Freedom of expression and Equality:
The prohibition of incitement to hatred in Latin America

- WORK IN PROGRESS -

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INTRODUCTION

The exact interpretation and extent of Article 20 in the International Covenant on Civil and Political Rights (ICCPR) - the advocacy of national, religious and racial hatred that constitutes incitement to discrimination, hostility and violence - is still to be ascertained, especially in light of freedom of expression as protected under Article 19 of the same international document.

Debate on the grounds under which a speech may constitute incitement prohibited by Article 20 are controversial and it is sure that ICCPR standards in this area need to be further developed.

For some years now ARTICLE 19 has carried out work on the links between articles 19 and 20. These include the development 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, in Nairobi in April 6-7, 2011 and in Bangkok in 6-7 July, 2011.

This paper builds on, and contributes to, ARTICLE 19's existing body of work through a review of the prohibition of incitement to hatred in Latin America. 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. It also proposes the use of other mechanisms to limit the use and impact of hate speech on the right to equality, especially through the use of media regulations, the right of reply and other public policies aimed at providing long-term structural solutions to inequality in the region.

1. THE LEGAL FRAMEWORK

a. International Legal Principles and Standards

The principle of substantive equality among human beings, including the right to freedom from discrimination, is at the heart of human rights, as highlighted by article 1 of the *Universal Declaration on Human Rights* (UDHR), adopted by the UN General Assembly in 1948, which states: "All human beings are born free and equal in dignity and rights." The principle applies to everyone in relation to all human rights and freedoms. It prohibits discrimination on the basis of a list of non-exhaustive categories such as sex, race, colour and so on, as per article 2 of the UDHR. Article 2 provides for equal enjoyment of the rights and freedoms therein proclaimed, "without distinction of any kind, such as race, colour, sex ..."

While the UDHR does not specifically provide for prohibitions on hate speech or incitement to hatred, its Article 19 guarantees everyone the right to "seek, receive and impart" both "information and ideas", through "any media and regardless of

frontiers." This right to freedom of expression is fundamental thus to human rights protection. The importance of freedom of expression was highlighted as early as 1946, when at its very first session, the UN General Assembly adopted Resolution 59(I) which states: *"Freedom of information is a fundamental human right and ... the touchstone of all the freedoms to which the United Nations is consecrated."*

The *International Covenant on Civil and Political Rights* (ICCPR), adopted by the UN General Assembly in 1976, guarantees equality and non-discrimination in the enjoyment of rights in terms similar to the UDHR. Article 19 of the ICCPR guarantees the right to freedom of expression in terms similar to the UDHR. It gives absolute protection to the right to hold opinions, and protects the right to seek, receive and impart information and ideas. It allows restrictions on these rights only where these are a) provided by law; b) for the protection of one of the aims listed; and c) necessary to protect that aim.

With regard to point b, Courts variously refer to 'public order' or the 'rights of others' as possible legitimate aims when considering challenges to hate speech laws, with 'equality' or 'non-discrimination' presented as examples of the rights of others.

The ICCPR does place an obligation on States Parties to prohibit hate speech. Article 20(2) provides that:

> *Any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law.*

This provision employs a double-barrelled formulation, whereby what is to be prohibited is advocacy of hatred that "constitutes" incitement rather than simply advocacy. The UN Human Rights Committee (HRC), the body of experts tasked with interpreting the ICCPR, has specifically stated that Article 20(2) is compatible with Article 19.[2]

The International Convention on the Elimination of All forms of Racial Discrimination (ICERD) in Article 4 (a) calls upon states to ban a much broader range of speech and action than the ICCPR:

> [State Parties] "[S]hall declare an offence punishable by law all dissemination of ideas based on racial superiority or hatred, incitement to racial discrimination, as well as all acts of violence or incitement violence or incitement to such acts against any race or group of persons of another colour or ethnic origin, and also the provision of any assistance to racist activities, including the financing thereof."[3]

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

[3] The International Convention on the Elimination of All Forms of Racial Discrimination, 7th March 1966, entered into force 4th Jan 1969, 85 signatories, 174 parties including 52 African states.

Another international instrument that outlaws incitement to genocide is the Convention on the Prevention and Punishment of the Crime of Genocide.[4]

b. Regional Legal Instruments

The American Convention on Human Rights protects the right to freedom of expression and information under Article 13:

> *Article 13. Freedom of Thought and Expression*
>
> *1. Everyone has the right to freedom of thought and expression. This right includes freedom to seek, receive, and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing, in print, in the form of art, or through any other medium of one's choice.*
>
> *2. The exercise of the right provided for in the foregoing paragraph shall not be subject to prior censorship but shall be subject to subsequent imposition of liability, which shall be expressly established by law to the extent necessary to ensure:*
>
> *a. respect for the rights or reputations of others; or*
>
> *b. the protection of national security, public order, or public health or morals.*
>
> *3. The right of expression may not be restricted by indirect methods or means, such as the abuse of government or private controls over newsprint, radio broadcasting frequencies, or equipment used in the dissemination of information, or by any other means tending to impede the communication and circulation of ideas and opinions.*
>
> *4. Notwithstanding the provisions of paragraph 2 above, public entertainments may be subject by law to prior censorship for the sole purpose of regulating access to them for the moral protection of childhood and adolescence.*
>
> *5. Any propaganda for war and any advocacy of national, racial, or religious hatred that constitute incitements to lawless violence or to any other similar action against any person or group of persons on any grounds including those of race, colour, religion, language, or national origin shall be considered as offenses punishable by law.*

Along with ICCPR and ICERD, the American Convention on Human Rights is one of only three human rights instruments that explicitly require governments to make advocacy of racial hatred an offence punishable by law, as indicated by Article 13.5.

The Inter-American Court on Human Rights – IACourt has not yet been presented with the opportunity to interpret the ACHR's restriction on hate speech.

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[4] Convention on the Prevention and Punishment of the Crime of Genocide, 9th Dec 1948, entered into force on 12th Jan 1951, signatories 41, and parties 141.

Limited to Lawless Violence

The Convention discusses hate speech in relation to incitement of "lawless violence" or "any other similar action".

The ACHR provision raises at least two main issues.

First the threshold required for a speech to be prohibited is that is must incite lawless violence – that is not only violence but more specifically lawless violence – that is violence outside what may be tolerated by law (eg lawful violence). The wording thus appears to allow for any *advocacy of national, racial, or religious hatred provided it constitutes incitements to **lawful violence** – a rather strange construct.*

Further and in contrast with the ICCPR article 20, incitement to hostility or discrimination are not considered as sufficient ground for prohibiting speeches.

The first draft of article 13.5 had included "discrimination, hostility, crime or violence", but the U.S. delegation objected to the provision, arguing that it should be deleted because it required censorship that could conflict with the U.S. protection of freedom of speech. Instead of this approach, 'the remedy to be applied is more speech, not enforced silence'.

The American delegation tried to remove paragraph 5 altogether, but realised it would remain in some form; hence proceeded to propose amendments. The language finally adopted was drafted and proposed by the US after much consultation with other delegations. The report of the U.S. delegation commented that the wording that resulted in the final provision was guided by the U.S. Supreme Court decision, *Brandenburg v. Ohio*. Brandenburg set forth the principle that "the constitutional guarantees of free speech and free press do not permit a State to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action." The provision on hate speech in the American Convention bears therefore greater similarity to U.S. case law. Consequently, a review of U.S. case law may be more useful in interpreting this provision than a perusal of the case law of other international systems[5].

Prohibition on Prior Restraint

Since according to ACHR, censorship is only allowed for the purposes stated in paragraph 4 (moral protection of children) above, hate speech should be regulated like the other areas of expression in paragraph 2 of Article 13 – through subsequent liability. So no prohibition to hate speech can take place in the form of prior censorship.

[5] Stephanie Farrior, *Hate Propaganda and International Human Rights Law* in Forging peace: intervention, human rights and the management of media space, edited by Monroe Edwin Price and Mark Thompson, MPG Books Ltd.

This is evident in the *Case of the Last Temptation of Christ:* in this case, the Inter-American Court on Human Rights - IACourt noted that paragraph 4 *"establishes an exception to prior censorship, since it allows it in the case of public entertainment, but only in order to regulate access for the moral protection of children and adolescents,"* so for *"all other cases, any preventive measure implies the impairment of freedom of thought and expression."*

The IACourt has stated in its Advisory Opinion OC-5/85 (1985) that subsequent liability must fulfil four requirements:

- There must be previously established grounds for liability.
- There must be express and precise definition of these grounds by law
- The ends must be legitimate
- There has to be a showing that the grounds of liability are necessary to ensure the aforementioned ends.

Therefore, any subsequent liability referring to the practice of hate speech needs to pass the test above, complying with all four requirements set forth by the IACourt.

c. Domestic Laws

At the domestic level, provisions prohibiting discrimination are commonly found in the Constitutions of a number of Latin American countries. As regards Criminal Codes/Laws, a number of texts refer specifically to hate speech and others to the prohibition of discriminatory speech[6]. Many countries have also adopted specific legislation on media or on discrimination and these documents also bring relevant provisions. However, all these legal provisions differ greatly amongst themselves, and the Latin America legal landscape offers a range of concepts and constructs regarding speeches that may be prohibited that not always meet the threshold established by Article 20.

The wording of Article 20 of the ICCPR is rarely found enshrined in domestic legislation. The term "incitement" as such does not always appear and countries either use similar terms such as "induce" or a variety of other terminology. The different choices of terms do not always carry the equivalent significance as "incitement", where advocacy to proscribed action is a key element.

In addition, domestic legislation in Latin America does not meet the threshold of lawless violence established by Article 13 of the ACHR.

For instance, the Constitutions of Jamaica, Bahamas and a number of other Caribbean islands, the Constitutions of Bolivia, Costa Rica, Honduras, Mexico, Nicaragua, Panama, Peru and Trinidad and Tobago, adopted provisions explicitly referring to the prohibition of discrimination. Other Constitutions, such as those of Chile, El Salvador and Uruguay use language that refers to the equality of all under

[6] Refer to table in Annex A: Incitement to Hatred and Relevant Legislation in Latin America, and also the studies carried out by Bertoni and Hernandez.

the law. The Constitution of Brazil affirms equality of all under the law and also establishes that "the practice of racism is a non-bailable crime, not subject to statute of limitations, subject to the penalty of confinement, under the terms of the law" (article 5, XLII). The Constitution of Venezuela prohibits "war propaganda", "discriminatory messages" and "messages that promote religious intolerance" (article 57). Finally, the Constitution of Ecuador prohibits a number of discriminatory speech in its article 19: "(...) it is forbidden the dissemination of propaganda that induces to violence, discrimination, racism, (...) sexism, religious or political intolerance and all propaganda that attempts against rights".

As regards Criminal Codes or General Criminal Laws in the region, a number of distinct provisions can be found, for example: in Argentina, the Criminal Code, under the section on terrorist and illicit associations, establishes criminal sanctions to those that participate in illicit organizations which use terror having a "plan of action for the dissemination of ethnical, religious or political hatred" (article 213, third paragraph). In Bolivia, the Criminal Code sets up as a crime the act of inciting to violence or to the persecution of people or groups on the grounds of racist and discriminatory reasons (article 281). In Ecuador, the Code sanctions with 6 months to 3 years all those "who disseminate, by any means, ideas based in racial superiority or racial hatred", "those who incite, by any means, to racial discrimination", and "those who commit acts of violence or incite others to commit it against any race, person or groups of people of any colour or ethnical origin" (article 212 A). The Nicaragua Criminal Code simply states that the public promotion of acts of discrimination may result in fines (article 427). In Peru, the Criminal Code establishes the same prison sentences to those that discriminate as well as to those that publicly incite or promote discriminatory acts based on racial and other grounds (article 323). In Uruguay, legislation criminalizes those that publicly, or through any means suitable for public dissemination, incite to hatred, to disregard, or any form of physical or moral violence against one or more people on the grounds of skin colour, race, religion or national or ethnical origin (article 149).

In addition, some jurisdictions place special responsibilities on the media to prohibit incitement to discrimination. For instance, in Chile, the law on the exercise of journalism (Law 19.733) provides for the application of fines to those that, through any media, disseminate publication or broadcasting aimed at promoting hatred or hostility in relation to people or collectives. In Brazil, Law 7716 defines the crime of discrimination and establishes increased sanctions if this crime is committed through the media or any publication.

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 are generally covered across the region. In addition, discriminatory speech is also prohibited on the grounds of genetic factors, age, language, dressing codes, and economic conditions (see Article 323 of the Peruvian Criminal Code).

According to a brief review of judicial cases based in the abovementioned legal provisions, as per study carried out by Bertoni, 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.

It seems that 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.

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. "

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[7] and the Framework Convention for the Protection of National Minorities of the Council of Europe,[8] 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.

As observed in other regions where similar studies have been carried out by ARTICLE 19, Latin American laws and jurisprudence related to incitement to hatred may be best characterised as:

- A patchwork: there are significant variations across countries in how prohibition and threshold of incitement is approached and defined in laws and regulations, and in how these concepts are applied;
- Uneven and inconsistent: The patchwork's variations generate significant inconsistencies and approach both across the region and even within countries.

[7] Available at http://www.un.org/en/ga/durbanmeeting2011/pdf/DDPA_full_text.pdf.
[8] Available at http://conventions.coe.int/Treaty/en/Treaties/html/157.htm.

- In domestic jurisprudence, the interpretation and legal reasoning deployed often appears vague, ad hoc and possibly lacking in conceptual discipline or rigour.

2. BEYOND CRIMINAL PUNISHMENT - ASSESSING THE SOCIO-POLITICAL CONTEXT AND THE EFFECTIVENESS OF THE PROHIBITION OF HATE SPEECH IN LATIN AMERICA

The prohibition of hate speech seems to have proven ineffective, considering that expressions of this nature continue to occur[9].

Some researchers have concluded that many times the prohibition is seen as an invitation or an incentive to disobedience[10]. Cases have also shown that the use of extreme measures such as prohibition may result in even greater general interest in relation to learning the content of the speech or literature subject to such measure, therefore promoting even broadly the dissemination of its arguments and ideas.

Bertoni[11] has concluded in his study on the application of article 20 of ICCPR in the Americas that the existence of an extensive set of criminal provisions in domestic legislation around the region and, at the same time, the identification of a very limited number of cases taken to courts, suggests that the punitive approach to hate speech in the Americas has been considered a non-effectual tool to tackle discrimination.

Although we broadly agree with this conclusion we also consider that further research should be carried out with anti-discrimination legal experts, specialized authorities and NGOs within countries to explore the reasons for the relatively low use of hate speech provisions.

These provisions may not have been as used for a number of reasons such as:

- There is a strong lack of legal knowledge among the general public about the content and extension of anti-discrimination, hate speech and freedom of expression provisions in domestic legislation and a lack of legal skills to make use of such legislation.
- There is a broad sense of suspicion in relation to the Judiciary (and how it rules on controversial social issues) and a sense that decisions can bring up very unexpected results, for courts lack clear standards for addressing concrete cases.
- There is a certain degree of demobilization within organized civil society to address the use of hate speech in a coherent and strategic manner and especially to engage in litigation in this area.

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[9] Jesse Solomon actually affirms that the use of this type of speech is increasing, *Hate Speech Infiltrates Social-Networking Sites, Report Says*, CNN.COM, Mar. 15, 2010.

[10] Raul Vaneigem, *Nada é sagrado e tudo pode ser dito: reflexoes sobre a liberdade de expressao*, Sao Paulo, Parabola Breve, 2004.

[11] Eduardo Bertoni, *A Study on the Prohibition of Incitement to Hatred in the Americas*, paper presented as a baseline research for the Americas consultation on the topic organized by the OHCHR in Santiago, 12-13 October 2011.

- The use of strategic litigation in the region is a relatively new phenomenon, although growing in recent years.
- Domestic legislation may place hate speech at a threshold that is too high for most situations, eg lawless violence. Instead, other provisions will be preferred to prohibit some speeches, which do not qualify as hate speeches but may still be prohibited under a different range of legal provisions such as defamation.

Studies aiming at verifying the reasons for the low use of hate speech provisions within domestic legal systems in the region are especially needed in view of new demands put forward by groups seeking an expansion of the grounds on which hate speech could be established, for example, to include gender or sexual orientation. If criminal provisions prohibiting hate speeches are not used and are considered ineffective, why should "new" groups call for hate speech provisions to include and protect them as well?

It should be further noted that there are actually few cases of hate speech litigation in most parts of the world, with the possible exception of Western Europe[12].

Professor Hernandez has noted in her study on hate speech that: "even well-meaning government officials may be reluctant to impose the sanctions of the criminal law out of concern that hate speech is a social problem that should otherwise be addressed outside of the harsh penalties of the criminal law. This may help to explain why so few hate speech cases are actually brought despite the many jurisdictions that have hate speech criminal laws".

And she goes on to affirm that, "furthermore, the punitive focus of criminal law can create a backlash against the targets of hate speech, whereby they are resented by the public for incarcerating others for their speech. Such public resentment would undermine the goal of enforcing hate speech regulations to further racial equality"[13].

This may be especially true for countries with a recent history of dictatorial regimes.

Observation in some countries shows, that alternatives to the criminalization of hate speech have indeed been sought by both authorities and civil society. In order to explore this approach, we will look further into some of the measures carried out in Brazil, as a case study.

ARTICLE 19 believes that States should 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

[12] See ARTICLE 19's papers on the prohibition of incitement to hatred in Europe, Africa and Asia, available at www.article19.org.

[13] Tanya Katerí Hernandez, *Hate Speech and The Language of Racism in Latin America: A Lens for Reconsidering Global Hate Speech Restrictions*, paper presented in the International Law Department of the Organization of American States' Afro-descendants in the Americas Experts Workshop of January 22, 2010, University of Pennsylvania Journal of International Law, Vol. 32:3, p. 830.

guarantee the right of access to information. In Brazil, a number of such measures have been taken which could be emulated elsewhere and go a long way towards protecting both the right to equality and freedom of expression.

3. A BRIEF CASE STUDY: RESPONSES TO HATE SPEECH IN BRAZIL

„We are in a country where certain grave and important things are done with no discourse, in silence, in order not to call attention and not trigger a process of awareness, contrary to what happened in countries of open racism. The silence, the implicit, the subtle, the veiled, the paternalism are some of the aspects of this ideology."

Kebengele Munanga, Brazilian political scientist

a. Racial groups and discrimination in Brazil

According to the 2000 census carried out in Brazil[14], the country had in that year a population of approximately 170 million people and from this total, 44,7% was composed of African-Brazilians (auto-classified as "black" or "dark skin" (*pardos*)), totalling at that time around 75,5 million people. These numbers indicate that Brazil was the non-African country with the largest population of Africans outside that continent.

Slavery of African individuals was present in Brazil throughout the colonial period and continued after independence. Slavery of indigenous peoples occurred at lower levels if compared with slavery of African individuals and was abolished at the end of the XVIII century. African slavery was abolished slowly, through a series of laws that restricted its extent till the total ban in 1888. Despite the official prohibition on the use of African slaves, little was done to integrate former slaves into Brazilian society and a number of limitations continued to apply to their exercise of civil, political rights. This resulted in lack of opportunities to access education, health, housing and labour, maintaining inequality and imposing the effects of exclusion on generations of African-descendents.

Although African-descendents compose almost half of Brazilian population, their presence in politics and government still today is very limited. African descendants are disproportionally living in poverty and illiteracy[15].

African-descendents continue to be subject to strong prejudice and such prejudice has been translated to public discourse. Jokes and expressions linking African-descendents to wrongdoing, laziness and dirtiness, among others, are still very frequent today and part of daily discourse.

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[14] Brazilian Institute for Geography and Statistics, *Estudos Sociodemográficos e Análises Espaciais Referentes aos Municípios com Existencia de Comunidades Remanescentes de Quilombos*, Preliminary Technical Report, Rio de Janeiro, August 2007.

[15] See Inter-American Commission on Human Rights, Report on the Situation of Human Rights in Brazil, OEA/Ser.L/V/II.97, Doc. 29 rev.1, 29 September 1997.

According to Van Dijk, "racism has to be learned, hence taught, and does not arise spontaneously from everyday experiences: People need social categories of difference, criteria of superiority, examples, and in general a legitimization for their racism. The mass media, political discourse and didactic discourse are the main sources for such processes of communicating and reproducing racism[16].

According to Hernandez, the widespread myth of a racial democracy in Latin America "facilitates the normalization of hate speech and in turn makes hate speech an even greater danger for blacks than elsewhere in the Americas"[17].

b. Legal prohibitions on incitement to hatred and discriminatory speech in Brazil

There is no prohibition of incitement to hatred in Brazilian Constitution or Criminal Code. However, the language used in other anti-discrimination legislation refers to incitement to discrimination on several grounds.

One of the first key measures taken by Brazil to combat racial discrimination was the adoption of legislation, first, with the passing of Law Afonso Arinos in 1951 (Law 1390/51). The sanctions it established ranged from prison terms of three months to one year to the imposition of fines. This law was poorly implemented till it was modified by Law 5437 in 1985, introducing sex and civil status to the grounds protected under it.

In 1988, with the end of dictatorship and the adoption of a new Constitution, legal protection against discrimination reached a new level of institutionalization and recognition..

The Brazilian Constitution of 1988 provides that:

> **Article 3.** The fundamental objectives of the Federative Republic of Brazil are:
>
> (...)
>
> IV. to promote the well-being of all, without prejudice as to origin, race, sex, colour, age and any other forms of discrimination.
>
> **Article 5.** All persons are equal before the law, without any distinction whatsoever, Brazilians and foreigners residing in the country being ensured of inviolability of the right to life, to liberty, to equality, to security and to property, on the following terms:
>
> (...)
>
> XLI. the law shall punish any discrimination which may attempt against fundamental rights and liberties;

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[16] Teun Van Dijk, *Racism and Discourse in Spain and Latin America*, John Benjamin's Publishing Company, 2005.

[17] Hernandez, p. 384.

XLII. the practice of racism is a non-bailable crime, not subject to statute of limitations, subject to the penalty of confinement, under the terms of the law;

In order to regulate Article 5, LXII, in 1989 Law 7716 was passed. The overall purpose of this law is to define the crimes resulting from race, colour, ethnicity, religion or national origin discrimination and set forth their respective punishments.

According to article 20 of Law 7716/89, to practice, **induce or incite discrimination or prejudice** on the grounds mentioned in the preceding paragraph (race, colour, ethnicity, religion or national origin) may result in 1 to 3 years of prison and fines.

The crime of racism also covers the production, commercialization and distribution of symbols and propaganda using such symbols to disseminate Nazism. When the crime is practiced through the media or publication of any kind, the sanction is increased to 2 to 5 years. The law also allows the judge to determine the immediate apprehension of all editions of the publication, the withdrawal of broadcasting licenses or the blocking of respective messages or webpages in the internet, when ruling on specific cases.

In its 1997 report about the situation of human rights in Brazil the Inter-American Commission concluded that "the above-mentioned law 7,716 has proven difficult to enforce since it does not establish mechanisms to facilitate proof that a crime has been committed. Moreover, by making it necessary to prove that discrimination was intended leads to situations in which the aggressor and the aggrieved must confront one another and the offense must be proven objectively"[18].

The Commission also highlighted that "On September 1, 1995, 53 complaints of racism were reported in Sao Paulo, which according to sources that have done research on the issue is a relatively low number and would be explained by general ignorance of the conditions surrounding crimes of this kind since it is often confused with injury, calumny, and defamation. It is also explained by a decline in the efficiency of the police and justice system and the fact that the daily occurrence of racial discrimination and prejudice leads to a feeling of resignation and a belief that any efforts to correct this situation will ultimately fail"[19].

African-Brazilian's struggle to improve racial equality focused on better structured laws and many subsequent modifications were introduced to the above mentioned legal documents. In 2010, an important and progressive new piece of legislation was approved to address the issue of discrimination in all areas of daily life. This law sets up not only punitive measures, but a series of obligations on the State to adopt

[18] Inter-American Commission on Human Rights, Report on the Situation of Human Rights in Brazil, OEA/Ser.L/V/II.97,□Doc. 29 rev.1,□29 September 1997, Chapter IX, para. 15.
[19] Inter-American Commission on Human Rights, Report on the Situation of Human Rights in Brazil, OEA/Ser.L/V/II.97,□Doc. 29 rev.1,□29 September 1997, Chapter IX, para. 17.

clearly defined positive actions for the inclusion of racial minorities in the country. This is the Statute for Racial Equality, Law 12.288 of July 20, 2010[20].

Here are some of the provisions of the Statute:

- Employment opportunities for Afro-Brazilian actors, extras and technicians In the production of films and programs for television and cinemas shall be adopted and any discrimination for political, ideological, ethnic or art reason forbidden.
- The federal government shall put in place, according to the law and within the Legislative and Executive Branches, Permanent Ombudsmen for the Defence of Racial Equality, to receive and forward complaints of prejudice and discrimination based on ethnicity or colour and monitor the implementation of measures to promoting equality.
- In cases of injury and threat of injury to the interests of the Afro-Brazilian population due to unequal treatment on the basis of ethnicity, a public civil action, among other legal instruments, can be taken.
- Public funding shall be secured for encouraging the creation of programs and communication vehicles for the dissemination of materials related to the interests of Afro-Brazilian people.

The LGBT groups have been pressing for many years now to modify Law 7716/89 and criminalize homophobia. Bill 122/2006 is currently under analysis before the Brazilian Senate.

c. Judicial cases

As indicated in the preceding sections, there are other thresholds regarding public and media speech besides hate speech, including minimum standards applied to broadcasting regulations.

The number of hate speech criminal cases is still low[21], but as mentioned in the section on legislation above, public civil actions can now also be used to promote equality. We have selected 4 cases to demonstrate the results of litigation in relation to discriminatory speech in Brazil. It is our understanding that the civil cases have provided a more creative approach to the issue, resulting in solutions better suited to the domestic context and, therefore, better designed to reach longer-lasting responses to hate speech in Brazil.

The Ellwanger Case:

[20] Amends Laws No. 7716, of January 5, 1989; 9029, of April 13. 1995; 7347, of July 24, 1985; and 10,778, of November 24, 2003.

[21] Although some anti-racism activists have indicated to ARTICLE 19 in interviews that they consider it to be increasing. To our knowledge, there is no comparative data available to verify this information. An information request has been presented to the Public Prosecutor's Office and to the Secretariat for the Promotion of Racial Equality on this issue and we are awaiting a reply.

In 2002, Siegfried Ellwanger appealed to the Brazilian Supreme Court via *habeas corpus*[22] after being sentenced to prison under Law 7716/89 for the crime of racism. The crime was committed through the publication of books considered of an anti-Semitic nature. In September 2003 the Supreme Court, by 7 votes against 3, decided to reject his petition.

This is certainly Brazil's major case on the issue of hate-speech and it called significant public attention. When deciding on the case, Supreme Court judges focused on two questions:

- Should the protection given under the anti-racism law be extended to Jewish individuals?
- How to address the conflict between the rights to freedom of expression and equality in the case?

In relation to the first question, judges decided that "the division of human beings in racial groups results from a process of a socio-political nature. It is from a socio-political process that racism arises and, in turn, generates discrimination and segregational prejudice." The idea of inferiority of some races violates the dignity of human beings and therefore is incompatible with the principles that guide the Brazilian Constitution[23].

In relation to the conflict between freedom of expression and equality, most judges decided to use the principle of proportionality (Alexy's Weight Formula) for ruling on the case. Despite starting from the same proposal to address the conflict, judges used completely different methodologies and arguments in applying the principle of proportionally, including to reach opposite conclusions. Lack of clear standards became evident and the result was a decision that does not observe international law on the matter, be it the ACHR or ICCPR.

Benvindo comments on the dangers of the Weight Formula based on this case: "The Ellwanger case is particularly remarkable, because it enters into the core of the debate on otherness, and how methodologies, when not deployed with the concern for the quest for justice, on the one hand, and the consistent and enforceable character of the system of rights, on the other, can conceal the tensions of this debate. Indeed, they can culminate in arbitrary axiological points of view, transforming thereby the practice of decision-making into an activity that shapes the system rights according to "broad discretionary powers"[24].

Despite reaching a decision that was broadly welcomed within Brazil, the Ellwanger case did not serve to clarify the difficult links between freedom of expression and equality and the criteria for adjudication in cases of alleged conflict between these rights.

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[22] Supremo Tribunal Federal, HC 82424/RS.

[23] HC 82424/RS, summary.

[24] Juliano Zaiden Benvindo, *On the Limits of Constitutional Adjudication: Deconstructing Balancing and Judicial Activism*, Springer-Verlag New York, LLC, August 2010.

Also, the Ellwanger case cannot be used to prove the case for the use of the punitive approach to hate speech in Brazil because of its singularity in relation to Anti-Semitism. As defended by Hernandez: "The singular Brazilian case of Ellwanger was in large measure a successful criminal prosecution of hate speech because of the view that the blatant anti-Semitic Holocaust denial in the case was rare in Brazil. In contrast, the more pervasive anti-black racist speech is viewed as too commonplace to be worthy of criminal prosecution"[25].

The Viradouro Case:

The Ellwanger case resulted in proposals for the express legal prohibition of the dissemination of revisionist speech in Brazil. It also had an impact on other cases involving the topics of Holocaust and Nazism.

In 2008, the samba school Unidos de Viradouro, from Rio de Janeiro, composed the samba-enredo[26] *It causes goose bumps!* (*É de arrepiar*) and prepared a number of allegories referring to spiders, exorcism, electrical chairs, guillotines, and the Holocaust. One of the allegories was composed of a person dressed as Adolf Hitler and a sculpture showing piled corpses and shoes.

After learning about the allegory, the Israeli Federation of Rio de Janeiro filed a petition requesting a judicial order prohibiting its use during the main Rio Carnaval parade. The judge not only issued the order, but also set up a fine of 200,000 Reais (today, approximately 100,000 USD) if the allegory was used, and a fine of 50,000 if any individual member of the school were seen dressed as Aldolf Hitler.

The lack of clear standards in the Ellwager case resulted in a misinterpretation of the protection against hate speech in following cases, especially the need to establish, at a minimum, the intent of promoting (or inciting) discriminatory behaviour and the practice of racism.

Members of the Viradouro samba school took part in the 2008 Caranaval parade using black tapes over their mouths as a protest against this judicial decision, which was considered by the majority of public opinion as straightforward censorship[27].

Tiririca Case

> *When she passes she calls my attention, but her hair, there's no way no. Her catinga [African] (body odor) almost caused me to faint. Look, I cannot stand her odor.*

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[25] Tanya Katerí Hernandez, *Hate Speech and The Language of Racism in Latin America: A Lens for Reconsidering Global Hate Speech Restrictions*, paper presented in the International Law Department of the Organization of American States' Afro-descendants in the Americas Experts Workshop of January 22, 2010, University of Pennsylvania Journal of International Law, Vol. 32:3, p. 834.

[26] A samba addressing a specific theme, where the lyrics are the base for the allegories and costumes used during the Carnaval parade.

[27] See, for example, *Censurada, Viradouro promote 'arrepiar' na Sapucai*, O Estado de Sao Paulo, 3 February 2008.

> *Look, look, look at her hair! It looks like a scouring pad for cleaning pans. I already told her to wash herself. But she insisted and didn't want to listen to me. This smelly negra (Black woman) . . . Stinking animal that smells worse than a skunk. Look at her Hair*[28]

Tiririca is a singer that dresses out as a clown and records songs with poor lyrics and melody. In 1996 he recorded *Look at her Hair,* above, for which he was subject to both criminal and civil lawsuits.

In the criminal lawsuit Tiririca was acquitted. In addition to that, he received significant attention in the media and become an awkward celebrity. Today Titiririca is a federal parliamentarian.

In the civil lawsuit, however, Tiririca was sentenced to compensation for moral damages and collective pain. He was ordered to pay 300,000 Reais (approximately 150,000 USD) that were reverted to a fund for the production of programmes on racism that were disseminated in radio, TV and educational material.

Right of Reply Case

In 2005 the Public Prosecutor's Office filed a civil action against Rede TV! for broadcasting the program *Tardes Quentes,* hosted by Joao Kleber. Under the request of Ministerio Publico, which considered that the programmes had engaged in a number of human rights violations, the Judiciary issued a provisionary order requiring Rede TV! to replace *Tardes Quentes* by another programme till the final decision on the case. Most of the violations concerned the degrading treatment of women and homosexuals and the use of discriminatory speech.

The TV channel did not comply with the order and, one month later, the Federal Court in Sao Paulo ordered the halting of the Rede TV! transmissions. The channel then entered into agreement with the Public Prosecutor's Office to open space in its programming for the broadcasting of 39 productions prepared by civil society groups addressing a number of human rights issues. The productions were broadcasted during a period of 1 month, for one hour, daily. The 39 productions were broadcasted as different chapters of a same programme, named by the group as *Rights of Reply*. The progamme covered diverse issues, from the state of public security in Brazil to sexual identity. *Tardes Quentes* was never broadcasted again.

d. Other Approaches to strengthen the right to equality and freedom of expression

An interesting experience was the organization of a series of public consultations with civil society on several areas of public live. These consultations took the form of National Conferences where civil society organizations, academics and the private sector sat with authorities to assess the situation of different rights and propose

[28] Translation by Hernandez.

recommendations concerning public policies and legal reforms. The recommendations were then considered by the government in setting up governmental plans and projects. Relevant Conferences for the issue of freedom of expression and equality were the National Conferences on Human Rights, the National Conferences on the Promotion of Racial Equality (CONAPIR) and the Conference on Communications (CONFECOM). Among the recommendations that arose from these conferences we should mention:

- Promote the participation of 20% of Afro-Brazilians, indigenous peoples and other ethnicities in TV and radio programmes, including as leading actors or anchors;
- Adopt broadcasting regulations aimed at ensuring pluralism and diversity in the media;
- Establish an independent broadcasting oversight body;
- Decriminalization of community radios operating without license;
- Increased representation of ethnical minorities in advertisement;
- Increased number of black professionals in media companies;
- Promotion of racial equality awareness programmes in Journalism schools.

Civil society organizations and community and public broadcasters have highlighted the role of the media in promoting equality through the valorisation of traditional knowledge, promotion of the significance of indigenous cultures, the history and current status of Afro-descendants and women, among other topics that may have a deep educational and informational role in changing biased ideas and prejudice. The adoption of progressive broadcasting regulations can have a central importance in this process.

Capacity-building programmes have been carried out with journalists to improve coverage of issues touching the topics of inequality, discrimination and human rights. The Code of Ethics for Journalists put together by the National Federation of Journalists (FENAJ) states that it is a duty of journalists, both men and women, to combat the practice of persecution or discrimination on the grounds of social, economic, political, religious, gender, racial, sexual orientation, mental or physical condition or any other grounds.

Those that discriminate very rarely assume their prejudice and some times, according to Afro-descendents activists, do not even realize their racism. This type of prejudice has been targeted by awareness activities by anti-racism groups such as the campaign *Where do you hide you racism?* calling people to reflect on their assumptions and values.

e. Media Legislation and Hate Speech[29]

Unfortunately, some of the interesting and innovative approaches adopted by Brazil

[29] Please see ARTICLE 19's Mission Statement on Brazil, August 2007, 20th Anniversary Publication, 2008 and Access to the Airwaves, 2002, all available at www.article19.org.

when it comes to the right to equality are undermined by a legal and policy framework regarding freedom of expression and the media which is NOT conducive to strengthening the right to equality.

Brazilian researcher Meyer-Pflug[30] suggests that the solution to the challenges imposed by hate speech regarding the conflict between freedom of expression and equality could maybe lay on State measures that do not aim at limiting freedom of expression, but in adopting regulations that promote such freedom. Hate speech prohibition, in itself, does not have the effect of avoiding hate speech, because it actually does not aim at addressing its causes; it merely bans its exteriorization with the objective of avoiding damage to the affected individuals or groups.

State action could provide minority and marginalized groups with improved conditions to express their ideas and arguments and, in that way, take part in the public debate and be enabled to expose thoughts, ideas, and opinions in equal conditions with other members of the society. And citing Owen Fiss[31] on the legitimacy of this type of State intervention: in this case, the goal sought represents a conception of democracy that requires that the freedom of expression of the most powerful will not suffocate and diminish the freedom of expression of the less powerful.

A crucial international standard with regard to freedom of expression is that of pluralism and diversity of the media. The Inter-American Court has held that freedom of expression requires that "the communication media are potentially open to all without discrimination or, more precisely, that there be no individuals or groups that are excluded from access to such media.[32]"

International and regional bodies and courts have also elaborated on the several components of pluralism and diversity, such as the existence of three broadcasting systems (public, private and community), source pluralism, the existence of fully independent regulatory bodies, pluralism of voices, viewpoints and languages within broadcast programming as a whole. In particular, diversity implies the existence of a wide range of independent broadcasters and programming that represents and reflects society as a whole.

In Brazil, the situation unfortunately does not meet these standards.

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[30] Samantha Ribeiro Meyer-Pflug, *Liberdade de Expressão e Discurso do Ódio*, Revista dos Tribunais, 2009, p. 201.

[31] Owen Fiss is Sterling Professor Emeritus of Law and Professorial Lecturer in Law at Yale Law School. Professor Fiss is author of a number of books, including *The Irony of Free Speech, A Community of Equals, A Way Out/America's Ghettos and the Legacy of Racism, Adjudication and its Alternatives* (with Judith Resnik), and *The Law as it Could Be*. Professor Fiss also directs extensive Law School programs in Latin America.

[32] Inter-American Court of Human Rights, Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism (Arts. 13 and 29 American Convention on Human Rights), Advisory Opinion OC-5/85 of November 13, 1985. Series A No. 5, para. 34.

The commercial media (press, broadcasting, new medias) has developed to be disproportionally stronger than public and community sectors, while the principle of public interest broadcasting barely get recognised.

Brazilian Broadcasting is generally considered to consist of mediocre commercial programmes, with excessive advertising.

Racial minorities are poorly represented in the media and by the media. These groups have little opportunity to express their points of view or disseminate news related to their specific interests. Professionals of indigenous and African descent are under-represented in the mass media. Recent research showed that only 5.5 per cent of media professionals are African-Brazilians. Anti-racism activists have denounced the reaffirmation of stereotypes and discriminatory behaviour in *novelas* and humoristic shows, as well as in journalism:

> "Traditionally, Brazilian journalism has presented analysis on themes involving black and indigenous women that are inconsistent, detached from reality or seasonal. It is important to move beyond historical challenges of sub-representation of such groups: non-recognition of their specific demands, the reproduction of stereotypes that are present in the social imaginary about them, and the poor coverage of news with a focus on the problems faced by these groups end up victimizing them. To reach this goal, besides having a media that provides equal treatment to women in general and to black and indigenous women, news rooms must reflect this diversity of gender, race and ethnicity in the hiring of professionals and invest in skilled journalists that will be able to link the implications of racism, sexism and ethnocentrism to the persistency of socio-economic inequalities and inequality in political representation in the country" [33].

Community broadcasting could be explored as an important alternative to give space to these voices, but its operation is undermined by critical challenges. Community broadcasters still face significant obstacles in their operation that vary from lengthy and over-bureaucratic licensing procedures to instances of intimidation and violence. In the city of Sao Paulo, for example, only 2 community radios currently operate with a license. Other 117 have been waiting for a license in a process that began in 2007. A large number of radios is shut down each year for operating without licenses. Broadcasters have accused the police and other authorities of using excessive violence and seizing equipment. Many such broadcasters then face criminal charges. A bill to decriminalize the operation of community radios without licensing is under discussion in Congress and could be approved soon.

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[33] Angélica Basthi, *Guia para Jornalistas sobre Gênero, Raça e Etnia* / Angélica Basthi (organização e elaboração) Brasília: ONU Mulheres; Federação Nacional dos Jornalistas (FENAJ); Programa Interagencial de Promoção da Igualdade de Gênero, Raça e Etnia (Fundo de Alcance dos Objetivos do Milênio, F-ODM), 2011.

Brazil has an embryonic public service broadcasting that needs to be strengthened if it is to play its role and provide a space for the discussion of public interest matters. A public TV channel was launched in 2008 and the goal of setting it up as a true public service broadcast is reflected in the final constitutive document, although the contents/programs have yet be improved. There is no overall nationwide public service broadcasting system.

In order to move away from this state of affairs, it is necessary to carefully design holistic strategies to promote the flourishing of independent and pluralistic broadcasting sectors, including through broadcasting regulations.

For ARTICLE 19, broadcasting regulations must be driven by the public interest and be protected against commercial and government interference. The main guiding principles for regulations in the area must be independency and pluralism. The development of regulatory mechanisms can ensure a more comprehensive approach to develop and uphold media ethics and ensure pluralism and diversity. Regulation in the public interest and within legitimate constraints is a difficult task that will require dialogue, participation and concrete proposals to promote true freedom of expression in the country.

f. Conclusions on the Brazilian case study

When racism is as systemic as it is in Brazil, the main source of racist beliefs stem not from an individual's daily experiences but rather from the racist speech prevalent in public discourse and racially biased media sources. Therefore, traditional hate speech prohibition may not suit this context and may not reach the goal of combating discrimination and inequality. The criminal sanctions, should be limited to a few strictly defined cases only and further attention should be given to developing more positive, pro-active and sustainable solutions that will ensure that African-Brazilians and other groups victims of structural discrimination have equal access to the means of communication to ensure their voices and views are heard, and to address a key aspect for substantive equality. Other Positive measures should also be privileged that ensure that increased and improved information about race, prejudice and traditional superiority beliefs, and debates and dialogues, can play a major role towards changing people's ideas and perceptions about this issue. This does not mean simply letting the "market of ideas" take care of entrenched discriminatory discourse so pervasive in Brazilian's daily lives, but promoting a series of awareness raising, incentives and many other measures adopted as public policies and assumed by the State as part of its obligations under international law, as relates to the right to freedom of expression and information.

4. DETERMINING THE THRESHOLD FOR INCITEMENT

For those cases where the use of criminal liability is indeed to be considered, a clear threshold must be established.

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."[34]

  - ***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 and fundamental freedoms in the political, economic, social, cultural or any other field of public life.[35]

  - ***Violence*** shall be understood as the intentional use of physical force or power against another person, or against a group or community that

[34] Camden Principles on Freedom of Expression and Equality, ARTICLE 19, Principle 12.1.
[35] The definition of discrimination is adapted from the definitions of discrimination in the CEDAW and ICERD.

either results in or has a high likelihood of resulting in injury, death, psychological harm, mal-development, or deprivation.[36]

- ***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"[37]. 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."*[38]

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.[39]
>
> 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

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[36] 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.

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

[38] Communication No 736/1997.

[39] Ross v. Canada, No. 736/1997.

this extent that Article 20 may be considered as *lex specialis* with regard to Article 19. (paras 52-53)"

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." [40]
- 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.[41] 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.[42]

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

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

[41] *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.

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

5. Likelihood or probability of action
6. Imminence
7. Context

These tests should be reviewed and applied in the order as follows:[43]

TEST ONE - Severity

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"[44] 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[45] 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,[46] 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

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[43] 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

[44] 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

[45] See above, section 3, part e.

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

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).
- **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.[47]

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.[48] Another man, Supriyanto was also convicted for sending text messages to take part in the same attack.[49] 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 of a result prohibited under law will have to be established on case-by-case basis, but the following criteria should be considered:[50]

- 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

[47] *Jones v Toben,* [2002] FCA 1150, September 2002.
[48] The Jakarta Globe, "Indonesian Cleric Gets One-Year Sentence for Church Attacks ", 14 June 2011.
[49] 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.
[50] Adapted from Susan Bensch "reasonably possible consequences test" for incitement to genocide"

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."[51]

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?
- **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.

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

- 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.

5. CONCLUSIONS

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."[52]

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.

Proposal for the threshold tests for Article 20 of the ICCPR

Level of protection	Severity	Intent	Content	Extent	Likelihood/ Probability	Imminence	Context

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

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.[53] 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'?

[53] 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.[54] In order to combat national, racial and religious hatred, we must guarantee the ability to exercise freedom of expression for all.[55]

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[56] 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.

[54] 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.
[55] Outcome Document of the Durban Review Conference, 23 November 2008.
[56] See: http://www.article19.org/advocacy/campaigns/camden-principles/index.html

ANNEX 1[57]

Argentina
- Law No. 23.592, art. 3
Punishing the dissemination of propaganda touting the superiority of a race, color or ethnic group, and the act of inciting the hatred against persons based on their race or ethnic origin with three months to three years of imprisonment.

Bolivia
- Penal Code art. 281
Punishing the dissemination of ideas through whatever medium that justify racial subordination or incite racial hatred with ten to fifteen years of imprisonment.
- Law Against Racism and All Forms of Discrimination, art. 16 (Sept. 10, 2010)
Punishing the public incitement towards racial hatred or racial defamation with two to four years of imprisonment.

Brazil
- Law No. 7716, art. 20, as amended by Lei No. 8081/90
Prohibits "acts of discrimination and prejudice carried out by means of communication or publication of any nature" with 1 to 3 years imprisonment and a fine.

Costa Rica
- Law No. 7711, art. 2 & 4 (Oct. 8, 1997) Law for the Elimination of Racism in Educational Programs and Collective Mediums of Communication
Mandating that when publications refer to issues of race, color, and ethnic origin, that they do so respecting the principles of respect, dignity and equality for all human beings.

Cuba
- Penal Code art. 295
Criminalizes those who "disseminate ideas based on racial superiority or racial hatred" in addition to criminalizing "those who commit a violent act or incite others to commit one against any race, ethnic group, or group of a different color".

Ecuador
- Penal Code art. 212.4
Criminalizes those who through whatever medium, diffuse ideas based on racial superiority or racial hatred.

Guatemala
- Penal Code Decree 17-73
Punishing racial insults.

Mexico

[57] Hernandez, p. 380.

- Law for the Prevention and Elimination of Discrimination, art. 9, para. XV
Prohibiting racially offensive messages and images in mediums of communication.

Peru
- Penal Code art. 323
Punishing discriminatory speech or action with two to three years imprisonment, and four years where mental or physical abuse or discrimination by a public employee is involved.

Venezuela
- Penal Code art. 286
Outlaws "he who publicly incites hatred against other inhabitants" and imposes a sanction of 45 days to 6 months of imprisonment).

Uruguay
- Penal Code
Art. 149.2
Punishes whoever publicly or by any means suitable for dissemination incites any person to racial hatred or contempt or any form of racial "moral" [non-bodily] violence with imprisonment of between 3 and 18 months.
Art. 149.3
Punishes whoever commits an act of moral [non-bodily] racial violence with imprisonment of between six and twenty-four months.