



**Towards an interpretation of article 20 of the ICCPR:  
Thresholds for the prohibition of incitement to hatred  
Work in Progress**

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# Thresholds for the prohibition of incitement to discrimination, hostility or violence under Article 20 of the ICCPR

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## INTRODUCTION

This paper<sup>1</sup> offers a brief comparative approach to forms of expression that are considered to be “incitement” under national law and by regional human rights systems, notably the European human rights system. This paper will then propose a threshold for expression that meets the criteria of Article 20 of the ICCPR.

## RELEVANT 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.

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<sup>1</sup> This paper was researched and drafted by Barbora Bukovska, Agnes Callamard and Sejal Parmar. It relies on research and internal documents drafted by a number of ARTICLE 19 staff members over the last ten years.

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 incitement. 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.<sup>2</sup>

### **“INCITEMENT” IN EUROPE: BRIEF COMPARATIVE OVERVIEW**

The *European Convention on Human Rights* (ECHR),<sup>3</sup> provides for non-discrimination in the enjoyment of rights, respectively at Articles 14, 1 and 2. It also guarantees the right to freedom of expression, under Article 10. However, European laws and jurisprudence related to incitement may be best characterised as:

- A patchwork: there are significant variations across countries in how incitement and advocacy of hatred under the law are approached and defined, and in how these concepts are applied;
- Uneven and inconsistent: The patchwork’s variations generate significant inconsistencies in law and approach both across the region and even within countries.
- In case law and in judgements, the legal reasoning deployed often appears vague, ad hoc and possibly lacking in conceptual discipline or rigour.

#### **1. A patchwork of concepts, approaches and interpretations**

The wording of article 20 of the ICCPR is rarely, if ever, found enshrined in domestic legislation. Indeed, some domestic laws fail to refer to “incitement” as such, using comparable terms such as “stirring up” (the UK), “provocation” (Spain) or “threatening speech” (Denmark). The absence of reference to “incitement” in domestic legislation suggests that states are either unwilling to take on the language of the ICCPR’s Article 20 or are simply ignorant of it. The lack of reference to Article 20 of the ICCPR by state authorities (including by the judiciary) of States parties to the ICCPR, or their ignorance of these provisions, does provide potentially a significant hurdle to the effective implementation of a consistent threshold in relation to “incitement” in the first instance.

- **The grounds for hatred**

In many European countries’ jurisdictions, the term “hatred” generally covers racial, national and religious hatred and in the same manner. It often also covers hatred on the grounds of sex, sexual orientation, political convictions, language, social status or physical or mental disability.

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

<sup>3</sup> [Adopted 4 November 1950, entered into force 3 September 1953.](#)

The Spanish Criminal Code of 1996, for instance, defines the grounds for “incitement” in its Article 510<sup>4</sup> as being: “Those who provoke discrimination, hatred or violence against groups or associations for racist, anti-Semitic or other reasons regarding ideology, religion or beliefs, family status, ethnic, race or national origin, gender, sexual orientation, illness or physical, will be punished with one to three years in prison and a fine equivalent to six to twelve months’.

In Ireland, the Prohibition of Incitement to Hatred Act 1989, prohibits words or behaviours which are “threatening, abusive or insulting and are intended or, having regard to all the circumstances, are likely to stir up hatred” against “a group of persons in the State or elsewhere on account of their race, colour, nationality, religion, ethnic or national origins, membership of the travelling community or sexual orientation.”<sup>5</sup>

While otherwise similar in scope, in Georgia, Malta, Slovakia and the former Yugoslav Republic of Macedonia, religion is not specifically seen as a ground for hatred.

**The UK “Pen Clause”:** The UK adopts a differentiated model for the prohibition of incitement and has an express guarantee of freedom of expression in legislation on hate speech on the grounds of religion. Part 3 of the Public Order Act 1986 prohibits expressions of racial hatred, which is defined as hatred against a group of persons by reason of the group’s colour, race, nationality (including citizenship) or ethnic or national origins. The Racial and Religious Hatred Act 2006 inserted into the 1986 Public Order Act a new part 3A which is entitled “Hatred against persons on religious grounds”. Religious hatred is defined as “hatred against a group of persons defined by reference to religious belief or lack of religious belief”.<sup>6</sup> Unlike racial hatred, the actus reus (external element of the crime) of the offence is confined to “threatening” words or behaviour and does not include those which were merely abusive or insulting. Unlike laws governing racial hatred, it is not sufficient that religious hatred is likely to be stirred up. The speaker must have intended his speech to produce that effect.<sup>7</sup> Notably, the scope of the act is circumscribed by the following provision which protects freedom of expression:

*Nothing in this Part shall be read or given effect in a way which prohibits or restricts discussion, criticism or expressions of antipathy, dislike, ridicule, insult or abuse of particular religious or beliefs or practices of their adherents, or of any other belief system or the beliefs or practices of its adherents, or proselytising or urging adherents of a different religion or belief system to cease practising their religion or belief system.*<sup>8</sup>

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<sup>4</sup> 1. Los que provocaren a la discriminación, al odio o a la violencia contra grupos o asociaciones, por motivos racistas, antisemitas u otros referentes a la ideología, religión o creencias, situación familiar, la pertenencia de sus miembros a una etnia o raza, su origen nacional, su sexo, orientación sexual, enfermedad o minusvalía, serán castigados con la pena de prisión de uno a tres años y multa de seis a doce meses. 2. Serán castigados con la misma pena los que, con conocimiento de su falsedad o temerario desprecio hacia la verdad, difundieren informaciones injuriosas sobre grupos o asociaciones en relación a su ideología, religión o creencias, la pertenencia de sus miembros a una etnia o raza, su origen nacional, su sexo, orientación sexual, enfermedad o minusvalía.

<sup>5</sup> Articles 2 and 1 of the Prohibition of Incitement Act 1989

<sup>6</sup> Paragraph 29A of the Racial and Religious Hatred Act 2006

<sup>7</sup> The provision which the Act inserts in the 1986 Act now reads: “29B(1) A person who uses threatening words or behaviour, or displays any written material which is threatening, is guilty of an offence if he intends thereby to stir up religious hatred.”

<sup>8</sup> Paragraph 29J of the Racial and Religious Hatred Act 2006.

- **Variety of conducts**

The term incitement in various jurisdictions can encompass the variety of conducts beyond the direct calls to engage in act of violence, discrimination or hostility as proscribed by Article 20. These may include:

- praises for acts already committed (e.g. Holocaust)
- display of symbols (e.g. swastika)
- support for certain actions (e.g. capture all Muslims and expel them from the country)
- distribution of materials
- calling offensive names of certain groups (e.g. Nigger)
- vilification.

## **2. An Overbroad Interpretation**

ARTICLE 19's review of case laws reaches a conclusion similar to that which the Human Rights Committee recently highlighted in its draft General Comment No 34 on Article 19 of the ICCPR:

*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 on incitement 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 in relation to speech targeting vulnerable groups and speech by Holocaust deniers, as the examples of Germany and Denmark illustrate. While ARTICLE 19 does not deny that the speech in these cases was hurtful, offensive and even in some cases inflammatory, we do not believe that it should pass the threshold of Article 20 of the ICCPR. ARTICLE 19 believes though that this overbroad use highlights an absence of alternative options to criminal law and the failure of the legal and political systems to provide for other courses of action.

## **3. The European Court: a lost opportunity for guidance?**

As there is no provision equivalent to Article 20 ICCPR in the ECHR banning hate speech, the European Court of Human Rights is not directly tasked with assessing whether statements qualify as "incitement". However, the Court has held that certain comments do *not* constitute hate speech but have done so without defining the precise meaning of "hate speech".<sup>9</sup> The Court

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<sup>9</sup> See *Dağtekin v. Turkey* Application No 36215/97, judgment of 13 January 2005; *Gümüş and Others v. Turkey* Application No 40303/98, judgment of 15 March 2005; *Han v Turkey* 50997/99 judgment of 15 September 2005; *Koç and Tambaş v. Turkey* Application No 50934/99 judgment of 21 March 2006; *Düzgören v. Turkey* Application

has sometimes excluded complaints concerning the most extreme forms of expression<sup>10</sup> as well as Holocaust-denial speech from the scope of Article 10 ECHR altogether, by relying on Article 17 of the ECHR which stipulates that the rights guaranteed by the Convention may not be interpreted as granting the right to engage in any activity aimed at the destruction of any of the rights it proclaims, or at limiting them further than is provided for in the ECHR.<sup>11</sup>

In its jurisprudence on extreme forms of expression, the Court has employed a case-by-case approach. This suggests that whenever the Court is confronted with a clearly racist, xenophobic or Holocaust denial type of speech, it refuses to apply the guarantees of Article 10(1).

If on the other hand, the Court entertains any doubts as to the hatred-related aspects of the impugned speech, it applies the test strictly and thoroughly examines the type of speech in issue as well as the context in which it was formulated Article 10(2).<sup>12</sup> In some cases, Article 10 has been found to apply to racist expression, and Article 17 has been simply referred to as an additional reason for holding the interference to be “necessary in a democratic society”.<sup>13</sup>

The Court’s approach also shows inconsistencies towards speech that may risk offending religious believers. For example, the Court has accepted an exemption to freedom of expression based on the protection of the religious feelings of believers in cases such as *Otto-Preminger Institute v Austria*,<sup>14</sup> *Wingrove v UK* and<sup>15</sup> *IA v Turkey*.<sup>16</sup>

## **A THRESHOLD FOR INCITEMENT UNDER ARTICLE 20 OF THE ICCPR: ARTICLE 19’s PROPOSAL**

While ARTICLE 19 has not been in a position to review all case law regarding incitement across all European countries, the proposal below is based on a study of case laws across a dozen European countries, and the European Court jurisprudence. We have also considered the jurisprudence in Canada and Australia and of the Human Rights Committee.

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No 56827/00 judgment of 9 November 2006; *Ulusoy v. Turkey* Application No 52709/99 judgment of 31 July 2007; *Birdal v. Turkey* Application No 53047/99 judgment of 2 October 2007.

<sup>10</sup> *Norwood v UK* Application No 23131/03, judgment of 16 November 2004.

<sup>11</sup> *Refah Partisi (the Welfare Party) and Others v Turkey*, judgment of the Grand Chamber of 13 February 2003, Application Nos 41340/38, 41342/98, 41343/98, 41344/98, paras 86-89.

<sup>12</sup> Mario Oetheimer, “Protecting Freedom of Expression: the Challenge of Hate Speech at the European Court of Human Rights”, Strasbourg 2006; “La Court Européenne de Droits de L’Homme Face Au Discours de Haine” (2007) *Revue Trimestrielle des Droits de L’Homme* 63-80.

<sup>13</sup> For example, *Kühnen v Germany*, 12 May 1988, Application No 12194/86; *H, W, P and K v Austria*, 12 October 1989, Application No 12774/87.

<sup>14</sup> Application No 13470/87 judgment of 20 September 1994, (1995) 18 EHRR 34. In this case, Austria’s censorship of a satirical film that mocked Christian religious beliefs was upheld by the Court, which based its decision on the absence of a European consensus on the regulation of religious speech.

<sup>15</sup> Application No 13470/87 judgment of 25 November 1996, (1997) 24 EHRR 1. The Court deferred to the state in relation to a video “Visions of Ecstasy” which was said to constitute blasphemy. The Court held that “a wider margin of appreciation is generally available to Contracting States when regulating freedom of expression in relation to matters liable to offend intimate personal convictions within the sphere of morals, or especially, religion.” See paragraph 58.

<sup>16</sup> Application No 42571/98 judgment of 13 September 2005, (2007) 45 EHRR 30. The Court held that there was no violation in the case of a conviction for blasphemy for the publication of novel, *Forbidden Phrases*, which contained a section on the Prophet Muhammad.

In presenting this proposal, Article 19 seeks to offer possible alternatives to the current mishmash of approaches; alternatives that would uphold the Article 20 of the ICCPR. The following elements are set out in sufficient detail to convey their potential utility to a more robust legal standard relevant to hate speech. Although not presumed to be complete or comprehensive, the following are intended to convey both the need for and the possibilities of greater systematization.

**a) Overarching key principles.**

In this first instance ARTICLE 19 submits that the legal framework and jurisprudence 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. However, this 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 legislation is supposed to implement Article 20 of the ICCPR.

- **Robust definition of key terms**

In this context, 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.”<sup>17</sup>
- ***Discrimination*** shall be understood as any distinction, exclusion, restriction or preference based on race, gender, ethnicity, religion or belief, disability, age, sexual orientation, language political or other opinion, national or social origin, nationality, property, birth or other status colour, which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life<sup>18</sup>.
- ***Violence*** shall be understood as the intentional use of physical force or power against another person, or against a group or community that either results in or has a high likelihood of resulting in injury, death, psychological harm, maldevelopment, or deprivation.<sup>19</sup>
- ***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”<sup>20</sup>. The concept has received scant

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<sup>17</sup> Camden Principles on Freedom of Expression and Equality, ARTICLE 19, Principle 12.1.

<sup>18</sup> The definition of discrimination is adapted from the definitions of discrimination in the CEDAW and ICERD.

<sup>19</sup> 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 [http://whqlibdoc.who.int/publications/2002/9241545623\\_eng.pdf](http://whqlibdoc.who.int/publications/2002/9241545623_eng.pdf).

<sup>20</sup> Camden Principles on Freedom of Expression and Equality, ARTICLE 19, Principle 12.1.

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**

As a restriction to freedom of expression, any incitement-related restriction should conform to the three part test provided under article 19 (3) of the ICCPR and article 10 of the ECHR.

There is strong coherence between articles 19 and 20 of the ICCPR, as is highlighted by the Human Rights Committee and the European Court. In *Ross v Canada*, the HRC recognised 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.*”<sup>21</sup>

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:

*are 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.*<sup>22</sup>

*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)*

The European Court of Human Rights also supports this approach. For instance, in *Lehideux and Isorni v. France*, [...] the Court [...] noted that the Commission had, in that case, held that Article 17 could not prevent the applicants from relying on Article 10, which protects freedom of expression in terms similar to Article 19 of the ICCPR. The Court implicitly agreed as it analysed the case through the filter of Article 10, albeit interpreted in accordance with Article 17.<sup>23</sup>

*This again suggests close legal proximity between what may be required to protect the rights of others and what is permitted as a restriction on freedom of expression. Similar accommodation between these two interests is found in the Council of Europe Recommendation on Hate Speech, which refers to instances of hate speech which do not*

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<sup>21</sup> Communication No 736/1997.

<sup>22</sup> *Ross v. Canada*, No. 736/1997.

<sup>23</sup> 23 September 1998, Application No. 24662/94, paras. 34-35. Article 19 rules out reliance on rights to justify actions which are aimed at the destruction or undue limitation of the human rights of others



*enjoy the protection of Article 10, because they are aimed at the destruction of rights and freedoms recognised by the ECHR, that is, which breach Article 17.*<sup>24</sup>

The implication is that for an incitement-related restriction to be legitimate, it must 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<sup>25</sup>.”
- 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.<sup>26</sup> 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.<sup>27</sup>

Applying this three part test, the European Court has repeatedly asserted that “*Freedom of expression ... is subject to a number of exceptions which, however, must be narrowly interpreted and the necessity for any restrictions must be convincingly established*<sup>28</sup>” and that speech that “offends, shocks or disturbs” is protected.<sup>29</sup>

Application of this “three part test” has an essential part to play in building a more coherent and cohesive legal framework; a framework in which freedom of speech is respected, protected and upheld while allowing for the legitimate and need restrictions that are needed to limit incitement to hatred.

### **c) The Threshold Test**

ARTICLE 19 further recommends that a robust, codified threshold to be passed before speech is deemed “hate speech” – is essential for the promotion of coherent legislation and sound international, regional and national jurisprudence in this area.

Designed to give courts a framework for explaining how they draw the line between 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 are constitutive to incitement as part of article 20 of the ICCPR. They should be reviewed and applied in the order presented as follows:

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<sup>24</sup> Recommendation R(97)20 of the Committee of Ministers of the Council of Europe on ‘Hate Speech’, 30 October 1997, Appendix, Principle 4.

<sup>25</sup> *The Sunday Times v. United Kingdom*, 26 April 1979, Application No. 6538/74, para. 49 (European Court of Human Rights).

<sup>26</sup> *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.

<sup>27</sup> *Lingens v. Austria*, 8 July 1986, Application No. 9815/82, paras. 39-40 (European Court of Human Rights).

<sup>28</sup> *Thorgeirson v. Iceland*, 25 June 1992, Application No. 13778/88, para. 63.

<sup>29</sup> *Handyside v. United Kingdom*, Application No 5493/72, judgment of 7 December 1976, Series A no 24, 1 EHRR 737.

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

### **TEST ONE - Severity**

So that it is drawn in law as a narrowly confined offence, rather than, as is currently the case in the European context, an offence that is resorted to on a too frequent a basis, 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”<sup>30</sup> to meet the threshold of severity.

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**

The majority of states under consideration recognise intent or intention as one of the defining elements of incitement. In the UK (in relation to religious speech), in Ireland and in Canada the criterion of intention is a specific and necessary element of the legislation.

For example, it is a defence under the Irish Prohibition of Incitement Act 1989 for the accused to show they had not intended to stir up hatred or not have been aware that the words, behaviour or material concerned might be threatening, abusive or insulting.<sup>31</sup>

Intention to stir up hatred is also a necessary element of the offence of incitement in states such as Cyprus, Ireland, Malta and Portugal.<sup>32</sup>

In its case-law, the European Court has paid specific attention to the original intention of the author of the statement, including whether it was intended to spread racist or intolerant ideas through the use of hate speech or whether there was an attempt to inform the public about an issue of general interest. This in turn may determine whether the impugned speech falls within

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<sup>30</sup> 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

<sup>31</sup> Section 2 of the Prohibition of Incitement to Hatred Act 1989.

<sup>32</sup> Section 47.2 of the Criminal Code (Cyprus); Section 2 of the Prohibition of Incitement Act 1989 (Ireland); Paragraph 82A.1 Criminal Code (Malta); Article 240 of the Criminal Code/Law Number 65/98 (Portugal).

the scope of Article 10, or is so destructive of the fundamental values of the Convention system that it is excluded from the protection of the Convention on the basis of Article 17.<sup>33</sup>

For example, the case of *Jersild v. Denmark*<sup>34</sup> involved a journalist who had been convicted in Denmark in relation to a television programme that included hate speech statements by racist extremists, albeit with a view to exposing the problem and generating public debate (the racists were also convicted by the Danish courts). The Court held that his conviction was not a proportionate means of protecting the rights of others when the speech occurred within the context of a factual programme about the holding of racist opinions, even though the applicant had solicited such racist contributions and had edited them to give prominence to the most offensive. The lack of racist intent was the central consideration for a finding in favour of the journalist.

[A]n important factor in the Court's evaluation will be whether the item in question, when considered as a whole, appeared from an objective point of view to have had as its purpose the propagation of racist views and ideas.<sup>35</sup>

*The Faurisson v. France*<sup>36</sup> case about a claim that a hate speech conviction for statements of Holocaust denial represented a breach of the right to freedom of expression, also demonstrates that intent is required for hate speech rules to be compatible with freedom of expression. Although the law under which Faurisson was convicted was potentially problematical because it did not require intent, in the particular circumstances of the case intent was present, and thus the conviction was not a breach of the right to freedom of expression.<sup>37</sup>

It is worth noting that in a minority of European states, a threshold lower than intent, such as recklessness, is considered as sufficient to demonstrate incitement. For example, in Norway, the offence of incitement to hatred may be committed willingly or through gross negligence.<sup>38</sup> 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 intentional action.

In order for the protection to be enforceable, in the absence of guilty plea, the courts can determine intent from various sources. The courts can look at questions such as how explicit was the language used or whether the language was direct without being explicit. They can and should consider the tone of the speech and the circumstances in which it was disseminated.

Intent can be also determined from the scale and repetition of the communication (e.g. if the inciter repeated the communication over time or on several occasions, it might be more likely that there was an intent to incite the action). However, if the court can identify a legitimate objective (such as "historical research, the dissemination of news and information, and the public

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<sup>33</sup> *Jersild v Denmark*, judgment of 23 September 1994, Application No 15890/89 para 35. See also *Garaudy v France*, 24 June 2003, Application No 65831/01.

<sup>34</sup> 22 August 1994, Application No. 15890/89.

<sup>35</sup> Para. 31. Cited in Toby Mendel, Study on International Standards Relating to Incitement to genocide or Racial Hatred, a study for the UN Special Advisor on the prevention of Genocide, April 2006

<sup>36</sup> 8 November 1986, Communication No. 550/1993, paras. 9.6-9.7.

<sup>37</sup> Mendel, 2006

<sup>38</sup> Paragraph 135(a) of the Criminal Code.

accountability of government authorities”) for the speech, other than to incite to discrimination, hostility or violence, then the speech should fall short of the threshold.<sup>39</sup>

### **TEST THREE - Content or form of the Speech**

The content of the speech constitutes one of the key foci of the court’s deliberations and is a critical element of incitement. 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, etc.

The European Court has emphasised the importance of distinguishing between publications that exhort the use of violence, which are properly categorised as “hate speech”, and those that simply offer a genuine critique on a matter of public interest.<sup>40</sup>

In *Gündüz v Turkey (No 1)*, for example, the Court considered that the applicant’s comments, which attacked contemporary Turkish institutions from an Islamic perspective, were not in reality “hate speech” based on religious intolerance.<sup>41</sup> The particular style employed was simply not inciting.

In other hate speech cases, the Court has looked closely at the material at issue to ensure that it does indeed contain racial or religious hate speech.<sup>42</sup> In one of these cases, *Incal*, the Court specifically stated:

[I]t cannot be ruled out that such a text may conceal objectives and intentions different from the ones it proclaims. However, as there is no evidence of any concrete action which might belie the sincerity of the aim declared by the leaflet’s authors, the Court sees no reason to doubt it.<sup>43</sup>

In the *Jersild* case, the Court placed some reliance on the fact that the applicant had made an attempt to indicate that he did not support these statements, although he did not specifically counterbalance them. For example, he introduced the discussion by relating it to recent public debates about racism, described the interviewees as “a group of extremists” and even rebutted some of the statements.<sup>44</sup>

The European Court has also condemned speech which is seen as a genuine threat to pluralism, one of the fundamental values of the Convention. In *Norwood v UK*, the hate speech at issue

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<sup>39</sup> Analogy to analysis of Media Cases at the ICTR in Gregory S. Gordon, “*A War of Media, Words, Newspapers, and Radio Stations*”: *The ICTR Media Trial Verdict and a New Chapter in the International Law of Hate Speech*, 45 VA. J. INT’L L. 139, 150 (2004-2005).

<sup>40</sup> *Ergin v Turkey* (No 6), judgment of 4 May 2006, Application No 47533/99 at para 34. *Otto-Preminger-Institut v Austria* judgment of 20 September 1994, Application No 13470/87, para 49.

<sup>41</sup> *Gündüz v Turkey*, judgment of 4 December 2003, Application No 35071/97, para 51.

<sup>42</sup> See for example, *Ceylan v Turkey*, judgment of 8 July 1999, Application No 23556/94 and *Karkin v Turkey*, judgment of 23 September 2003, Application No 43928/98.

<sup>43</sup> Para. 51.

<sup>44</sup> Paras. 33-34.

“was incompatible with the values proclaimed by the Convention, notably intolerance, social peace and non-discrimination.”<sup>45</sup>

In *Lehideux v France*, the European Court, while noting the biased nature of the impugned statements regarding wartime France, also held that the applicants had explicitly disapproved of Nazi atrocities.<sup>46</sup> The Court explained that the demands of “pluralism, tolerance and broadmindedness” in a democratic society were such that a debate on matters of history must be permitted despite the memories it might bring back of past sufferings and the controversial role of the Vichy regime in the Nazi Holocaust.<sup>47</sup> In such cases, the Court has emphasised the importance of restricting speech where the aim of that speech is to incite hatred towards a particular group along racial or national lines and where it constitutes a genuine threat to public order.<sup>48</sup>

Absent a direct threat to order, even extreme views on a matter of serious public interest – such as the practices of the Church – deserve protection. An insult to a principle or dogma or a representative of a religion does not necessarily incite to hatred against individual believers of that religion. The Court has made clear that an attack on a representative of the church does not automatically discredit and disparage a sector of the population on account of their faith in the relevant religion, and that criticism of a doctrine does not necessarily contain attacks on religious beliefs as such.<sup>49</sup>

This confirms that when assessing the severity of speech, 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. Critically, “any interference with an artist’s right to such expression must be examined with particular care”.<sup>50</sup>

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

- **Magnitude or intensity:** in order to qualify as an incitement, the speech would have to reach a certain level of 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 degree to which the speech involved advocacy is relevant. Advocacy is present when there is a direct call for the audience to act in a certain way. The Court should consider whether the speech specifically calls for violence, hostility or discrimination. A call to such action which is unambiguous in as far as the intended

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<sup>45</sup> *Norwood v UK*, judgment of 16 November 2004, Application No 23131/03.

<sup>46</sup> Para. 53.

<sup>47</sup> *Lehideux v France*, judgment of 23 September 1998, Application No 24662/94, para 55.

<sup>48</sup> *Norwood* and *Garaudy* above.

<sup>49</sup> *Klein v Slovakia*, judgment of 31 October 2006, Application No 72208/01 paragraph 51; *Giniewski v France*, judgment of 31 January 2006, Application No Application No 64016/00, para 51.

<sup>50</sup> ECtHR decision in *Vereinigung Bildener Künstler v Austria*, judgment of 25 January 2001, Application No 68354/01 at para 33.

audience is concerned and could not be interpreted in other fashion would suggest the possible presence of incitement under article 20.

- **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 opinion expressed and the taking of action based on that opinion may also be relevant under this test.
- **The inciter** themselves 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. According to the Venice Commission, one of the elements to be considered in deciding if a given statement constitutes an insult or amounts to hate speech is whether the statement was made by a person in his or her official capacity, in particular if this person carries out particular functions. With respect to a politician, the Strasbourg Court has underlined that “it is of crucial importance that politicians in their public speeches refrain from making any statement which can provoke intolerance.”<sup>51</sup>

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

For the majority of the Council of Europe’s member states, the incitement to hatred, to be found, must have occurred in public.<sup>52</sup> ARTICLE 19 agrees with this approach.

We emphasize that 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.

As highlighted by the Venice Commission, a factor which is relevant is whether the statement (or work of art) was circulated in a restricted environment or widely accessible to the general public, whether it was made in a closed place accessible with tickets or exposed in a public area. The circumstance that it was, for example, disseminated through the media bears particular importance, in the light of the potential impact of the medium concerned. It is worth noting in this respect that “it is commonly acknowledged that the audiovisual media have often a much more immediate and powerful effect than the print media; the audiovisual media have means of conveying through images meanings which the print media are not able to impart.”<sup>53</sup>

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*, the Australian Federal Court ruling that publication on the Internet without password protection is a “public act,” found that posting this material online was in direct violation of Section 18C of the Racial Discrimination Act 1975 and called for the material to be removed from the Internet. Jeremy Jones and the Executive Council

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<sup>51</sup> Venice Commission, Op.cit. October 2008 [http://www.venice.coe.int/docs/2008/CDL-AD\(2008\)026-e.pdf](http://www.venice.coe.int/docs/2008/CDL-AD(2008)026-e.pdf)

<sup>52</sup> Exceptions to this include Albania, Estonia, Malta, Moldova, Montenegro, the Netherlands, Poland, Serbia, Slovenia and Ukraine, and the United Kingdom with the exception of one’s private dwelling).

<sup>53</sup> Venice Commission, Op cit.

of Australian Jewry brought a lawsuit against Frederick Toben, the director of the Adelaide Institute, because of material on Toben's Web site that denied the Holocaust.

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 several states – such as Armenia, Bosnia and Herzegovina, Latvia, Montenegro, Serbia, Slovenia, Ukraine – the fact that incitement to hatred has actually provoked violence constitutes an aggravating circumstance.

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.

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:<sup>54</sup>

- 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?

In at least one case involving allegations of hate speech, the European Court of Human Rights found in fact that there was a breach of the right to freedom of expression on the basis that the impugned statements did not create an actual risk of harm. In *Erbakan v. Turkey*, the Court stated:

[I]t was not established that at the time of the prosecution of the applicant, the impugned statements created an “actual risk” and an “imminent” danger for society ... or that they were likely to do so.<sup>55</sup>

As is noted by Toby Mendel<sup>56</sup>, a series of hate speech cases that were rejected by the European Commission and Court of Human Rights as inadmissible also included a focus on impact. Although most provided little in the way of reasoning to substantiate their claims of impact, most made reference to either Article 14 of the ECHR, which protects the enjoyment, without discrimination, of the rights set out in the Convention, or Article 17, which prohibits the use of a right in a way which is aimed at destroying or limiting other rights. The logical conclusion of

<sup>54</sup> Adapted from Susan Bensch “reasonably possible consequences test” for incitement to genocide”

<sup>55</sup> *Erbakan v. Turkey*, 6 July 2006, Application No. 59405/00, para. 68. Un-official translation from the original French: “il n'est pas établi qu'au moment de l'engagement des poursuites à l'encontre du requérant, le discours incriminé engendrait « un risque actuel » et un danger « imminent » pour la société (paragraphe 48 ci-dessus) ou il était susceptible de l'être.

<sup>56</sup> Based on Toby Mendel, Study on International Standards Relating to Incitement to genocide or Racial Hatred, a study for the UN Special Advisor on the prevention of Genocide, April 2006

this argumentation was that the statements in question would be likely to undermine other rights, in particular equality.<sup>57</sup> In some cases, the Commission or Court referred to the likelihood of the impugned statements fostering anti-Semitism.<sup>58</sup> In others, the negative impact of the statements on the underlying Convention objectives of justice and peace was noted.<sup>59</sup>

*From the perspective of freedom of expression, causality in this sense is very important... Restrictions on freedom of expression, which are not effective in promoting the legitimate aim they purport to serve, cannot be justified. If certain statements are not likely to cause a proscribed result – whether it be genocide, other forms of violence, discrimination or hatred – penalising them will not help avoid that result and hence cannot be said to be effective. If on the other hand, a sufficient degree of causal link or risk of the result occurring can be established between the statements and the proscribed result, penalising them may be justifiable.<sup>60</sup>*

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

### **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 draw any general conclusions from the case law about what sorts of contexts are more likely to promote the proscribed result, although common sense may supply some useful conclusions. Indeed, it sometimes seems as though international courts rely on a sample of contextual factors to support their decisions rather than applying a form of objective reasoning to deduce their decisions from the context. Perhaps the impossibly broad set of factors that constitute context make this inevitable.<sup>61</sup>*

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<sup>57</sup> See *Glimmerveen; B.H., M.W., H.P. and G.K; Kühnen; Ochensberger; Remer and Garaudy.*

<sup>58</sup> See *Kühnen and Garaudy.*

<sup>59</sup> See *Remer; Nationaldemokratische Partei Deutschlands and Garaudy*

<sup>60</sup> Toby Mendel, p.50

<sup>61</sup> Toby Mendel, Study on International Standards Relating to Incitement to Genocide or Racial Hatred (2006).



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.

In *B.H., M.W., H.P. and G.K.*, a 1989 case, for example, the European Commission of Human Rights referred to Austria's Nazi past as justifying convictions for "performing acts inspired by National Socialist ideas". Those acts included publications denying the Holocaust and promoting the idea that people should be differentiated on the basis of biological and racial distinctions.

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, etc; 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 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.
- 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.

## CONCLUSION

It is ARTICLE 19's contention that all of the tests we have outlined 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 chart below).

- **Court case and process**

ARTICLE 19 recommends that Courts consider a range of sources when assessing incitement to hatred cases. 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.

- **Importance of judicial training on incitement under Article 20**

It is ARTICLE 19's opinion, that 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.<sup>62</sup> 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.

- **Positive obligations of states to promote equality, diversity and pluralism**

The prosecution of cases under incitement to hatred legislations is only one element of the state's responsibilities in this arena. 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 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

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<sup>62</sup> Venice Commission, above at 30.

not meet the threshold of severity requested by article 20, provided they remain within the scope of article 19 (three part test) and proportionate.

We also wish to highlight a 2008 initiative by the French National Assembly, as part of the work of a mission of inquiry (*Mission d'information sur les questions mémorielles*) on memory laws. The official report recommended that no new laws on 'historical truth' and memory should be adopted. The report indicated that it is not the role of Parliament to adopt laws which, in effect, pre-judge the relative importance or value of historical facts, particularly when such laws include criminal sanctions. Most importantly, is the broad and all-encompassing process that was adopted, allowing for a variety of persons and individuals to be heard and for a large number of proposals to be made to remember and celebrate a country's past without having recourse to criminal sanctions.

- **Alternative models to strengthen the right to equality**

Laws on protection against discrimination and promotion of equality, if properly framed according to international human rights law, provide states with a mechanism for responding to expressions and actions which do not meet the threshold of incitement. It is clear that, in the absence of strong anti-discrimination laws and/or because of an unwillingness to enforce them, states seek to rely on criminal prohibitions of expressions of hatred even more than they would otherwise.

ARTICLE 19 recommends that provisions on incitement, which meet the threshold indicated above, should be complemented by strengthened anti-discrimination provisions such as those in EU and UK law as indicated below:

- The Racial Equality Directive (2000/43/EC) against discrimination on grounds of race and ethnic origin provides for:
  - Protection against discrimination on grounds of racial or ethnic origin in employment and training, education, social protection, membership of organisations and access to goods and services;
  - Definitions of direct and indirect discrimination and harassment;
  - Positive action to ensure full equality in practice;
  - the right to complain through a judicial or administrative procedure, with appropriate penalties for those who discriminate;
  - Limited exceptions to the principle of equal treatment (where a difference in treatment on the ground of race or ethnic origin is a genuine occupational requirement);
  - Shared burden of proof in civil and administrative cases: victim must provide evidence of alleged discrimination, defendant must prove there has been no breach of the equal treatment principle;
  - An organisation in each EU country to promote equal treatment and assist victims of racial discrimination.

- The directive's definition of discrimination which includes harassment:

*when an unwanted conduct related to racial or ethnic origin takes place with the purpose or effect of violating the dignity of a person and of creating an intimidating, hostile, degrading,*

*humiliating or offensive environment. In this context, the concept of harassment may be defined in accordance with the national laws and practice of the Member States.*

- The UK Equality Act 2010 which strengthens and harmonises existing equality legislation, previously spread across numerous statutes and statutory instruments, into a single comprehensive piece of legislation. Some notable developments coming into force today are:
  - A harmonisation of protection across all of the protected characteristics (age, disability, gender reassignment, marriage and civil partnership, pregnancy and maternity, race, religion or belief, sex and sexual orientation), including (i) the extension of protection from indirect discrimination to include disability and (ii) the extension of protection from third party harassment to all protected characteristics;
  - Protection from discrimination in new circumstances through the inclusion of associative and perceived discrimination in the definition of prohibited conduct, which will be particularly significant for carers;
  - Provisions allowing for positive action where proportionate to the aim of overcoming disadvantage and improving equality;
  - The restriction of the circumstances in which employers are permitted to ask job applicants about their health before making a job offer which should serve to improve job opportunities for people with disabilities; and
  - Provisions which make pay secrecy clauses unenforceable and thereby make it easier for individuals to establish whether they are suffering from unlawful discrimination with regard to pay.
  
- Some of the following, and arguably some of the most innovative, Equality Act provisions will be brought into force in April 2011:
  - The new public sector duty related to socio-economic inequalities (ss. 1-3);
  - The prohibition of dual discrimination (s.14);
  - The provision for legislation requiring that employers review gender pay differences within their organisations and publish the results (s.78); and
  - The creation of a unified public sector duty, intended to promote equality in public policy and decision-making, whereby the existing provisions relating to sex, race and disability have been extended to the protected grounds of sexual orientation, age and religion or belief (ss. 149-157).

<b>Level of protection</b>	<b>Severity and means of communication</b>	<b>Intent</b>	<b>Content</b>	<b>Public/private</b>	<b>Imminence</b>	<b>Likelihood/probability</b>
Criminal sanctions (Article 20 standard)	The 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 the action – discrimination, hostility or violence	Directed at a non-specific audience (general public) or to a number of individuals in a public space	How immediate is the likely harm to occur? 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.	speech very likely to result in criminal action and harm Must be considered on a case-by-case basis and in the light of the local culture and the specific circumstances.
<p><b><i>Other course of action</i></b>            Civil remedies            Administrative Sanctions            Positive measures</p>						