Preventing Hatred Or Silencing Voices:

Making the Case for a Rigorous Threshold for the Incitement to National, Racial or Religious Hatred

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1. INTRODUCTION

For many years ARTICLE 19 has carried out rigorous work on the links between the right to freedom of expression as guaranteed by Article 19 and the advocacy of national, religious and racial hatred that constitutes incitement to discrimination, hostility and violence by Article 20 in the International Covenant on Civil and Political Rights (ICCPR). These include the development of a number of policy papers for expert meetings at the United Nations Human Rights Council (UN HRC) in Geneva in 2008 and more recently at the regional experts meetings organised by the Office of the High Commissioner of Human Rights in Vienna in February 8-9, 2010 and in Nairobi in April 6-7, 2011.

This paper builds on ARTICLE 19's existing work to look at the prohibition of incitement to hatred in the Asia Pacific region. It gives an overview of the context of the region, examines the formulation and applications of legislations to prohibit incitement, identifies the key challenges to prohibiting hate speech, and argues for a set of clearly defined and structured tests to determine the threshold of incitement.

The underlying principle throughout the paper is that the prohibition of hate speech and incitement, is an exceptional restriction on the fundamental freedom of expression. It should therefore be narrowly defined and proven to be necessary.

2. CONTEXT

The Asia-Pacific region consists of 60 countries and territories (as defined by the UN) covering a vast geographical area. They can be further grouped into the sub-regions of New Zealand and Australia in the south, the South Pacific island states, East Asia, South Asia, Southeast Asia, the Middle East, Central Asia and South Caucasus. It is the most populated region in the world and also one of the most diverse and contrasting in many aspects.

Firstly, the region has a wide range of political systems - monarchy, democracy, communist, military dictatorship and Islamic republic among others. It is home to the world's largest democracy (India) and also two most politically isolated nations in the world (Burma and North Korea). Further west, a wave of political transformation following the Arab Spring has spurred massive public demand for democracy in Yemen and Bahrain.

Asia-Pacific nations are also at different stages of economic development: there are the advanced markets of Japan and South Korea, the emerging economies such as China and India that are exerting increasing influence on the world stage, and economies of countries like Afghanistan and Timor-Leste that depend heavily on foreign aid. In terms of the Human Development Index (HDI), Japan and South Korea lead the region in 2010 at the 11th and 12th place respectively, whilst Tuvalu and Vanuatu lag behind ranking at the bottommost two in the world.[2]

Aside from that, this region has witnessed some of the most violent episodes in contemporary history and a number of conflicts are still on going. These include the genocide carried out by the Khmer Rouge in Cambodia, the independence wars fought in the former colonies, the Nagorno-Karabakh armed conflict between Armenia and Azerbaijan, the civil war in Sri Lanka that ended violently in 2009, and the ongoing conflicts between Israel and Palestine, and in the

[2] Human Development Report 2010: 20th Anniversary Edition - The Real Wealth of Nations: Pathways to Human Development.

Kashmir region. The advocacy of hatred has played a significant role in fanning violence in these countries and contributed to the high price paid by their people.

Despite a history tainted by violence and hardships, there is a notable quantitative gap in the number of ratifications of international human rights treaties by states in this region. The economic success in a number of Asian countries in recent years has not brought about positive change towards greater democracy and respect for human rights. Notably, allegations and charges of incitement on the grounds of religious hatred and *hatred of the government* have been used to silence dissident voices and suppress government critics. For example in Bahrain, a 20-year-old poet and university student Ayat al-Qarmezi was arrested in March 2011 and charged with "incitement to hatred of the regime" for reading out a poem addressed to the King of Bahrain at a pro-reform rally.[3] In China, democracy activist and Nobel peace prize laureate Liu Xiaobo, is serving an 11-years sentence after he was found guilty of "inciting subversion of state power" for co-writing Charter 08 which called for democratic reforms.[4] Prominent Chinese blogger Ran Yunfei has been arrested under the same charge for criticising the ruling Communist Party.[5]

By contrast, it is not uncommon for religious extremists in the region to use sermons and mass media to spread hatred and incite violence. Islamic communities in the region, on the other hand, are making increasing demands for greater restrictions on the right to freedom of expression, including by expanding the exceptions to freedom of expression to include words and expressions deemed to defame religion. Over the last decade, member states of the Organization of the Islamic Conference (OIC) – many in the Asia Pacific region - have been campaigning the UN Human Rights Council to adopt resolutions to combat "defamation of religions".

3. LEGAL FRAMEWORK

a. International Legal Standards and Principles

Developed under the backdrop of the Second World War and the Holocaust, international human rights have placed the principle of equality and non-discrimination at the core of the enjoyment of all rights. Article 1 of the Universal Declaration of Human Rights (UDHR) adopted by the UN General Assembly in 1948 states: "All human beings are born free and equal in dignity and rights." It is followed by Article 2, which provides for equal enjoyment of the rights and freedoms therein proclaimed, "without distinction of any kind, such as race, colour, sex, …".

Although UDHR does not specifically prohibit incitement to hatred or hate speech, the subsequent International Covenant on Civil and Political Rights (ICCPR) adopted in 1976, in Article 20 places a **duty** upon states to prohibit war propaganda and incitement to hatred as follows:

(1) "Any propaganda for war shall be prohibited by law".
(2) "Any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law."

[3] Amnesty International, "Bahraini Poet Set to Face Verdict for Protest Reading", 8 June 2011.
[4] BBC News, "Chinese dissident Liu Xiaobo jailed for subversion", 25 December 2009, available at http://news.bbc.co.uk/2/hi/asia-pacific/8430409.stm.
[5] The Guardian, "China arrests blogger Ran Yunfei", 28 March 2011, available at http://www.guardian.co.uk/world/2011/mar/28/china-arrests-blogger-ran-yunfei

On the other hand, both UDHR and ICCPR give absolute protection to the right to hold opinions, and protect the right to seek, impart information and ideas in Article 19. They affirm that the right to freedom of expression is fundamental to human rights protection, and that restrictions on the right to expression are permitted only where these are a) provided by law; b) for the protection of a legitimate aim (such as public order and the rights of others); and c) necessary to protect that aim. "Public order" or the "rights of others" are often regarded by international courts and bodies alike as legitimate aims when considering challenges to hate speech laws, with "equality" or "non-discrimination" presented as examples of the rights of others.

The strong relation between Articles 19 and 20 of the ICCPR is indisputable. The UN Human Rights Committee, the body of experts tasked with interpreting the ICCPR, has specifically stated that Article 20(2) is compatible with Article 19 and that the two articles "must be interpreted harmoniously". [6]

In the Asia-Pacific region, more than one-third of the states are not parties to the ICCPR, including Bhutan, Brunei, Burma, China, Fiji, Kiribati, Malaysia, Singapore, Qatar, Saudi Arabia, United Arab Emirates and many of the South Pacific Islands (Marshall Islands, Micronesia, Nauru, Palau, Solomon Islands, Tonga, and Tuvalu). This means that these states are not obliged to implement the protections for political and civil rights provided by the ICCPR.

b. Regional Legal Instruments

Unlike Europe, Africa, and the Americas, there is no comprehensive regional instrument for the protection of human rights in Asia Pacific. However, a number of initiatives have emerged from sub-regions in recent years, which point towards a greater inclination of governments in the region to align regional legal standards with international human rights instruments.

For instance, the Charter of the Association of Southeast Asia Nations (ASEAN), entered into force on 15 December 2008, outlines the obligations of the member states to uphold the principles of the rule of law, good governance, democracy and human rights, including "respect fundamental freedoms, promote and protect human rights, and promote social justice (Article 2.2: Principles). Although it does not prohibit incitement to hatred specifically, Article 2.2 (l) obliges member states to "respect for the different cultures, languages, and religions of the people of ASEAN, while emphasising their common values in the spirit of unity in diversity". Subsequently, the ASEAN Inter-governmental Commission for Human Rights (AICHR) was established in 2009 to promote and protect human rights. At its present stage, however, there is no mechanism in ASEAN to address human rights violations. Nevertheless the ongoing drafting of an ASEAN Human Rights Declaration is a step towards strengthening commitment to human rights in Southeast Asia.

In South Asia, the South Asian Association for Regional Cooperation (SAARC) adopted the Charter of Democracy on 8 February 2011. Although the focus of the Charter is to promote and preserve the values and ideals of democracy, it outlines commitments of its member states to liberty and equal rights of all citizens, and to "the fundamental human rights and dignity of the human person as enunciated in the UDHR". It also reflects the international human rights principle of equality and non-discrimination by urging its member states to "promote equality of opportunity, equality of access and equality of treatment at the national level, in keeping with the respective constitutional provisions, as safeguards against social injustices and stratification".

[6] General Comment 11: Prohibition of propaganda for war and inciting national, racial or religious hatred (Art. 20), 29 July 1983.

Countries with large Muslim populations in this region are member states of the Organization of the Islamic Conference (OIC), which has adopted the Cairo Declaration on Human Rights in Islam in 1990. Article 22 (d) of the Declaration makes specific reference to incitement to hatred:

> "It is not permitted to arouse nationalistic or doctrinal hatred or to do anything that may be an incitement to any form or racial discrimination"

The other provisions that have a bearing on incitement to hatred include:

- "Article 2: (b) It is forbidden to resort to such means as may result in the genocidal annihilation of mankind;
- Article 18: (a) Everyone shall have the right to live in security for himself, his religion, his dependents, his honour and his property;
- Article 22: (a) Everyone shall have the right to express his opinion freely in such manner as would not be contrary to the principles of the Shari'ah. (b) Everyone shall have the right to advocate what is right, and propagate what is good, and warn against what is wrong and evil according to the norms of Islamic Shari'ah (c) Information is a vital necessity to society. It may not be exploited or misused in such a way as may violate sanctities and the dignity of Prophets, undermine moral and ethical values or disintegrate, corrupt or harm society or weaken its faith."

Many countries in the Middle East are also member of the League of Arab States. Adopted in 2004 and effective since 15 March 2008, The Arab Charter of Human Rights affirms the principles in the Cairo Declaration on Human Rights. The relevant provisions are:

- "Article 2: 3. All forms of racism, Zionism and foreign occupation and domination constitute an impediment to human dignity and a major barrier to the exercise of the fundamental rights of peoples; all such practices must be condemned and efforts must be deployed for their elimination.
- Article 3:1. Each State party to the present Charter undertakes to ensure to all individuals subject to its jurisdiction the right to enjoy the rights and freedoms set forth herein, without distinction on grounds of race, colour, sex, language, religious belief, opinion, thought, national or social origin, wealth, birth or physical or mental disability.
- Article 3: 2. The States parties to the present Charter shall take the requisite measures to guarantee effective equality in the enjoyment of all the rights and freedoms enshrined in the present Charter in order to ensure protection against all forms of discrimination based on any of the grounds mentioned in the preceding paragraph
- Article 30.2. The freedom to manifest one's religion or beliefs or to perform religious observances, either alone or in community with others, shall be subject only to such limitations as are prescribed by law and are necessary in a tolerant society that respects human rights and freedoms for the protection of public safety, public order, public health or morals or the fundamental rights and freedoms of others."

Whilst the region lacks mechanisms to enforce the prohibition of incitement to hatred, some of the states along the border with Europe are members of the Council of Europe, namely Armenia, Azerbaijan and Cyprus, and therefore parties to the European Convention of Human Rights (ECHR). They are therefore mandated to provide for non-discrimination in the enjoyment of rights, under Article 14 of the ECHR. ECHR also guarantees the right to freedom of expression under Article 10.

c. Domestic Laws and Judicial Practices

At the domestic level, provisions prohibiting incitement to hatred (as well as other forms of hate speech) are commonly found in the **Constitutions and Criminal Codes/Laws** of a number of Asia-Pacific countries.[7]

For instance, the Constitution of Azerbaijan (Article 47.3) and the Constitution of Bhutan (Article 22) prohibit incitement to racial, ethnic or religious hatred. There are similar provisions in the Constitutions of Armenia (Article 47) and Kyrgyzstan (Article 31.4), which prohibit incitement to national hatred, in addition to racial, ethnic or religious hatred. A number of countries in Central Asia and the South Caucasus, such as Uzbekistan (Article 57), Turkmenistan (Article 30) and Fiji (Section 30), have specific provisions on hate speech in their Constitutions.

Interestingly, Singapore is among one of the first jurisdictions in the world to criminalise hate speech when it adopted a legislation to criminalise speech that discriminated on the ground of religion in 1871.[8] Its current Penal Code (2007) extends the protection of the colonial-era law to cover incitement to racial hatred, stating in Section 298 the criminal act of "uttering words, etc., with deliberate intent to wound the religious or racial feelings of any person." Section 298A, continues to prohibit the promotion of "enmity between different groups on grounds of religion or race and doing acts prejudicial to maintenance of harmony." In addition, the Maintenance of Religious Harmony Act requires people of different faiths to "exercise moderation and tolerance, and do nothing to cause religious enmity or hatred."

Similarly, the provision for "uttering words with deliberate intent to wound religious feelings" can also be found in the Criminal Codes of Brunei, Malaysia, Israel, Syria and Afghanistan, with penalties of fines and imprisonment of up to 3 months to 3 years. Countries like Azerbaijan, Pakistan, Oman, Vietnam, China, and Timor-Leste, especially place a hefty penalty on incitement to hatred. For example, under the Penal Code of Timor-Leste (Section 135), those who are found guilty of "inciting or encouraging religious or racial discrimination, hatred or violence" can face a prison sentence of four to 12 years.

Incitement to hatred is also forbidden during a **specific period and at specific places**, such as during election: Azerbaijan's Election Code 2003 provides for the "prohibition of any (pre) election campaigns inciting social, racial, national and religious hatred and hostility"; and at sporting events: Israel's Safety in Public Places Law 1962 prohibits racially motivated expression at sporting events.

Administrative and media laws: In addition, some jurisdictions place special responsibilities on the media to prohibit incitement to hatred, likely to be related to its audience size and widespread penetration. For instance, Iran's Press Law 1986 forbids the press to create "discord between and among social walks of life especially by raising ethnic and racial issues" (Section 6). Cambodia's Law on the Regime of the Press 1995 also bars the press from "publishing any information which incites and causes to have discrimination on any basis" (Section 7). Some countries, including Kazakhstan, Lebanon, Israel, Armenia and Azerbaijan, prohibit television and radio stations from broadcasting material that incites hatred. Kazakhstan furthermore imposes responsibility on the owner or chief editor of the mass media medium for material containing propaganda or promotes one group over another (racial, religious, national, class, etc). In India, the Cable Television Network Act of 1995 prohibits the transmission of a programme or a channel that is likely "to promote disharmony or feelings of enmity, hatred or ill will

[7] Refer to table in Annex A: Incitement to Hatred and Relevant Legislation in Asia-Pacific.

[8] *See* Mohan Gopalan, Evaluating, Re-Interpreting and Reforming Hate Speech Regulation in Singapore (2010) (unpublished B.L. dissertation, National University of Singapore) (on file with author).

between different religious, racial, linguistic or regional groups or is likely to disturb public tranquillity."

It is notable that with the growing penetration of social media and the Internet, hate speech prohibition has also manifested itself in **cyber-related laws**. This trend is particularly visible in Southeast Asia; examples include Malaysia's Computer Crimes Act 1997, Thailand Computer Crimes Act 2007 (Article 14) Myanmar's Electronic Transactions Law Act 2004 (Article 33). Although not binding, Singapore's Internet Code of Practice prohibits material that "glorifies, incites or endorses ethnic, racial or religious hatred, strife or intolerance".

d. Grounds for incitement to hatred

Article 20 of the ICCPR clearly defines the prohibition of incitement to hatred on three grounds – national, racial and religious. A review of the domestic laws and judicial practices points to a whole range of justifications for incitement prohibition, within and beyond the grounds of Article 20.

National, ethnical, racial and religious hatred (as well as caste)[9] are generally covered across the region. In addition, incitement is also prohibited on the grounds of "public mischief" (Brunei Penal Code Section 505), "commission of a felony" (Cambodia Criminal Code Section 59), "enmity between groups" (Criminal Code of Malaysia, Singapore, Vietnam, Bangladesh, Azerbaijan, Jordan, India), "incite any group of persons to commit an offense against any other group" (Criminal Code of Malaysia, Burma, Singapore, Syria, Timor-Leste), and "subversive activities under the guise of religion" (Singapore's Act on the Maintenance of Religious Harmony).

Countries with large Muslim populations often prohibit any **criticism or ridicule of the Islamic religion or the Islamic leadership** as well as any product that is inconsistent with the Islamic religion, using both incitement and anti-blasphemy legislations. Kuwait, for example, prohibits any speech and expression that constitutes an "incitement to acts that will offend public morality".[10]

e. What constitutes incitement?

There is no uniform test that is used by judicial authorities throughout the region in cases of incitement to hatred. Moreover, there is only a limited documentation of court deliberations in incitement cases available in the region. The following elements have been identified as considered by courts and public bodies in a very small pool of available jurisprudence.

1. Whether there is proof *of intent:* Some countries require intentional act to trigger criminal responsibility already in their criminal laws. For example, the Criminal Code of Kazakhstan (Article 164) requires "deliberate act" in order to result in criminal liability. India's Penal Code does not clearly require intentional crime for incitement to hatred on various grounds (Section 153A)[11], however, the Indian courts have clarified this matter

[9] The Penal Code of India prohibits incitement based "on grounds of religion, race, place of birth, residence, language, **caste or community** or any other ground whatsoever, disharmony or feeling of enmity, hatred or ill-will between different religious, racial, language or **regional groups castes or communities**."

[10] U.S. Department of State, "Doing Business In: Kuwait", available at: http://www.state.gov/g/drl/rls/hrrpt/2007/100599.htm.

[11] Section 153-A of India's Penal Code states: "Whoever by words, either spoken or written, or by signs or by visible representation or otherwise, promotes, or attempts to promote on grounds of religion, race, place of birth, residence, language, caste or community or any other ground whatsoever, disharmony or feeling of enmity, hatred or

previously. In the case of *P.K. Chakravarty v. Emperor*, Judge J. Rankin established the test of intent as follows,

> "It is settled law that Sec. 153A, I.P.C., does not mean that any person who published words that have a tendency to promote class hatred can be convicted under that section. The words "promotes or attempts to promote . . . feelings of enmity" are to be read as connoting a successful or unsuccessful attempt to promote feelings of enmity. It must be the purpose or part of the purpose of the accused to promote such feelings and, if it is no part of his purpose, the mere circumstance that there may be a tendency is not sufficient. It is quite true that whether or not the promoting of enmity is the intention is to be collected in most cases from the internal evidence of the words themselves, but I know of no authority for saying that other evidence cannot be looked at; and it appears to me that the explanation shows quite conclusively that, in many matters on which other evidence could assist, it may be taken."[12]

Through several other cases, the necessity of proof of intent was established.[13]

Other jurisdictions, however, do not require intent for the crime of incitement. For instance, in the case of *Tung Lai Lam v Oriental Press Group Ltd* in Hong Kong,[14] the court ruled on the basis that "Proof of intention on the part of the defendant is not necessary, nor is the fact that a person or persons were actually incited by the public activity to respond in a requisite manner". Also under Article 317 of the Criminal Code of Lebanon, act whose "effect" (regardless of intent) is incitement to "religious or racial hatred or to promote dissension between the communities or different elements of the population" is punishable.[15]

2. Whether there is *advocacy* of hatred[16]: In *Tung Lai Lam* v *Oriental Press Group Ltd*, the Hong Kong court was concerned with the likely effect as opposed to the actual effect of the alleged conduct of incitement. "It is not unlawful if the words merely convey hatred or express serious contempt or severe ridicule. There must be something more than an expression of opinion, something that is positively stimulatory of that reaction in others."

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ill-will between different religious, racial, language or regional groups castes or communities, or commits any act which is prejudicial to the maintenance of harmony between different religious, racial, language, or regional groups or castes or communities and which disturbs or is likely to disturb the public tranquility, shall be punished with imprisonment which may extend to three years, or with fine or with both."

[12] *P.K. Chakravarty v. King Emperor*, 1926 A.I.R. (Cal.) 1133. The requirement of intent was further stressed in the case of *Satya Ranjan Bakshi v. Emperor*, 1926 A.I.R. (Cal.) 309., where Judge Rankin stated "…I had occasion to point out that al though the internal evidence of the words published will generally be decisive on the question of intention, they are never more than evidence of intention and it is the real intention of the accused that is the test. I pointed out also that the mere fact that ill-feeling may result or may be likely to result from the publication is not in itself sufficient and that there may be circumstances . . . which would rightly prevent a judge of fact from holding that the publication was an attempt to promote ill-feeling."

[13] See, e.g. *Lajpat Rai v. Emperor*, 1928 A.I.R. (Lah.) 245, in which it was held that malicious intent, that might be proved by extrinsic evidence or inferred from the nature of the words spoken or written, must be shown by the Crown. In *Kali Charan Sharma v. Emperor*, 1927 A.I.R. (All.) 649, 652, the Judge concluded that "If the language is of a nature calculated to produce or to promote feelings of enmity or hatred (,) the writer must be presumed to intend that which his act was likely to produce. This was the principle laid down by Best, J., in Burdett's case in dealing with a case of seditious libel and the same principle clearly applies to the case of a publication punishable under Sec. 153-A, [by the Indian Penal Court].

[14] *Tung Lai Lam v Oriental Press Group Ltd*, Distict Court (Hong Kong), [2011] HKEC, 27 January 2011

[15] *See* http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G03/452/51/PDF/G0345251.pdf?OpenElement; page 8.

[16] Advocacy of hatred is not required by the ICERD, but is by the ICCPR.

3. Whether the *audience understood the message*: In *Ekermawi v Network Ten Pty Ltd*, the Tribunal emphasized that "the test is whether the ordinary, reasonable viewer would understand from the public act that he or she is being incited to hatred towards serious contempt for or severe ridicule of a person on the ground of race." [17]

4. Whether the speech in question must *incite to a proscribed result* or it is sufficient for it merely to fall within a category of prohibited statements: In Indonesia, incitement charges are often made following serious acts of violence by specific groups of people. For example, an Islamic cleric Syihabudin was convicted to one-year imprisonment on 13 June 2011 for inciting people to burn churches and attack the police in Temanggung.[18] Another man, Supriyanto was also convicted for sending text messages to take part in the same attack.[19] In Australia, in the case of *Islamic Council of Victoria Inc. v. Catch the Fire Ministries Inc.* (concerning critical statements made by Catch the Fire Ministries about Islam), the Victoria Court of Appeal stated that a question to consider is "whether the natural and ordinary effect of the conduct is to incite hatred or other relevant emotion in the circumstances of the case," which include the characteristics of the audience to which the conduct is directed.[20]

5. Whether the act is *reasonable* and done in *good faith*: For example, in the case of *Islamic Council of Victoria Inc. v. Catch the Fire Ministries Inc.*, mentioned above, the Court stated that "the effect of the conduct must be gauged by reference to the reasonable."

4. KEY CHALLENGES

a. Vague, overlapping and uneven legislations and jurisprudence

There is a mixed bag of legislations and judicial approaches, using a wide range of grounds for the prohibition of incitement to hatred. The wording of Article 20 of the ICCPR is rarely found enshrined in domestic legislation. The term "incitement" as such does not always appear in domestic legislations. Countries either use similar terms such as "vilification" (Australia) or a variety of terms, such as "promotion of feelings of enmity and hatred" (Bangladesh), "uttering words with deliberate intent to wound religious feelings" (Malaysia, Brunei), "public expression of hostility" (Indonesia), "disharmony or feeling of enmity, hatred or ill-will" and disturbing "public tranquillity" based on prohibited grounds (India) or "provocation of religious strife" (Oman). The different choices of terms do not always carry the equivalent significance as "incitement", where advocacy to proscribed action is a key element.

The lack of a uniformed terminology and the wide range of grounds for incitement have generated much confusion and inconsistencies in law and applications both across the region and even within the countries. The legal reasoning deployed in judgements often appears vague, *ad hoc* and lacking in conceptual discipline or rigour.

b. Overbroad interpretation

[17] *Ekermawi v Network Ten Pty Ltd*, [2008] NSWADT 334, 18 November 2008, 16 December 2008.
[18] The Jakarta Globe, "Indonesian Cleric Gets One-Year Sentence for Church Attacks", 14 June 2011, available at: http://www.thejakartaglobe.com/home/indonesian-cleric-gets-one-year-sentence-for-church-attacks/446889.
[19] Channelnewsasia.com, "Indonesia jails 17 men over church attacks", 10 June 2011
[20] *Islamic Council of Victoria Inc. v. Catch the Fire Ministries Inc.*, [2006] VSCA 284, 14 December 2006.

The Human Rights Committee in its draft of the General Comment No 34 on Article 19 of the ICCPR highlights that:

> "Many forms of "hate speech" that, although a matter of concern, do not meet the level of seriousness set out in article 20. It also takes account of the many other forms of discriminatory, derogatory and demeaning discourse. However, it is only with regard to the specific forms of expression indicated in article 20 that States parties are obliged to have legal prohibitions. In every other case, while the State is not precluded in general terms from having such prohibitions, it is necessary to justify the prohibitions and their provisions in strict conformity with article 19. "

It is ARTICLE 19's view that laws and judicial practices on incitement in Asia Pacific do not always meet the "level of seriousness" set out in Article 20 of the ICCPR. There seems a particularly broad application of "incitement" laws not only on national, religious and racial hatred but also speech targeting specific institutions such as the monarchy of Thailand[21] or the government as in Bahrain and the Philippines. While ARTICLE 19 does not deny that the speech in some of these cases could be perceived as offensive and even at occasions inflammatory by some, we do not believe that it should pass the threshold of Article 20 of the ICCPR.

ARTICLE 19 believes that there is a need to make a distinction between robust criticisms and expression of opinions, and incitement to hatred as prohibited by Article 20 of the ICCPR. As highlighted by Durban Declaration and Programme of Action[22] and the Framework Convention for the Protection of National Minorities of the Council of Europe,[23] the promotion of more speech and robust criticism is in fact central to combating discrimination and hate speech. The prohibition of incitement and hate speech should not prevent robust criticism, rather, they should prevent a much more serious call to hatred.

The lack of distinction of criticism from incitement is illustrated by the case of two journalists in Azerbaijan: Reporter Rafiq Tagi and editor Samir Sadagatoglu were sentenced to, three and four years in prison respectively, for inciting religious hatred under Article 283 of the Azerbaijani Criminal Code, in relation to an article they published in November 2006 in the small Azeri newspaper *Sanat* entitled "Europe and Us". In it they compared European and Islamic traditions and stated that Islam was an obstacle to Azerbaijan's economic and political development. The article - or rather rumours about it, as only few people were familiar with its exact content - led to protests and death threats from religious extremists, who called for the execution of journalists.

In Australia in the case of *Jones v Toben*, the Federal Court found that a website that denied the Holocaust and "vilified" Jewish people was unlawful under the Racial Discrimination Act 1975.[24] The material posted on the Internet by Dr Fredrick Toben cast doubt on the Holocaust, suggested that homicidal gas chambers at Auschwitz were unlikely and that some Jewish people, for improper purposes including financial gain, had exaggerated the number of Jews killed during World War II. In 2000, the Human Rights and Equal Opportunity Commission had found the material to be in breach of the Racial Discrimination Act. The complainant, President of the

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[21] E.g. in the case of American-Thai citizen Joe Gordon who has been charged with "inciting unrest", *lese majeste,* "disobedience of the law in public", and "disseminating computer data which threatens national security" in relation to the on-line publication of the banned book "The King Never Smiles".

[22] Available at http://www.un.org/en/ga/durbanmeeting2011/pdf/DDPA_full_text.pdf.

[23] Available at http://conventions.coe.int/Treaty/en/Treaties/html/157.htm.

[24] *Jones v Toben*, [2002] FCA 1150, September 2002.

Executive Council of Australian Jewry, Mr Jeremy Jones, then applied to the Federal Court to enforce HREOC's determination. Federal Court Justice Branson stated she was "satisfied that it is more probable than not that the material would engender in Jewish Australians a sense of being treated contemptuously, disrespectfully and offensively". She ordered the respondent, Dr Toben, to remove offensive material from the Internet.

c. Misuse of law

Even more worrying is the trend of governments using incitement laws, often in combination with other laws, to target civil society activists, journalists, human rights defenders, government critics and members of the opposition.[25]

For instance in Azerbaijan, journalist Eynulla Fatullayev was convicted for, *inter alia*, incitement of ethnic hatred, and sentenced to a total of eight and a half years in prison after writing a series of articles critical of the government.[26] He was convicted by Azerbaijani courts of libel, terrorism, incitement of ethnic hatred and tax evasion, and sentenced to a total of eight and a half years in prison. In spite that the Azeri judgement was later found to be illegitimate by the European Court of Human Rights, Fatullayev was in prison for almost four years and was only recently pardoned by the country's president.[27]

Incitement charges are often used together with other charges such as "threat to national security" and "terrorism". In Uzbekistan, a human rights defender Gaybullo Jalilov was arrested in December 2009 on Criminal Code charges of "incitement of national, racial or religious enmity", "terrorism", "infringement against the constitutional system of the Republic of Uzbekistan", "sabotage", "organisation of criminal association", "production or dissemination of materials constituting a threat to public security and public order, " and of "founding, leading and participating in religious extremist, separatist, fundamentalist and other forbidden organisations".[28]

Abuse of incitement laws is also common in Cambodia. The UN Special Rapporteur on the situation of human rights in Cambodia, Surya Subedi, has expressed his concern about the current use of the crime of incitement against human rights defenders in the country. In his end of mission statement in February 2011, he emphasised that "criticism is not a crime but an exercise of freedom of conscience, an act of intelligence."[29]

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[25] In China, for instance, many activists and government critics have been charged and imprisoned for "incitement to subvert state power", including Liu Xianbin, Ran Yunfei, Chen Wei, Hu Jia and Liu Xiaobo. In the Philippines, the publisher and two columnists of *The Daily Tribune* newspaper were charged with "incitement to sedition" under the Revised Penal Code on 14 February 2007 over articles critical of the then President Gloria Macapagal Arroyo. The Department of Justice Senior State Prosecutor Philip Kimpo claimed that the articles tend to "lead or stir up the people against the lawful authorities, namely the President of the Philippines, and disturb the peace of the community". *See*: SEAPA, 15 February 2007. Available at http://seapa.wordpress.com/2007/02/15/philippines-daily-tribune-columnists-charged-with-incitement-to-sedition.

[26] For details, see *Fatullayev v Azerbaijan*, Application no. 40984/07; available at http://cmiskp.echr.coe.int/tkp197/view.asp?action=html&documentId=866824&portal=hbkm&source=externalbydocnumber&table=F69A27FD8FB86142BF01C1166DEA398649

[27] *See* Enulla Fatullayev Pardoned, 26 May 2011; available at: http://en.apa.az/news.php?id=148098 .

[28] The Observatory for the Protection of Human Rights Defenders, Urgent Appeal UZB 010/1209/OBS 183, 8 December 2009.

[29] End-of-mission statement by the Special Rapporteur on the situation of human rights in Cambodia, Surya Subedi, 24 February 2011:
http://cambodia.ohchr.org/WebDOCs/DocStatements/2011/022011/SR_Press_Statement_24_Feb_2011_EN.pdf

The vague and broad provisions for the prohibition of hate speech in domestic laws, facilitates some state actors to abuse the law to silence their critics, with little or no checks in placed.

d. Defamation of religions as hate speech?

A recent campaign originating from a number of Islamic states considers blasphemy a form of hate speech and argues for the expansion of existing international concept of incitement, to include defamation of religions as a form of, or catalyst for, incitement to religious hatred.[30] At the United Nations Human Rights Council, a draft resolution on "Combating Defamation of Religions" has been proposed by Pakistan on behalf of the 56 nations of the Organisation of the Islamic Conference (OIC).

ARTICLE 19 has argued that the concept of "defamation of religions" is contrary to freedom of expression as protected by Article 19 of ICCPR as well as the prohibition on any advocacy of national, racial or religious hatred that constitutes incitement to violence, discrimination and hatred as provided by Article 20.[31] International human rights standards do not and should not protect religions *per se*, but rather individuals and groups from discrimination and harassment on the basis of their religion or ethnicity. Belief systems themselves should not be exempt from debate, commentary or sharp criticism. In other words, for freedom of thought, conscience and religion to be fully realized, robust examination and criticism of religious doctrines and practices – even in a harsh manner – must also be allowed.[32]

Furthermore, laws prohibiting defamation of religious are often counterproductive and prone to being abused against religious minorities that they purport to protect.[33] For instance, the 1965 law on defamation of religions in Indonesia, and the 2008 national decree that requires the Ahmadiyah to stop proselytizing their faith, have indirectly legitimised mob attacks on the religious minority groups in the country. In an especially bloody attack in 6 February 2011, three Ahmadis were killed and five seriously injured by a mob of 1500 Muslims in Banten.[34] 12 defendants have been charged with incitement and other various crimes, including assault-causing death, maltreatment of others (less serious assault), participating in assault, and illegal possession of sharp weapons. One of the victims and member of Jamaah Ahmadiyah Indonesia Deden Sujana has also been charged for provoking the attack.[35] In Pakistan, at least 70 members of the Ahmadiyah community died in targeted killings by gunmen armed with grenades. Followers of Ahmadiyah all over the world are subjected to systematic incitement of hatred, institutional discrimination, and violence, raising international concerns.[36]

ARTICLE 19's is of the opinion that the concept of defamation of religions has polarized debates about the protection of religious and minority groups, weakening the global fight against discrimination. On the one hand, some governments are calling for defamation of religion to be

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[30] Freedom House, "Policing Belief: The impact of blasphemy laws on human rights", 21 Oct 2010, available at: http://www.freedomhouse.org/template.cfm?page=383&report=95.
[31] Letter from Civil Society Organizations to State Representatives: "Defamation of Religions" at the 13th Session of the UNHRC, 11 Mar 2010.
[32] Joint submission by Heiner Bielefeldt - Special Rapporteur on freedom of religion or belief, Frank La Rue - Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, and Githu Muigai - Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance. OHCHR expert workshop on Africa on the prohibition of incitement to national, racial or religious hatred. 6-7 April 2011.
[33] Joint statement by the above three Special Rapporteurs at the Durban Review Conference, April 2009.
[34] Embassy of the Republic of Indonesia in London-United Kingdom, "Chronology of the Cikeusik Incident", available at: http://www.indonesianembassy.org.uk/CikeusikIncident/Cikeusik_chronology.html
[35] The Jakarta Post, "After Banten attack, Ahmadi could face 6 years in prison", 9 June 2011.
[36] UN HRC, "UN experts strongly condemn attacks against Ahmadis in Pakistan", 28 May 2010, Geneva.

adopted as a legitimate restriction to freedom of expression to protect religions, yet on the other hand these governments are often reluctant to prohibit and punish the on-gong incitement to discrimination, hostility and violence against particular religious groups – such as the Ahmadis in their jurisdictions, leaving advocacy for religious hatred unregulated and unrestrained.

5. DETERMINING THE THRESHOLD FOR INCITEMENT

As shown above, the understanding and approaches to what constitute incitement and advocacy of hatred are vague, ad hoc and inconsistent across the region. The application of incitement laws in some countries give rise to the violation, not the protection, of fundamental human rights, especially the right to freedom of expression. In view of this situation, greater conceptual discipline and rigour in needed in the application of incitement laws.

ARTICLE 19 has been developing a proposal for the threshold for incitement under Article 20 of the ICCPR, based on a study of case laws and jurisprudence in European countries, Canada, Australia and the Human Rights Committee. In presenting this proposal, ARTICLE 19 seeks to offer possible alternatives to the current mixed bag of approaches - alternatives that would uphold the intentions of Article 20 of the ICCPR with careful considerations for the other fundamental human rights. It is our intention to set out the following key principles and tests as a basis for a set of more robust legal standards for the prohibition of incitement. Although not presumed to be complete or comprehensive, it is expected that the discussions generated by this proposal and the feedback received will work towards improving the model and contribute to a more rigorous application of incitement law.

a. Overarching principles.

The legal framework, jurisprudence and policy on incitement should be guided by the following overarching key principles:

- **Express recognition of "incitement" as provided by Article 20 of the ICCPR**: National laws should include specific reference to the terms "incitement to discrimination, hostility or violence" directly and explicitly rather than "incitement to hatred" only. The latter is the term often used in criminal legislation, but it does not meet Article 20's standards even though it is often assumed to. Ideally, there should be explicit recognition in its drafting that the national legislation is supposed to implement Article 20 of the ICCPR.

- **Robust definition of key terms.** The following terms should be the subject of technical and robust definition:

  - *Hatred* is a state of mind characterised as "intense and irrational emotions of opprobrium, enmity and detestation towards the target group."[37]

  - *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, which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights

[37] Camden Principles on Freedom of Expression and Equality, ARTICLE 19, Principle 12.1.

and fundamental freedoms in the political, economic, social, cultural or any other field of public life.[38]

- *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, mal-development, or deprivation.[39]

- *Hostility* implies a manifested action – it is not just a state of mind, but it implies a state of mind, which is acted upon. In this case, 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"[40]. The concept has received scant attention in jurisprudence and therefore deserves greater consideration. Of particular importance is to determine the level of hostility requested under Article 20.

b. Coherence between Article 19 and Article 20 of the ICCPR and explicit recognition that the three part test of *legality*, *proportionality* and *necessity* applies to incitement cases

There is strong coherence between articles 19 and 20 of the ICCPR, as highlighted by the Human Rights Committee. In *Ross v Canada*, the UN Human Rights Committee recognized the overlapping nature of articles 19 and 20, stating that it considered that "*restrictions 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.*"[41]

This reflects the conclusion that any law seeking to implement the provisions of Article 20(2) ICCPR must not overstep the limits on restrictions to freedom of expression set out in Article 19(3). The Human Rights Committee has re-affirmed this in its Draft General Comment No 34 (2011) on Article 19 of the ICCPR, when it states 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.[42]
>
> 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)"

[38] The definition of discrimination is adapted from the definitions of discrimination in the CEDAW and ICERD.
[39] The definition of violence is adapted from the definition of violence by the World Health Organization in the report World Report on Violence and Health, 2002; available at: http://whqlibdoc.who.int/publications/2002/9241545623_eng.pdf.
[40] Camden Principles on Freedom of Expression and Equality, ARTICLE 19, Principle 12.1.
[41] Communication No 736/1997.
[42] Ross v. Canada, No. 736/1997.

The implication is that as a restriction to freedom of expression, any incitement-related restriction must conform to the **three-part test** provided under 19 (3) of the ICCPR and meet all three parts of the test:

- First, 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." [43]

- Second, 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.

- Third, the restriction must be necessary in a democratic society or meet a pressing social need.[44] The word "necessary" means 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.[45]

Application of this three-part test is key to the development of a more coherent and cohesive legal framework for the prohibition of incitement under Article 20 in which the right to freedom of speech is respected, protected and upheld while allowing for the legitimate restrictions that are needed to limit incitement to hatred.

c. The Threshold Tests for Article 20 of the ICCPR

ARTICLE 19 further recommends that a robust and codified threshold to be passed before speech is deemed "hate speech". Designed to give courts a framework for identifying the forms of speech that warrant criminal sanctions (i.e. incitement under Article 20) or other speech that can be sanctioned by means of civil law or administrative law (e.g. sanctions imposed by the Communication, Media and Press Councils, consumer protection authorities, or any regulatory bodies), ARTICLE 19 considers these elements to be constitutive to incitement under Article 20 of the ICCPR:

1. Severity
2. Intent
3. Content
4. Extent, in particular the public nature of the speech
5. Likelihood or probability of action
6. Imminence
7. Context

These tests should be reviewed and applied in the order as follows:[46]

TEST ONE - Severity

[43] *The Sunday Times v. United Kingdom*, 26 April 1979, Application No. 6538/74, para. 49 (European Court of Human Rights).
[44] *Zana v Turkey*, judgment of the Grand Chamber of 25 November 1997, Application No 18954/91 para 51; *Lingens v Austria*, Judgment of 8 July 1986, Application No 9815/82, paras 39-40.
[45] *Lingens v. Austria*, 8 July 1986, Application No. 9815/82, paras. 39-40 (European Court of Human Rights).
[46] For more details on the Threshold Test for Article 20 of the ICCPR, see ARTICLE 19 paper "Towards an interpretation of article 20 of the ICCPR: Thresholds for the prohibition of incitement to hatred": http://www2.ohchr.org/english/issues/opinion/articles1920_iccpr/docs/CRP7Callamard.pdf

The starting point should be an examination of the severity of the hatred at issue. ARTICLE 19 supports a narrowly defined offence of "the most severe and deeply felt form of opprobrium"[47] to meet the threshold of severity, so that it is drawn in law as a narrowly confined offence - rather than as is currently the case in the Asia-Pacific context - an offence that is not defined narrowly and that is, subsequently, resorted to too frequently.

To assess the *severity* of the hatred, possible issues may include (which need further elaboration and study):

- Severity of what is said
- Severity of the harm advocated
- Aforementioned three part test
- Magnitude or intensity: – in terms of frequency, amount and extent of the communications (e.g. one leaflet vs. broadcast in the mainstream media)
- Reach and extent

TEST TWO - Intent

In comparison to some jurisdictions in other parts of the world, countries in the Asia-Pacific region do not require the crime of incitement to hatred to be an intentional crime[48] and place the test rather on how the speech is perceived by its audience. For example, as already noted above, in Hong Kong in the case of *Tung Lai Lam* v *Oriental Press Group Ltd* in 27 January 2011,[49] the court ruled on the basis that "proof of intention on the part of the defendant is not necessary, nor is the fact that a person or persons were actually incited by the public activity to respond in a requisite manner."

Although it is sound to consider the understanding of the message by its recipient, ARTICLE 19 rejects this approach on the grounds that it does not meet Article 20's wording or its principles, particularly in relation to "advocacy," which must be understood as an intentional action.

TEST THREE - Content or form of the Speech

Content analysis may include a focus on the form, style, nature of the arguments deployed in the speech at issue or in the balance struck between arguments deployed. Absent a direct threat to order, even extreme views on a matter of serious public interest – such as the practices of Islam – deserve protection. An insult to a religion 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 as such.

Courts should distinguish between various **forms of speech**. In particular, the courts should recognize that artistic expression (including artistic works such as poetry, novels, music or images - painting or caricature) should be considered with reference to its artistic value and context. A large number of artistic pieces may be made expressly to provoke very strong feelings without intending to incite violence or discrimination or hostility. They may be expressions in the public interest and forms of political speech.

Additional factors to be considered when taking account of content may include:

- **Magnitude or intensity**: in terms of its frequency, amount and the extent of the communications (e.g. one leaflet vs. broadcasting in the mainstream media).

[47] Decision of the Supreme Court of Canada in *R v Keegstra*, [1990] 3 S.C.R. 697, 13/12/90, at 697 (Can.), para. 1
[48] See above, section 3, part e.
[49] *Tung Lai Lam v Oriental Press Group Ltd*, Distict Court (Hong Kong), [2011] HKEC, 27 January 2011

- **Advocacy**: The Court should consider whether the speech specifically calls for violence, hostility or discrimination, and is unambiguous in so far as the intended audience is concerned and could not be interpreted in other fashion.
- **Tone**: The degree to which the speech was provocative and direct - without inclusion of balancing material and without any clear distinction being drawn between the opinions expressed and the taking of action based on that opinion.
- **The inciter** him/herself should be considered, specifically their standing in the context of the audience to whom the speech is directed. The level of their authority or influence over the audience is relevant as is the degree to which the audience is already primed or conditioned, to take their lead from the inciter.

TEST FOUR - Extent of the speech (its reach and the size of its audience)

Some courts in Asia-Pacific, such as in Hong Kong and the federal states of Australia require that the incitement to hatred, to be found, must have occurred in public. ARTICLE 19 agrees with this approach.

To qualify as incitement under Article 20, the communication has to be directed at a non-specific audience (general public) or to a number of individuals in a public space. At a minimum, a speech made in private ought to be considered with reference to the right to privacy and its location in such instances should act as mitigating circumstances.

It is also clear that in many circumstances the Internet should be regarded as public space. Nonetheless, this is not only a simple or straightforward matter, given, for example, the complicating issue of "private" sites. In *Jones v. Toben*, cited above, 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.[50]

It is ARTICLE 19's opinion that the connections therefore between this element of extent and the provisions associated with the right to privacy should be maintained and coherently so.

TEST FIVE – The likelihood or probability of harm occurring

In some states such as Armenia and Indonesia, the fact that incitement to hatred has actually provoked violence constitutes an aggravating circumstance. For example, an Indonesian court convicted an Islamic cleric Syihabudin to one-year imprisonment for inciting people to burn churches and attack the police.[51] Another man, Supriyanto was also convicted for sending text messages to take part in the same attack.[52] The incitement led to the setting ablaze of two churches by a 1500-strong mob of Muslims in the town of Temanggung in February 2011.

However, *incitement,* by definition, is an inchoate crime. The action advocated through incitement speech does not have to be committed for that speech to amount to a crime. Nevertheless some degree of risk of resulting harm must be identified. It means the courts will have to determine that there was a reasonable probability that the speech would succeed in inciting actual action, recognising that such causation should be rather direct.

To be coherent, a legal framework for the identification and due punishment of hate speech should include attention to the element of risk. The criteria for assessing the probability or risk

[50] *Jones v Toben*, [2002] FCA 1150, September 2002.
[51] The Jakarta Globe, "Indonesian Cleric Gets One-Year Sentence for Church Attacks ", 14 June 2011.
[52] Channelnewsasia.com, "Indonesia jails 17 men over church attacks", 10 June 2011, available at: http://www.channelnewsasia.com/stories/afp_asiapacific/print/1134300/1/.html.

of a result prohibited under law will have to be established on case-by-case basis, but the following criteria should be considered:[53]

- Was the speech understood by its audience as a call to acts of discrimination, violence or hostility?
- Was the speaker able to influence the audience?
- Was the audience able to commit acts of discrimination, violence or hostility?
- Had the targeted group suffered or recently been the target of discrimination, violence or hostility?

TEST SIX – Imminence

The immediacy with which the acts (discrimination, hostility or violence) called for by the speech are intended to be committed should also be deemed relevant. Their imminence should be established on a case-by-case basis, but we suggest that it is important for the court to ensure that the length of time passed between the speech and the intended acts should not be so long that speaker could not reasonably be held responsible for the eventual result.

Further, the speech should be deemed to constitute incitement if it incites to the acts of hatred by a particular audience in a particular time and place.

TEST SEVEN – Context

Context is of great importance when assessing whether particular statements are likely to incite to hatred and it may bear directly on both intent and/or causation. Unfortunately, as noted by Mendel,

> "It is extremely difficult to drawn 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."[54]

Ideally, analysis of the context should place key issues and elements highlighted previously within the social and political context prevalent at the time the speech was made and disseminated. At one end of the spectrum, the context at the time of the speech may be characterised by frequent acts of violence against individuals or groups on the grounds of nationality, race, religion; day-to-day or regular media negative reports against/on particular groups; violent conflicts opposing groups or the police with groups; feeling of insecurity and so on. At the other end of the spectrum, the climate may be one of relative peace, tolerance and prosperity, with little to no indication of social unrest or conflict.

Overall, context analysis should include considerations such as:

- **The speaker/author**: Given the context, was the speaker's intent 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?

[53] Adapted from Susan Bensch "reasonably possible consequences test" for incitement to genocide"

[54] Toby Mendel, Study on International Standards Relating to Incitement to Genocide or Racial Hatred (2006).

- **The audience**: Was the speech easily interpreted in light of the context? Had the audience access to a range of alternative and easily accessible views and speeches? Were there large and frequent public debates broadcasted? An important aspect of the context would be the degree to which opposing or alternative ideas are present and available.
- The projected or intended **harm** (violence, discrimination or hostility): The context should be such that it greatly increases the probability that the audience would feel compelled to take harmful action.
- The existence of **barriers**, particularly those subject to political manipulation, to establishing media outlets, systematically limiting the access of certain groups to the media sector.
- **Broad and unclear restrictions** on the content of what may be published or broadcast, along with evidence of bias in the application of these restrictions.
- The **absence of criticism** of government or wide-ranging policy debates in the media and other forms of communication.
- The **absence of broad social condemnation** hateful statements on specific grounds when they are disseminated.

6. CONCLUSION

ARTICLE 19 is convinced that the existing international law is sufficient to address incitement to national, religious and racial hatred. The focus, rather, should be placed on better enforcement and implementation, especially on the development of a clear international definition of incitement and a set of rigorous tests to determine its threshold.

Articles 19 and 20 are inherently inter-related. The UN Human Rights Committee in General Comment 10 underscored that any restrictions on freedom of expression justified under Article 19 (3) – incitement included - "may not put in jeopardy the right itself."[55]

This is unfortunately not the case in Asia-Pacific. The wide array of incitement and related legislations in domestic criminal and civil frameworks and their vague and ambiguous provisions, has given rise to much confusion and overly broad interpretation. It also gives room for state actors to criminalise legitimate speech and other forms of expression such as the use of symbols, with serious implication for the ability of the people to exercise their right to freedom of expression. It is therefore urgent that international human rights community provides leadership in clarifying the definition of incitement under Article 20, its relationship with ICERD and establishes a threshold for incitement beyond what is reasonable and valuable for the free flow of information and the debates of ideas. Based on which, domestic laws and judicial practices can be aligned.

In so far the set of tests we have proposed for the threshold of incitement only applies within the grounds of Article 20 of the ICCPR. It is in ARTICLE 19's opinion that all the tests outlined above should be satisfied for a court to find that incitement to discrimination, hostility or violence has been committed by a defendant and to impose criminal sanctions on them. If a court finds that a specific case meets only some of these tests then that case should be dismissed and be pursued through means other than that of the criminal law (proposals under the different levels of test for different types of sanctions are also outlined in the table below). We also recognise that these tests require further review and discussion, with a particular focus on their relative weight and importance *vis-a-vis* one another, and their respective internal threshold.

[55] UN Human Rights Committee Draft General Comment No. 34 on Article 19, 14 Mar – 1 April 2011.

Proposal for the threshold tests for Article 20 of the ICCPR

Level of protection	Severity	Intent	Content	Extent	Likelihood/ Probability	Imminence	Context
Criminal sanctions (Article 20 standard)	Most severe and deeply felt form of opprobrium assessed in terms of form, magnitude and means of communication used.	Specific intent	Direct and/or explicit call to commit discrimination, hostility or violence	Directed at a non-specific audience (general public) or to a number of individuals in a public space	Speech very likely to result in criminal action and harm Must be considered on a case-by-case basis and in light of local culture and specific circumstances	How immediate is the harm to occur? Length of time passed between speech and intended acts should not be so long that speaker could not be held responsible for eventual result.	How does it relate to key issues and elements highlighted previously within the social and political context prevalent at the time the speech was made and disseminated
Other course of action: Civil remedies Administrative Sanctions Positive measures							

ARTICLE 19 has designed the framework of tests as an interpretive tool for applying the law rather than to become law itself. When assessing incitement to hatred cases, we recommend that Courts **consider a range of sources**. In particular, amicus briefs by representatives of various groups concerned by the case ought to be invited to strengthen the intellectual, legal and policy pursuit of justice.

The role of the courts is crucial in the implementation of Article 20 of the ICCPR, whether or not there is express legislation or jurisprudence on incitement. We emphasise in this regard the obligations flowing from the ICCPR which apply not only to the executive and legislative arms of the state, but also to the judiciary as is indicated by international authorities and jurisprudence. For present purposes it is important to also highlight that whether there has been incitement, whether damage has been suffered and, if so, the extent of such damage is for the courts to determine. The Venice Commission has emphasised that courts are well placed to enforce rules of law in relation to these issues and to take account of the facts of each situation.[56] Awards of damages should be proportional and carefully and strictly justified and motivated so they do not have a collateral chilling effect on freedom of expression.

As a proposal for the threshold of incitement, there are still a number of questions to be answered, especially with regards to the mechanisms for implementation, for example:

- Are the tests conjunctive or disjunctive or in series?
- What is the threshold within each 'test'?

[56] Venice Commission, above at 30.

We hope that by discussing the model with more parties and soliciting feedback from them can help to refine the tests and ensure their effectiveness in setting the bar for the advocacy of national, racial and religious hatred.

Positive obligations of states to promote equality, diversity and pluralism

ARTICLE 19 agrees with the three Special Rapporteurs on freedom of religion or belief, on the promotion and protection of the right to freedom of opinion and expression, and on contemporary forms of racism, racial discrimination, xenophobia and related intolerance, that the strategic response to hate speech is more speech.[57] In order to combat national, racial and religious hatred, we must guarantee the ability to exercise freedom of expression for all.[58]

Aside from prohibiting hate speech, States should also adopt a wide range of measures to guarantee and implement the right to equality and take positive steps to promote diversity and pluralism, to promote equitable access to the means of communication, and to guarantee the right of access to information.

As highlighted by the Venice Commission, "Criminal sanctions related to unlawful forms of expression which impinge on the right to respect for one's beliefs, which are specifically the object of this report, 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. The application of hate legislation must 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".

The Commission goes on to suggest that the existing courses of action should be used, including the possibility of claiming damages from the authors of these statements. This conclusion does not prevent the recourse, as appropriate, to other criminal law offences, notably public order offences.

ARTICLE 19's Camden Principles[59] offer a range of proposals to ensure the right to equality is fulfilled and freedom of expression respected. In addition, as highlighted in the table below, we believe that civil and/or administrative course of actions may be considered in cases which do not meet the threshold of severity requested by article 20, provided they remain within the scope of article 19 (three-part test) and proportionate.

[57] Joint submission by Heiner Bielefeldt - Special Rapporteur on freedom of religion or belief, Frank La Rue - Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, and Githu Muigai - Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance. OHCHR expert workshop on Africa on the prohibition of incitement to national, racial or religious hatred. 6-7 April 2011.

[58] Outcome Document of the Durban Review Conference, 23 November 2008.

[59] See: http://www.article19.org/advocacy/campaigns/camden-principles/index.html