applying to anti-discrimination and freedom of expression, but also to access to justice.
 - **The media landscape**, in particular the diversity and pluralism of the media in the country. Issues to be examined include censorship; the existence of barriers to establishing media outlets; limits to the independence of the media or journalists; broad and unclear restrictions on the content of what may be published or broadcast; evidence of bias in the application of these restrictions. Other issues may include whether there is an absence of criticism of government or wide-ranging policy debate in the media and other forms of communication; and whether the audience has access to a range of alternative and easily accessible views and speeches.

Test Two: The speaker

The identity of the speaker or originator of the communication, particularly their position or status in society and their standing or influence, should be analysed. Issues to be considered include:

- **The official position of the speaker** – whether he/she was in a position of authority over the audience;
- **The level of the speaker's authority or influence over the audience** and his/her charisma;
- Whether the statement was made by a person in his/her **official capacity**, in particular if this person carries out particular functions.

ARTICLE 19 believes that special consideration should be given to the following categories of speakers:

- **Politicians/prominent members of political parties:** It has been repeatedly highlighted that politicians should refrain from making public speeches which can provoke intolerance.⁶⁵ International jurisprudence has recognised that political parties have the right to defend their views in public, “although some of them offend, shock or disturb a portion of the population” but they should not do so by “using words or attitudes vexatious

or humiliating, because such behaviour may generate among the public reactions incompatible with a peaceful social climate and undermine confidence in democratic institutions.”⁶⁶

- **Public officials or persons of similar status:** Cases where the speaker is a public official or persons with particular status in the society, such as teacher or religious leader, may trigger stronger attention since they may exert influence over others.⁶⁷

As highlighted by experts an analysis of the speaker also necessarily requires a focus on the audience, considering issues such as the degree of vulnerability and fear of the various communities, including those targeted by the speaker; and whether the audience is characterised by excessive respect for authority, as factors of this kind would make an audience more vulnerable to incitement.⁶⁸

Test Three: Intent

As highlighted above, ARTICLE 19 strongly believes that incitement under Article 20(2) of the ICCPR or Article 4(a) of the

ICERD requires intention on the part of the speaker, as opposed to recklessness or negligence. As noted above, ARTICLE 19 defines intent as:

- Volition (purposely striving) to engage in advocacy to hatred;
- Volition (purposely striving) to target a protected group on the basis of prohibitive grounds as such;
- Having knowledge of the consequences of his/her action and knowing that the consequences will occur or might occur in the ordinary course of events.

The question of how the intent may be proven is complex. Unless the person confesses or admits to inner psychological deliberations, his/her state of mind will always be difficult to prove. In the absence of a guilty plea or other clear evidence, judicial authorities should have the flexibility to make their own assessment of whether the actions unquestionably attest to a speaker's intent to incite.

A review of international and comparative jurisprudence shows that courts decide

⁶⁶ *Féret v. Belgium*, Application No. 15615/07, judgement of 16 July 2009, para. 77.

⁶⁷ For example, in *Malcolm Ross v. Canada* – the case concerning statements against persons of the Jewish faith – the HR Committee took into account the fact that the author was a teacher. The HR Committee stressed that the special duties and responsibilities that the exercise of the right to freedom of expression entails “are of particular relevance within the school system, especially with regard to the teaching of young students”; ... the influence exerted by school teachers may justify restraints in order to ensure that legitimacy is not given by the school system to the expression of views which are discriminatory; *Malcolm Ross v. Canada*, Communication No. 736/1997, 18 October 2000, para 11.6.

Similarly, in *Seurot v. France*, the ECtHR put emphasis on the fact that the speaker was a teacher – “and in fact a history teacher” – in a case where the applicant was the author of an insulting article towards North Africans, which was published in his school's newsletter. The ECtHR recalled the “special duties and responsibilities” incumbent on teachers, since they “are figures of authority to their pupils in the educational field.”

⁶⁸ See Susan Benesh, *Dangerous Speech: A Proposal To Tackle Violence*, 2011.

about intent based on an assessment of the case and its circumstances as a whole. As the ECtHR noted,

[A]n important factor in the Court's evaluation will be whether the item in question, when considered as a whole, appeared from an objective point of view to have had as its purpose the propagation of racist views and ideas.⁶⁹

Individual aspects examined by the court can then include the following aspects:

- **Language used by the speaker:** In a number of cases, judicial authorities can determine from the wording or

expression used that the speaker had a specific intention. Here, they can look at questions such as how explicit the language was or whether the language was direct without being explicit. They can and should consider the tone of the speech and the circumstances in which it was disseminated.⁷⁰ They can examine, given the context, whether the speaker's intent was unambiguous and clear to its audience. Could he/she have intended something other than to incite hatred? Could he/she reasonably have guessed the likely impact of his/her speech?

⁶⁹ *Jersild, op. cit.*, para. 31.

⁷⁰ The following cases highlight deliberation on whether the conduct was guided by the requisite intent.

Mugesera v. Canada, a case concerning the deportation order for Léon Mugesera, a Rwandan politician on the grounds of inciting hatred and suspicion of crimes against humanity for his alleged role in the Rwandan Genocide. The Supreme Court of Canada confirmed that a "desire" of "the message [to] stir up hatred" will usually be inferred from the statements made, and their content must be "more than 'simple encouragement or advancement'." See, *Mugesera v. Canada* (Minister of Citizenship and Immigration), [2005] 2 S.C.R. 91, 2005 SCC 39.

In *Incal v. Turkey*, the European Court highlighted the need for a robust assessment of the evidence to establish the true intent of the applicants and that conclusions about intention cannot be made from the wording alone. It observed that "[I]t cannot be ruled out that [text of leaflets] conceal objectives and intentions different from the ones it proclaims. However, as there is no evidence of any concrete action which might belie the sincerity of the aim declared by the leaflet's authors, the Court sees no reason to doubt it." See *Incal, op. cit.*, para 51.

Even apparently explicit statements may be open to interpretation. For example, in February 2007, the Supreme Court of Poland decided that "holding a placard reading "we shall liberate Poland from [among others] Jews" did not amount to incitement to hatred. Referring to guarantees of freedom of expression, the Court stated that the ordinary meaning of the word "liberate" and the use of the indicative, as opposed to the imperative, did not show an intention to incite national hatred. See *ECRI Report on Poland*, 2010, available at: www.coe.int/t/dghl/monitoring/ecri/countrybycountry/poland/POL-CbC-IV-2010-018-ENG.pdf

Similarly, in *Virginia v. Black et al*, the US Supreme Court refused to infer the proof of intent to intimidate based on the assumed meaning of the expression. In this case, the Supreme Court examined a statute that made it a crime "for any person ... with the intent of intimidating any person or group ...to burn ... a cross on the property of another, a highway or other public place." The statute also specified that "[a]ny such burning ... shall be prima facie evidence of an intent to intimidate a person or group." Historically, burning of crosses was closely linked with the history of the Ku Klux Klan, which has often used cross burnings as a tool of intimidation and a threat of impending violence against minority communities. However, the Supreme Court found the statute (and the respective conviction of Black in this case) unconstitutional since it did not allow for examination of the particular facts of each case. It observed that a burning cross is not always intended to intimidate but can serve other purposes such as a political speech or a statement of ideology or for group identity or group solidarity.

- **Objectives pursued by the speaker:**

When determining intent, courts could also examine the purpose of the speaker and what compelled him/her to speak. If courts can identify a reason for the speech other than to incite to hatred, incitement may not apply and cases where a person seeks to inform the public about a matter of general interest for other reasons should be dismissed.⁷¹ These include the dissemination of news, historical research or attempts to expose the wrongdoings of government in the interests of public accountability.

- **The scale and repetition of the communication:**

Intent can be also determined by considering this; for example, if the speaker repeated the communication over time or on several occasions, it might be more likely that there was an intention to incite a certain action.

⁷¹ The following cases highlight analysis of the objective of the speaker. In the so-called *Tiririca case* in Brazil, criminal charges were brought against Francisco Everado Oliveira Silva (stage name Tiririca), a Brazilian entertainer who released a song with the Sony Music company entitled “Veja os Cabelos Dela” (“Look at Her Hair”) in 1996. The song consisted of a long tirade against the inherent distasteful animal smell of black women and the ugliness of their natural hair. The criminal action was dismissed as the court determined that the purpose of the song was to entertain and there was no real intent to incite discrimination against black women. See, Hernandez, *op. cit.*

In *Jersild v. Denmark*, a case involving a journalist convicted for complicity in relation to a television programme that included hate speech statements by racist extremists, the European Court concluded that the applicant was seeking “to expose specific aspects of a matter that already then was of great public concern.” The European Court held that his conviction was not a proportionate means of protecting the rights of others in a case where the speech occurred within the context of a factual programme about the holding of racist opinions, even though the applicant had solicited such racist contributions and had edited them to give prominence to the most offensive. *Op. cit.*

Similarly, in *Lehideux and Isorni v. France*, the case about two applicants involved in the Association for the Defence of the Memory of Marshal Petain, the European Court concluded that it “[did not] appear that the applicants attempted to deny or revise what they themselves referred to in their publication as “Nazi atrocities and persecutions... or “German omnipotence and barbarism.”

In describing Philippe Pétain’s policy as “supremely skilful”, the authors of the text were rather supporting one of the conflicting theories in the debate about the role of the head of the Vichy government, the so-called “double game” theory. The European Court found that their intent in publishing the respective text had been “to create a shift in public opinion which, in their view, would increase support for a decision to reopen the case.” *Op. cit.*

In case of *Aksu v. Turkey*, the Grand Chamber of the ECtHR highlighted the need for careful scrutiny of restrictions on the freedom of academics to carry out research and publish their findings. In this case, the European Court examined a complaint brought by a Turkish national of Romani origin against three government-funded publications (a book and two dictionaries), that included remarks and expressions that reflected anti-Roma sentiment. The applicant alleged that all three contained passages that “humiliated Gypsies,” as they depicted them as being involved in criminal activities, such as living from “pick-pocketing, stealing and selling narcotics.” The dictionary gave several meanings of the word “Gypsy”: it, *inter alia*, stated that it meant “miserly” and provided further definitions of certain expressions regarding the Gypsies, such as “Gypsy money” and “Gypsy pink.” The European Court observed that in several parts of the book at issue, “the author emphasised in clear terms that his intention was to shed light on the unknown world of the Roma community in Turkey, who had been ostracised and targeted by vilifying remarks based mainly on prejudice.” The European Court concluded that “in the absence of any evidence justifying the conclusion that the author’s statements were insincere,” and since “he had put effort into his work”, the author was “not driven by racist intentions.” As already noted, the European Court also emphasised the fact that the expression in question was made in the context of academic work. See *Aksu v. Turkey*, Applications nos. 4149/04 and 41029/04, Grand Chamber judgement of 15 March 2012.

Test Four: Content

The content of the expression – what was actually said or done – should be the next key focus of the Court’s deliberations. To reach a conclusion, it is critical that the expression reached the level of severity prohibited by Article 20(2) of the ICCPR or Article 4(a) of the ICERD.

The analysis of the content may include a focus on matters such as what was said, the form, the style, whether the expression contained direct calls for discrimination or violence, the nature of the arguments deployed or the balance struck between the arguments.

Speech analysis may include consideration of the following:

- **What was said:** The degree to which the speech involved advocacy is particularly relevant. Advocacy is present when there is a direct call for the audience to act in a certain way. The Court should consider whether the speech specifically calls for violence, hostility or discrimination. When such a call to action is unambiguous as far as the intended audience is concerned and could not be interpreted in other fashion, this would suggest the possible presence of incitement under Article 20.
- **Who was targeted (the audience):** The analysis should focus on the audience

that was actually targeted by the speech – those that the speech was intending to incite. The analysis should be made with specific reference to cultural and linguistic references within the groups that are being incited. It should assess whether the “speech asserts that the audience faced serious danger from the victim group.”⁷²

- **Who was targeted (the potential victims of discrimination, violence or hostility):** Who are the groups/ communities that are the object of hatred in the speech? Are they directly or indirectly named? Another question is whether “the speech describe the victims-to-be as other than human, e.g. as vermin, pests, insects or animals?” This is a rhetorical hallmark⁷³ of incitement to genocide, and to violence, since it dehumanises the victim or victims –to-be.⁷⁴
- **How it was said (tone):** The degree to which the speech was provocative and direct – without including mitigating material and without drawing a clear distinction between the opinion expressed and the taking of action based on that opinion – should also be considered in this test. Courts should also examine whether the expression contained “something that is positively stimulatory of that reaction in others”⁷⁵ and whether it was capable of stirring them towards

⁷² Another hallmark of incitement, this technique is known as “accusation in a mirror.” Just as self-defence is an ironclad defence to murder, collective self-defence gives a psychological justification for group violence, even if the claim of self-defence is spurious.

⁷³ These hallmarks are discussed at greater length in *Vile Crime or Inalienable Right*, *op. cit.*

⁷⁴ Susan Benesh, 2011, *op. cit.*

34 ⁷⁵ *Cf. Tung Lai Lam v Oriental Press Group Ltd*, District Court (Hong Kong), [2011] HKEC, 27 January 2011.

the illegal action. The degree to which the speech was provocative and direct may also be relevant in this test.⁷⁶ Courts should also examine whether “the speech contains phrases, words, or coded language that has taken on a special loaded meaning, in the understanding of the speaker and audience.”⁷⁷

- **What form the expression took:** When assessing the content of the speech, the judicial authorities should recognise that certain forms of expression provide “little scope for restrictions of freedom of expression.”⁷⁸ These should include:
 - o **Artistic expression:** Freedom of artistic expression is of fundamental importance in a democratic society. A

large number of artistic works may be made expressly to provoke very strong feelings without communicating a message that incites prohibited action. They may be in the public interest and may be forms of political speech. Critically, “any interference with an artist’s right to such expression must be examined with particular care.”⁷⁹

- o **Public interest discourse:** Courts should carefully distinguish between publications which exhort the use of violence and those which offer a genuine critique on a matter of public interest. This is particularly important for issues such as election campaigns or political debates.⁸⁰ Differentiation must be made between speech that

⁷⁶ For example, in *Ergin v. Turkey*, the ECtHR observed that “although the words used in the offending article give it a connotation hostile to military service, they do not exhort the use of violence or incite armed resistance or rebellion, and they do not constitute hate-speech.” Similarly, in the *Jersild* case, the European Court placed some reliance on the fact that the applicant had made an attempt to indicate that he did not support these statements, although he did not specifically counterbalance them. For example, he introduced the discussion by relating it to recent public debates about racism, described the interviewees as “a group of extremists” and even rebutted some of the statements; *Jersild, op. cit.*, paras. 33-34.

⁷⁷ “Such coded language... bonds the speaker and audience more tightly together. Familiar examples of this are the phrase “go to work,” used as code for killing during the Rwandan genocide, or the word “inyenzi” (Kinyarwanda for “cockroach”), used to refer to Tutsi or even to non-Tutsi who sympathized with Tutsi.” Susan Benesh

⁷⁸ *Erbakan, op. cit.*, para. 68.

⁷⁹ See the ECtHR decision in *Vereinigung Bildener Künstler, op. cit.*, para 33. In this case, the ECtHR held that an injunction which restrained a gallery, without any limit to time and space, from exhibiting a painting was a disproportionate interference with its rights of freedom of expression. The painting which presented a caricature of various persons was held by the court to be an important form of satire and social commentary which was intended to provoke debate. Similarly, the ECtHR rejected categorising as hate speech certain literary works by Turkish writers who had sought to describe in critical terms the plight of those conscripted into the Turkish army and their families. See, *Ergin v Turkey (No 6)* judgement of 4 May 2006, Application No 47533/99.

⁸⁰ For example, in *Erbakan* case, the ECtHR found that the sanction imposed on the applicant as a result of a public speech made during the municipal elections campaign violated his right to freedom of expression. The Court stressed that “freedom of expression in the context of political debate” should be attached “the highest importance” and “political discourse should not be restricted without imperious reasons”. *Op.cit.*

Similarly, in the *Gündüz* case about the criminal proceedings against a leader of *Tarikat Aczmendi* (a community that describes itself as an Islamic sect) for his appearance on a television broadcast, the European Court noted that the aim of the programme in question was to show the sect of which the applicant was leader. The Court also stressed that these extremist views were already known, had been discussed in the public arena and they were expressed in the course of a pluralistic debate in which the applicant was actively taking part. *Op. cit.*, para 51.

exhorts the use of violence or other prohibited conduct and speech that simply offers a genuine critique on certain matters.

- o **Religious expression:** Distinctions must be made between expressing opinions or communicating religious information or religious belief and inciting against the adherents of a religion. ARTICLE 19 notes that an insult to a principle or dogma or representative of a religion does not necessarily incite hatred against individual believers of that religion. Similarly, it has been recognised that an attack on a representative of the church does not automatically discredit and disparage a sector of the population on account of their faith in the relevant religion, and that criticism of a doctrine does not necessarily contain attacks on religious beliefs.⁸¹

- o **Academic discourse and research:** Academic discourse and research is another form of speech where even extreme views deserve protection in the public interest. This should include the discussion of historical events in a controversial manner.⁸²
- o **Statements of facts and value judgements:** When examining the form of a speech, the “distinction needs to be made between statements of fact and value judgements in that, while the existence of facts can be demonstrated, the truth of value judgements is not susceptible of proof.” As repeatedly observed in the jurisprudence, the requirement to prove the truth of a value judgement is impossible to fulfil and infringes freedom of opinion. However, even when a statement amounts to a value judgement, there must be a sufficient factual basis to support it, failing which it will be deemed excessive.⁸³

⁸¹ See *Klein v Slovakia*, judgement of 31 October 2006, Application No 72208/01 paragraph 51; *Giniewski v France*, judgement of 31 January 2006, Application No Application No 64016/00, para 51. See also, *Gündüz v. Turkey*, *op. cit.*, in which the ECtHR stipulated that “the mere fact of defending sharia, without calling for violence to establish it” did not constitute hate speech in the particular context of a television broadcast that aimed to show a religious sect. Also, in *Nur Radyo Ve Televizyon Yayincılı ı A. . v. Turkey*, the ECtHR found that statements “of a proselytizing nature likely to instil superstition, intolerance and obscurantism”, although “shocking and offensive, they [did] not in any way incite violence and [were] not liable to stir up hatred against persons that were not members of the religious community in question; *Nur Radyo Ve Televizyon Yayincılı ı A. . v. Turkey*, application No. 6587/03, judgement of 27 November 2007, para 30.

⁸² For example, in *Lehideux v France*, the ECtHR explained that the demands of “pluralism, tolerance and broadmindedness” in a democratic society were such that a debate on matters of history must be permitted, despite the memories it might bring back of past sufferings and the controversial role of the Vichy regime in the Nazi Holocaust; see *Lehideux v France*, judgement of 23 September 1998, Application No 24662/94, para 55. Also, in *Aksu v. Turkey*, the ECtHR assessed the impugned passages of a publication, considered offensive to the Romani community, not in isolation but in the context of the book as a whole and took “into account the method of research used by the author of the publication.” In particular, the Court observed that the author explained that he had collected information from members of the Roma community, local authorities and the police. He also stated that he had lived with the Roma community to observe their lifestyle according to scientific observation principles; *Aksu v. Turkey*, *op.cit.*

Test Five: Extent and magnitude of the expression

ARTICLE 19 suggests that the next important factor in examining whether expression reaches the threshold of incitement should be an examination of the extent and magnitude of the expression. As a part of this assessment, the judicial authorities should examine, in particular, three key issues:

- The public nature of the expression;
- The means of dissemination of the expression; and
- The magnitude of the expression.

Public nature of the expression

ARTICLE 19 emphasises that to qualify as incitement under Article 20(2) of the ICCPR and Article 4(a) of ICERD, a communication has to be directed at a non-specific audience (the general public) or to a number of individuals in a public space. At the very least, a speech made in private ought to be considered with reference to

the right to privacy and its location in such instances should therefore act as mitigating circumstances. This principle has already been explicitly recognised in several domestic jurisdictions.⁸⁴

To assess the public nature of the incitement, the following factors should be considered:

- Whether the statement or communication was circulated in a restricted environment or whether it was widely accessible to the general public;
- Whether it was made in a closed place accessible by ticket or in an exposed and public area;
- Whether the communication was directed at a non-specific audience (the general public);
- Whether the speech was directed to a number of individuals in a public place;
- Whether the speech was directed to members of the general public;

⁸³ For example, in *Incal v. Turkey*, the ECtHR decided that the case did not amount to incitement since the impugned leaflet exposed “actual events which were of some interest to the people”, namely certain administrative and municipal measures taken by authorities, in particular against street traders of the city of Izmir; *Incal, op.cit.*, para 50. In *Aksu v. Turkey*, in relation to wording used in the dictionary, the ECtHR noted that the expressions in question were “part of spoken Turkish.” The Court thus concluded that although they could be considered “humiliating or insulting”, they were part of everyday Turkish language and did not amount to prohibited speech; *Aksu, op.cit.*

⁸⁴ In Europe, exceptions include Albania, Estonia, Malta, Moldova, Montenegro, the Netherlands, Poland, Serbia, Slovenia and Ukraine, and also the United Kingdom with the exception of a person’s private dwelling.

It is clear that in many circumstances the internet should be regarded as a public space. Nonetheless, this is not a simple or straightforward matter, given, for example, the complicated issue of “private” sites⁸⁵.

It is ARTICLE 19’s opinion that the connection between this element of extent and the provisions associated with the right to privacy should be maintained in a coherent manner.

Means of dissemination of the expression

The authorities should examine which medium of communication was used to communicate the message, for example, the press, audiovisual media, a piece of art or a book.

As highlighted by the Venice Commission, a relevant factor is whether the statement (or work of art) was circulated in a restricted environment or widely accessible to the general public and whether it was made in a closed place accessible by ticket or in an exposed and public area. In a circumstance where it was, for example, disseminated through the media this is particularly important because of the potential impact of the medium concerned.

It is worth noting that:

[I]t is commonly acknowledged that the audiovisual media have often a much more immediate and powerful effect than the print media; the audiovisual media have means of conveying through images meanings which the print media are not able to impart.⁸⁶

ARTICLE 19 notes that when considering the medium used, careful consideration must be given to the freedom of the media in that society. As observed in international jurisprudence, “while the press must not overstep the boundaries set, inter alia, for the protection of the vital interests of the State, ... it is nevertheless incumbent on it to impart information and ideas on political issues, including divisive ones. Not only does the press have the task of imparting such information and ideas: the public also has a right to receive them. The freedom to receive information or ideas provides the public with one of the best means of discovering and forming an opinion on the ideas and attitudes of their leaders.”⁸⁷

Magnitude or intensity of the expression

A final consideration must be the intensity or magnitude of the expression, in terms of its frequency, amount and the extent of the communications, e.g. one leaflet vs. broadcasting in the mainstream media, one dissemination vs. repeated ones etc.⁸⁸

⁸⁵ In *Jones v. Toben*, the Australian Federal Court, ruling that publication on the internet without password protection is a “public act” found that posting this material online was in direct violation of Section 18C of the *Racial Discrimination Act 1975* and called for the material to be removed from the internet. Jeremy Jones and the Executive Council of Australian Jewry brought a lawsuit against Frederick Toben, the director of the Adelaide Institute, because of material on Toben’s website that denied the Holocaust.

⁸⁶ Venice Commission, Op cit.

38 ⁸⁷ *Halis Do an v. Turkey*. no. 71984/01, 7 February 2006.

Test Six: Likelihood of harm occurring, including its imminence

ARTICLE 19 suggests that the probability of the harm advocated by the speaker occurring must also be established in order to measure the level of severity. The aim here should be to assess the causality in the link between the communication and how it is received by the audience and then potentially acted upon.

It is noted that a number of domestic laws provide that if an incitement has actually provoked violence, this constitutes an aggravating circumstance. However, ARTICLE 19 notes that incitement, by definition, is an inchoate crime. The action advocated in the incitement speech does not have to be committed in order for that speech to amount to an incitement. Nevertheless, some degree of risk of resulting harm must be identified. This means that courts will have to determine that there was a reasonable probability that

the speech would succeed in inciting the audience into committing discrimination, violence or hostility against a victim group, recognising that such causation should be seen to be direct.

The criteria for assessing the probability or risk of discrimination, hostility or violence occurring will have to be established on a case-by-case basis. However, courts can consider criteria including the following:⁸⁹

- Was the speech understood by its audience to be a call to acts of discrimination, violence or hostility?
- Was the speaker able to influence the audience?
- Did the audience have the means to resort to the advocated action, and commit acts of discrimination, violence or hostility?
- Had the targeted victim group suffered or recently been the target of discrimination, violence or hostility?

⁸⁸ For example, in *Féret v. Belgium*, the chairman of the Belgian party *Front National* was convicted by a Belgian criminal court for publicly inciting racism, hatred and discrimination after distributing leaflets during the election campaign. The leaflets presented immigrant communities as “criminally-minded” and “keen to exploit the Belgian benefits they would get by living in Belgium.” They also used the slogan “Belgians and Europeans first!” or “The Attacks on the USA: It’s the Couscous Clan!” and associated all Muslims with terrorism. The ECtHR observed that such language was “susceptible to instill” or “of such a nature as to arouse” feelings of rejection, hostility or hatred against the targeted community. *Féret, op.cit.*, para 77.

Similarly, in *Le Pen vs. France* (in a case declared inadmissible by the ECtHR), Le Pen, the president of the French National Front party, was fined EUR 10,000 for incitement to racial and religious discrimination, hatred and violence on account of statements he had made about Muslims in France in an interview with the *Le Monde* daily newspaper and on account of his later comments on the fine imposed as a result of his statements. In the inadmissibility decision, the ECtHR noted that the wording used presented the Muslim community as a whole in a disturbing light likely to give rise to feelings of rejection and hostility. Le Pen was found to set the French as a group against a community whose religious convictions were explicitly mentioned and whose rapid growth was presented as an already latent threat to the dignity and security of the French people. *Le Pen v France* (18788/09), inadmissibility, 20 April 2010.

⁸⁹ Adapted from Susan Benesh, *op.cit.*

In terms of the audience, ARTICLE 19 suggests that “the test is whether the ordinary, reasonable viewer would understand from the public act that he or she is being incited to hatred.”⁹⁰ The conclusion, then should be that there must be at least a *certain and specific level of possibility* that the communication or messages will gain some credence, with the attendant result of discrimination, hostility or even violence, against protected group in the society.⁹¹

Moreover, ARTICLE 19 argues that the possibility of harm should be **imminent**. The immediacy with which the acts (discrimination, hostility or violence) called for by the speech are intended to be committed should be deemed relevant.

ARTICLE 19 does not suggest a specific time limit for this aspect of the test, since the imminence will always have to be established on a case-by-case basis.

However, it is suggested that it is important for the courts to ensure that the length of time that has passed between the speech and the time when the intended acts could take place should not be so long that the speaker could not reasonably be held responsible for the eventual result. A delay in time between the inciting message and the time needed to go and commit the activity should defeat imminence. Therefore, illegal action called for at some indefinite future time should fall short of any criminal law sanctions.

⁹⁰ *Ekeramawi v Network Ten Pty Ltd*, [2008] NSWADT 334, 18 November 2008, 16 December 2008.

⁹¹ The ECtHR found a series of hate speech cases to be inadmissible based on the lack of likelihood/impact of the communication. Although most provided little in the way of reasoning to substantiate their claims of impact, most made reference to either Article 14, or Article 17 of the Convention. The ECtHR concluded that “From the perspective of freedom of expression, causality in this sense is very important... If certain statements are not likely to cause a proscribed result – whether it be genocide, other forms of violence, discrimination or hatred – penalising them will not help avoid that result and hence cannot be said to be effective. If on the other hand, a sufficient degree of causal link or risk of the result occurring can be established between the statements and the proscribed result, penalising them may be justifiable.” Toby Mendel, *Study on International Standards Relating to Incitement to Genocide or Racial Hatred* (2006). p.50. In at least one case involving allegations of hate speech, the ECtHR found that there was, in fact, a breach of the right to freedom of expression on the basis that the impugned statements did not create an actual risk of harm. In *Erbakan v. Turkey*, the ECtHR found that it “was not established that at the time of the prosecution of the applicant, the impugned statements created an “actual risk” and an “imminent” danger for society ... or that they were likely to do so.” *Op.cit*.

Sanctions and other measures

After the authorities conclude that all six elements of the six-prong test of incitement, outlined in the previous section, have been satisfied, the next step is to determine appropriate sanctions. As recommended above, ARTICLE 19 believes that the obligations to prohibit incitement require States to introduce a variety of measures as sanctions. The selection of sanctions in a particular case should be guided by an assessment of the level of severity of the offence.

ARTICLE 19 submits that States should primarily employ a range of civil and administrative law sanctions: we recall that the necessity test requires that the least intrusive effective remedy should be employed when restricting speech in order to protect overriding public or private interests. Any such restrictions, however, must conform to the three-part test under Article 19(3) of the ICCPR.

Only in the most serious cases of incitement, when the authorities conclude that the particular incitement has reached the highest level of severity, should States impose criminal sanctions. If a court finds that a specific case meets only some of these tests, then that case should be dismissed and pursued through means other than criminal law.

Recourse to criminal law should therefore not be the default response to instances

of incitement if less severe sanctions would achieve the same effect. Moreover, the experience of many jurisdictions shows that civil and administrative law sanctions are better suited as responses to the harm caused by “hate speech.”⁹² These forms of sanction are also important as they presuppose the involvement and participation of victims and make provision for specific redress to them.

Sanctioning incitement through civil law remedies

ARTICLE 19 believes that civil remedies have the advantage of allowing the victim of incitement to seek various forms of redress that are not commonly available through criminal law. In considering the threshold at which civil remedies will be an appropriate response to incitement, attention must be paid to the three-part test under Article 19(3) of the ICCPR. At the same time, the factors outlined above in relation to determining “incitement” under criminal law (see below) should also be considered.

Civil law remedies should be a part of a comprehensive anti-discrimination framework which should include:⁹³

- Protection against discrimination on various grounds in employment and training, education, social protection, membership of organisations and access to goods and services;

⁹² For example, in Brazil, it has been documented that In Brazil, criminal law has not been efficient due to institutional bias among law enforcement agencies, while sanctions have been levied effectively in civil proceedings. See, Tanya Hernandez, *Hate Speech and the Language of Racism in Latin America*, 32 U. Pa. J. Int'l L. 805 2010-2011.

⁹³ The proposal is based on requirements set by the Racial Equality Directive (2000/43/EC) against discrimination on grounds of race and ethnic origin; available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32000L0043:en:HTML>.

- Definitions of direct and indirect discrimination and harassment;
- Positive action to ensure full equality in practice;
- The right to complain through a judicial or administrative procedure, with appropriate penalties for those who discriminate;
- Limited exceptions to the principle of equal treatment (where a difference in treatment on the respective ground is a genuine occupational requirement);
- A shared burden of proof in civil and administrative cases: victims must provide evidence of alleged discrimination and defendants must prove that there has been no breach of the principle of equal treatment.

As for forms of redress, they should include:

- **Compensation** in the form of pecuniary and non-pecuniary damages:⁹⁴ At the same time, awards of damages should be proportional and carefully and strictly justified and motivated so that they do not have a collateral chilling effect on the freedom of expression.
- **Right of correction and reply:** The right of correction and reply is often an adequate civil remedy as it causes minimal interference to the right to freedom of expression. The right of reply gives any person the right to have a mass media outlet disseminate his or her response

where the publication or broadcast by that media outlet of incorrect or misleading facts has infringed a recognised right of that person, and where a correction cannot reasonably be expected to redress the wrong. This remedy also has the result of encouraging further dialogue, rather than restricting it.⁹⁵

The effectiveness of civil remedies should be maximised by giving NGOs the ability to bring civil claims in relevant cases.⁹⁶ Moreover, legislation should allow for the possibility of bringing class action in the field of antidiscrimination and equality legislation.

Sanctioning incitement through administrative remedies

ARTICLE 19 also believes that consideration should be given to administrative sanctions, in particular to enforce rules established by communication, media and press councils, consumer protection authorities, or any other regulatory bodies.

In respect of politicians, public officials and civil servants (such as teachers), formal codes of conduct and employment rules may be supported by a framework for administrative sanctions. These measures should support the principle that public officials at all levels should, as far as possible, avoid making statements that promote discrimination or undermine equality and intercultural understanding. They should also include codes of integrity

⁹⁴ Council of Europe Committee of Ministers Recommendation No. R 97 (20) on 'hate speech', Principle 2.

⁹⁵ *Ibid.*, Principle 2. Also, Camden Principles, *op.cit.*, Principle 7.

⁹⁶ *Ibid.*

for members of parliament and political parties' members.

An order to issue a public apology for a statement or communication should also be considered as a remedy, although apology should not automatically presume the loss of culpability.

In respect of public service broadcasters, a framework for administrative sanctions may support the obligation to avoid communicating negative stereotypes of individuals and groups. Administrative sanctions may include the obligation to issue an apology or correction or to provide a right of reply; the obligation to allocate broadcasting time to advertise the outcome of an administrative decision; or the imposition of fines.

Alternative remedies

In addition to civil and administrative law remedies, ARTICLE 19 recommends that States consider a wider range of possible remedies when dealing with instances of violence or discrimination targeting minority or marginalised groups.

Alternative forms of redress, such as mediation and other forms of dispute resolution that ensure the full participation of victims or those affected, can also address some deficiencies in civil and administrative systems. Although victims' participation is expected in civil law remedies, (e.g. in civil cases, it is a victim who has to bring a case of discrimination

or an individual legal action), in many instances, the possibilities for seeking redress are limited due to prohibitive legal fees and a lack of access to legal aid.

ARTICLE 19 suggests that in this respect, States also consider the experience of the truth and reconciliation mechanisms that have gained prominence in many African countries. We do not argue that the truth and reconciliation process should take the place of existing legal processes; instead, they should be complementary to them. We observe that one of the key factors of these mechanisms has been the recognition of the need to restore the human dignity of the victims in both the eyes of society and in their own eyes. It has been also recognised that the direct participation of victims in this process communicated the perspective of the victims, not in the form of statistics or state reports, but with a direct human voice. Those who have been victims of violations were given an opportunity, for the very first time, to receive recognition from what had previously been considered a hostile State. In many instance, this led to public acknowledgment of violations by perpetrators (something that is often absent in criminal processes) and this has triggered a generous response in those who have been victimised and indeed de-humanised in the past.

The involvement of victims and their perspective is also important for dialogue and for the education of society. Importantly, some truth and reconciliation

commissions (e.g. in South Africa) were also charged with developing a long term policy of reparations and recommendations for state policies in this area. The truth and reconciliation processes also allowed for transparency in the hearings (opening them to the media and general public) which meant that truth telling, healing and reconciliation were not confined to a small group but were available to the population at large. Prior to these processes, certain groups in society had very little or no experience or contact with “the other side.” As a result, they believed that division and their own supremacy must be part of the solution of the problems, enabling them to retain an image of themselves as the protectors of certain established values or, alternatively, they were in denial of the reality.

Other measures

In order to ensure uniform and consistent interpretation of the key principles of incitement prohibitions and implementation of the six-prong test outlined above, ARTICLE 19 also recommends that States pay special attention to additional measures when adopting methods of prohibiting and sanctioning incitement.

Training on incitement standards

ARTICLE 19 believes that the judiciary, law enforcement authorities and other bodies must be provided with comprehensive and regular training on incitement standards.

ARTICLE 19 believes that the role of the courts and law enforcement agencies is crucial in the implementation of obligations to prohibit incitement, whether or not there is express legislation or jurisprudence on incitement. We emphasise in this regard the obligations which stem from the ICCPR and apply, not only to the executive and legislative arms of the state, but also to the judiciary as indicated by international authorities and jurisprudence.

Considering the perspective of victims

ARTICLE 19 recommends that courts, law enforcement authorities and public bodies should also consider a range of sources when addressing incitement cases through criminal law sanctions.

The perspective of victims should be considered in criminal law proceedings: we observe that in such proceedings, it is the State (prosecution or police) that pursues the case on behalf of often unidentified groups of victims, with victims themselves having limited or no input to the proceedings. In criminal cases, victims may appear only as witnesses, not as participants or parties. The courts and other authorities should attempt to involve victims in the proceedings through other channels, for example, by inviting third party interventions in the form of amicus briefs by representatives of various groups concerned in the case. Allowing this would strengthen the intellectual, legal and practical pursuit of justice.

Conclusion

In conclusion, ARTICLE 19 hopes that the recommendations we have proposed in this paper will help dispel current global and national confusion about the implementation and interpretation of States' international obligations to prohibit incitement to discrimination, hostility and violence.

In creating a new six-part incitement test, we aim to provide States with the means of avoiding both the vague and overly broad prohibitions of incitement that can be found in many national laws and the inconsistent and restrictive interpretations that can also be frequently seen. We believe that using this test will help States review cases and determine whether particular speech reaches the threshold of incitement to hatred.

If States accompany the use of the test with the development of an appropriate variety of measures, including sanctions – primarily civil and administrative – which they use to implement their obligations consistently, we will have helped to ensure that all people everywhere are able to enjoy both the right to freedom of expression and the right to equality.

DEFENDING FREEDOM
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