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PURSUING A UNIVERSAL THRESHOLD FOR REGULATING INCITEMENT TO DISCRIMINATION, HOSTILITY OR VIOLENCE

INTRODUCTION

Article 20(2) of the International Covenant on Civil and Political Rights (ICCPR)¹ provides that “any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law.”² Criminalizing hate speech is one of the few permissible limitations on freedom of expression under the ICCPR. Unfortunately, the lack of a universally accepted threshold for determining what constitutes incitement has produced inconsistent and contradictory results that vary from country to country.³ On the one hand, some countries, including the United States, have strong traditions of freedom of expression and only criminalize incitement when it is likely to result in imminent violence.⁴ In the United States the First Amendment protects even the most inflammatory speech.⁵ On the other hand, some countries admin-

1. International Covenant on Civil and Political Rights art. 20, Dec. 19, 1966, 999 U.N.T.S. 171, 178 [hereinafter ICCPR]. See *infra* Part I.B.2.

2. ICCPR, *supra* note 1, art. 20. The ICCPR does not say that criminalization is the only method for punishing speech likely to incite discrimination, hostility or violence. Article 20(2) only says that this type of speech “shall be prohibited by law.” *Id.* This Note focuses primarily on speech that rises to such a severe level that criminalization is appropriate.

3. See *infra* Part II.

4. See *infra* Part II.A.

5. Adam Liptak, *Hate Speech or Free Speech? What Much of West Bans is Protected in U.S.*, N.Y. TIMES (June 11, 2008), <http://www.nytimes.com/2008/06/11/world/americas/11iht-hate.4.13645369.html?mcubz=0>.

To be clear, the United States has made a reservation to Article 20(2), so it does not implement its prohibitions. *United States Government Response to the United Nations Office of the High Commissioner for Human Rights Concerning Expert Workshops on Incitement to National, Racial, or Religious Hatred*, Diplomatic Note 2, U.S. DEP’T. ST. (Nov. 3, 2010), available at <https://www.state.gov/documents/organization/179250.pdf>. The purported reason is that Article 20(2) would limit the rights guaranteed by the First Amendment. See *id.* The United States does recognize, however, the offense of incitement under its common law, so it still serves as a useful comparator when

ister the offense of incitement in an abusive manner; such countries adopt domestic laws that purport to criminalize hateful or violent speech, but that instead punish journalists and government critics.⁶

In 2012, the human rights advocacy organization, ARTICLE 19,⁷ acknowledged the disconnect between Article 20's purpose and application.⁸ It published a policy brief on issues related to identifying incitement and administering punishments for the offense.⁹ ARTICLE 19 proposed, inter alia, uniform legislation and a glossary of key terms related to the offense of incitement for use by courts.¹⁰ The organization also suggested a six-factor test for courts to apply when adjudicating incitement cases.¹¹ The test called upon courts to strictly scrutinize:

[the] context of the expression; speaker/proponent of the expression; intent of the speaker/proponent of the expression to incite to discrimination, hostility or violence; content of the expression; extent and magnitude of the expression (including its public nature, its audience and means of dissemination); [and] likelihood of the advocated action occurring, including its imminence.¹²

discussing the extreme dichotomy between enforcement and non-enforcement of incitement and related consequences. *See infra* Part II.A.

6. Ethiopia is one example. Aaron Maasho, *Ethiopian Court Convicts Journalist for Incitement of Violence*, REUTERS (May 24, 2017), <https://www.reuters.com/article/us-ethiopia-journalist/ethiopian-court-convicts-journalist-for-incitement-of-violence-idUSKBN18K24G>.

7. ARTICLE 19 is a United Kingdom-based organization that champion's issues related to free expression. *See About Us*, ARTICLE 19, <https://www.article19.org/about-us/> (last visited Aug. 30, 2018).

8. *See Prohibiting Incitement to Discrimination, Hostility or Violence*, ARTICLE 19 1, 1 (Dec. 2012), <https://www.article19.org/data/files/medialibrary/3548/ARTICLE-19-policy-on-prohibition-to-incitement.pdf> [hereinafter *Prohibiting Incitement*].

9. *See id.* The ARTICLE 19 framework appears to build off of an earlier legal study it conducted for a "regional expert meeting on [A]rticle 20" hosted by the Office of the High Commissioner for Human Rights. *See BARBARA BUKOVSKA, AGNES CALLAMARD & SEJAL PARRMER, TOWARDS AN INTERPRETATION OF ARTICLE 20 OF THE ICCPR: THRESHOLDS FOR THE PROHIBITION OF INCITEMENT TO HATRED 5* (2010), available at <http://www.ohchr.org/Documents/Issues/Expression/ICCPR/Vienna/CRP7Callamard.pdf>.

10. *See id.* at 2.

11. *See id.*

12. *See id.*

The policy brief provides a comprehensive framework for evaluating incitement cases; however, the paper is not binding on states or courts, both of which are free to and, indeed, do ignore the recommended framework.¹³ As a result of courts and legislatures' inattention to problems related to the offense of incitement, issues surrounding its criminalization persist.¹⁴

States across the international community are violating the fundamental purpose of Article 20(2),¹⁵ to punish hate speech, either by using it as a tool to restrict non-inciting expression or by using freedom of expression as a guise for non-enforcement.¹⁶ Such misuse of Article 20 can be remedied by a universal standard for the criminalization of incitement that promotes safety and protects individual rights and reputations, yet also safeguards free speech.

This Note will demonstrate the pressing need for a universal solution to this problem despite the growing number of obstacles to achieving uniformity. Part I will emphasize the need for governments to punish and deter acts of criminal incitement. It will also provide a history of regulatory efforts at the global level. Part II will illustrate the inconsistency in regulatory efforts among different states by contrasting the inattention to incitement in the United States with other countries who abuse Article 20(2), using it to silence dissent. Part III will describe challenges to regulating incitement, including limitations that may

13. The framework is also problematic for a number of reasons, so states and courts should not adopt it anyway. *See infra* Part IV.B.

14. Although many states have regulations for incitement, they often do not revisit them to ensure the enacted statutes are effectively grappling with the problem. *See Rabat Plan of Action on the Prohibition of Advocacy of National, Racial or Religious Hatred That Constitutes Incitement to Discrimination, Hostility or Violence*, OFF. HIGH COMM'R HUM. RTS. 1, 7–8 (2012) [hereinafter *Rabat*]. Further, provisions prohibiting incitement in different countries are dissimilar, some being too restrictive and others being too permissive. *Id.* To make matters worse, there is limited judicial precedent to standardize the field. *Id.* Often times when incitement has been prosecuted, it was done to affect a specific purpose not necessarily related to the underlying purpose of punishing inciting speech. *Id.* Additionally, the age of the Internet is presenting novel problems to regulating incitement. *See generally Incitement to Hatred vs. Freedom of Expression: Challenges of Combating Hate Crimes Motivated by Hate on the Internet*, OFF. DEMOCRATIC INSTITUTIONS HUM. RTS. 1 (Mar. 22, 2010), <http://www.osce.org/odihr/68750?download=true> [hereinafter *Hate on the Internet*]. *See infra* Part III.B for further discussion of this issue.

15. ICCPR, *supra* note 1, art. 20.

16. *See Rabat, supra* note 14, at 2.

prevent international bodies from effecting global change. It will also discuss the challenges to the consistent application of criminal incitement laws that the Internet presents. Part IV will evaluate solutions proffered by other scholars, focusing on ARTICLE 19's robust treatment of the issue and its solution. Finally, Part V will propose that a global standard, in lieu of a strict rule, will be the most effective means for achieving constancy in regulation. In doing so, this Note will elaborate on the analytical steps necessary to determine a regulatory standard. Delineating such a standard demands awareness of instances of inappropriate criminalization of incitement in order to clarify a threshold that comports with basic principles of freedom of expression. This proposal endeavors to strike a careful balance between the peremptory right of international citizens to true freedom of expression and the undeniable need to criminalize inciting speech in instances that endanger human rights and global safety.

I. A GLOBAL HISTORY OF INCITING SPEECH

This Part will display the true necessity of having laws that criminalize speech likely to incite “discrimination, hostility, or violence”¹⁷ using historic and present-day examples. It will then address past attempts to regulate such speech, culminating with the ratification of the ICCPR, and more specifically, Article 20(2) of that document.¹⁸

A. A Demonstrated Need for Laws Criminalizing Incitement

Dehumanization is a tool that helps leaders portray certain societal groups as enemies, thereby making it seem “necessary” to commit “atrocities . . . as a form of collective self-defense.”¹⁹ This is precisely what Adolf Hitler and his followers did in Nazi Germany through an extensive propaganda campaign advocating racial purity.²⁰ Hitler used his political platform and various

17. See ICCPR, *supra* note 1, art. 20.

18. *Id.*

19. Barrett Holmes Pitner, *Dangerous Speech is Not Free Speech or Even Hate Speech*, HUFFINGTON POST (May, 18, 2015), https://www.huffingtonpost.com/barrett-holmes-pitner/dangerous-speech-is-not-f_b_6890456.html (internal citations omitted).

20. See generally *Nazi Racism*, U.S. HOLOCAUST MEMORIAL MUSEUM, <https://www.ushmm.org/outreach/en/article.php?ModuleId=10007679> (last visited Oct. 19, 2017).

forms of mass communication to convince Germans that Jewish people were “racial enemies” and should be excluded from the nation.²¹ The propaganda was critical in convincing people to both carry out the mass murders and to stand by in “acquiescence.”²²

Years after the Nazi German atrocities, the radio especially played a critical and eerily similar role in the Rwandan Genocide.²³ Private radio stations led by Hutu extremists urged a “‘final war’ to ‘exterminate the cockroaches’” and gave information about where to find and kill members of the Tutsi population in hiding.²⁴ The propaganda had such a startling effect on the Rwandan people that some husbands of Tutsi women killed their own wives for fear that if they did not, they themselves would be killed.²⁵ Some priests and nuns were convicted of slaughtering Tutsis who came to churches for shelter and safety.²⁶

Clearly, this type of speech can be immensely powerful and persuasive, and therefore, cannot be left unregulated. Consider, especially, that decades after the horrors committed against

21. See *id.* After Hitler took power in Germany, he created a new propaganda ministry in the government whose sole purpose was to make sure that anti-Semitic messages were disseminated to the general public. *Nazi Propaganda*, U.S. HOLOCAUST MEMORIAL MUSEUM, <https://www.ushmm.org/wlc/en/article.php?ModuleId=10005202> (last visited Oct. 20, 2017). This propaganda came in many forms including in art, music, theatre, films, books, radio, educational materials and the press. *Id.* Films, especially, were used to portray Jewish people as enemies. *Id.* Movies depicted an idealized vision of success for Germany under the Nazi regime and contrasted that with a corrupted life for Germans sharing a society with Jewish persons. *Id.* These messages became more overt over time, eventually calling for support from the German people for total removal of all Jewish persons from German lands. *Id.*

22. *Id.*

23. Rwanda long suffered ethnic tensions between the Hutu majority and the Tutsi minority. See *Rwanda Genocide: 100 Days of Slaughter*, BBC NEWS (Apr. 7, 2014), <http://www.bbc.com/news/world-africa-26875506> [hereinafter *Rwanda Genocide*]. In 1994, a plane carrying the then Rwandan president, a Hutu, was shot down, killing the passengers, and many Hutus blamed Tutsi rebels for the attack. *Id.* Subsequently, the Hutus began systemically killing Tutsis. *Id.* In the end, approximately 800,000 people were killed. *Id.*

24. Russel Smith, *The Impact of Hate Media in Rwanda*, BBC NEWS (Dec. 3, 2003), <http://news.bbc.co.uk/2/hi/africa/3257748.stm>.

25. See *Rwanda Genocide*, *supra* note 23.

26. See *id.*

Jews in Germany, anti-Semitism persists.²⁷ This mentality extends far beyond the bounds of anti-Semitism.²⁸ The propaganda employed by the Nazi regime was so influential that it has become a “timeless” symbol for hate groups who regularly apply Nazi phrases and techniques to their own repulsive ideologies.²⁹ For example, in 2017, in Charlottesville, Virginia, a white supremacist demonstration largely targeted black minorities in the United States; yet, the participants displayed banners with swastikas, wore shirts referencing Hitler, and shouted Nazi phrases.³⁰

Different forms of racial, ethnic, religious, and other insensitivities still run rampant.³¹ On a smaller scale, instances of speech intended to incite discrimination, hostility, or violence are still heavily reported in the news across many countries worldwide.³² For example, in 2017 an Iraqi refugee, and ISIS

27. See Yair Rosenberg, *Five Myths About Anti-Semitism*, WASH. POST (Feb. 3, 2017), https://www.washingtonpost.com/opinions/five-myths-about-anti-semitism/2017/02/03/a8de59e2-e884-11e6-b82f-687d6e6a3e7c_story.html?utm_term=.91e7b236c3b4.

“The end of Nazism as a dominant political force did not silence anti-Semitism.” *Id.* Jewish persons are still targets of hate crimes all over the world; in the United States, they are annually the target of the most hate crimes against any religious group. *Id.* Further, in 2013, a survey conducted by the European Union revealed that almost 40 percent of Jewish persons in Europe feared to identify as such. *Id.* Similar anti-Semitic attitudes linger in non-Western states as well, where Jews have been persecuted to such an extent that they were forced to flee; whereas Arab countries used to be home to over 1 million Jewish persons, that number has fallen to just the thousands. *Id.*

28. See Emma Green, *Why the Charlottesville Marchers Were Obsessed with Jews*, ATLANTIC (Aug. 15, 2017), <https://www.theatlantic.com/politics/archive/2017/08/nazis-racism-charlottesville/536928/>. “Anti-Semitism often functions as a readily available language for all manner of bigotry—a Rosetta Stone that can translate animus toward one group into a universal hate for many groups.” *Id.* Other symbolisms, including Ku Klux Klan symbols, are also displayed at riots, such as the one in Charlottesville. *See id.*

29. *See id.*

30. *See id.*

31. See Meetings Coverage, General Assembly, Amid Rising Xenophobia, Violence, States Must Do More to Protect Migrants’ Rights, General Assembly Hears on International Day for Ending Racial Discrimination, U.N. Meetings Coverage GA/111895 (Mar. 21, 2017), <https://www.un.org/press/en/2017/ga11895.doc.htm>.

32. *See id.*

sympathizer, living in a shelter in Italy was arrested for spreading inciting “news and materials of the Islamic State.”³³ Although these beliefs were not necessarily representative of Islam, he claimed that those who do not follow Islam “should have their throats cut,” and he tried to recruit other Iraqis living in the shelter to commit violent, terroristic acts.³⁴ At around the same time in Switzerland, an Ethiopian imam was finally charged after months of Swiss officials investigating his mosque because of suspicion that violent messages were being disseminated there.³⁵ The imam was allegedly encouraging his followers to kill Muslims in the community who did not pray by burning them or by killing them in their homes, as well as using Facebook to post content of vicious murders.³⁶ There are countless additional examples of hate speech intended to cause violence, and just as it has been a powerful tool in perpetrating violence in the past, so is it today.³⁷ Without taking appropriate steps to regulate speech

33. *Italy Arrests Asylum Seeker for Inciting Terrorism*, REUTERS (June 19, 2017), <https://www.reuters.com/article/us-italy-security/italy-arrests-asylum-seeker-for-inciting-terrorism-idUSKBN19A0Y6>.

34. *See id.*

35. *See Michael Shields, Swiss Charge Ethiopian Imam with Inciting Violence*, REUTERS (Aug. 11, 2017), <https://www.reuters.com/article/us-swiss-imam/swiss-charge-ethiopian-imam-with-inciting-violence-idUSKBN1AR0Q4>.

36. *See id.*

37. The owner of a store called “Hitler 2” on the Gaza Strip displayed a mannequin out front holding a knife and wearing a shirt that said “stab,” which he said was intended to encourage Palestinians to attack Israelis with knives. Luke Baker, *In Gaza and Israel, Danger of Incitement to Violence Lurks*, REUTERS (Nov. 5, 2015), <https://www.reuters.com/article/us-israel-palestinians-incitement/in-gaza-and-israel-danger-of-incitement-to-violence-lurks-idUSKCN0SU2BM20151105>. Some Palestinians use Facebook to spread messages like “Death to the Jews” and “Slaughter the Jews.” Steven Scheer, *Social Media Heeding Most Israeli Calls to Delete Incitement: Minister*, REUTERS (Sept. 12, 2016), <https://www.reuters.com/article/us-israel-socialmedia/social-media-heeding-most-israeli-calls-to-delete-incitement-minister-idUSKCN11I247>. “Every 71 seconds there is an inciting post uploaded against Palestinians.” *7amleh Releases New Racism Index Exposing Heightened Israeli Online Incitement Against Palestinians*, 7AMLEH (Mar. 5, 2018), <http://7amleh.org/2018/03/05/7amleh-releases-new-racism-index-exposing-heightened-israeli-online-incitement-against-palestinians/>. “One out of nine posts about Palestinians contains a call for violence or a curse.” *Id.* In Myanmar, the military murdered and gang raped Muslim Rohingya with “genocidal intent,” and investigators blamed Facebook and others for allowing inciting content on its platform. Stephanie Nebehay, *U.N. Calls for Myanmar Generals to be Tried for Genocide, Blames Facebook for Incitement*, REUTERS (Aug. 27, 2018),

that rises to such a level that it poses a threat to human rights, personal safety and national security, society is vulnerable to the repetition of past horrors.

*B. Attempts to Regulate Provocative Speech on a Global Scale*³⁸

This Part will discuss past efforts, namely the adoption of the Universal Declaration of Human Rights (UDHR) and the

<https://www.reuters.com/article/us-myanmar-rohingya-un/un-calls-for-myanmar-generals-to-be-tried-for-genocide-blames-facebook-for-incitement-idUSKCN1LC0KN>. A retired professor in Singapore was sentenced to three months imprisonment for posting on a nationalist social media page that a “vigilante group” in the country should beat up Caucasians in bars to teach them a lesson. Elena Chong, *Retired Lecturer Jailed for Inciting Violence*, STRAITS TIMES (Aug. 1, 2017), <https://www.straitstimes.com/singapore/retired-lecturer-jailed-for-inciting-violence>. The professor started the nationalist page, “Act for Singapore,” himself after he became displeased with the increased number of foreigners in Singapore compared to a declining number of Singaporean natives. *Id.*

38. There have also been regional efforts to regulate inciting speech. For example, the European Convention on Human Rights has loosely recognized the concept of incitement. *See infra* Part III.A.1 for further discussion on this point. Additionally, the American Convention on Human Rights contains the following provision:

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, color, religion, language, or national origin shall be considered as offenses punishable by law.

American Convention on Human Rights “Pact of San Jose, Costa Rica” (B-32) art. 46(1)(a), July 18, 1978, 1144 U.N.T.S. 144, *available at* <http://www.cidh.oas.org/basicos/english/basic3.american%20convention.htm>.

Another major regional human rights treaty, The African Charter on Human and People’s Rights “does not deal directly with the prohibition of incitement and there are no provisions regarding incitement in the African Charter similar to those in Article 20(2) of the ICCPR.” *See Prohibiting Incitement, supra* note 8, at 16–17. In the landmark 2015 case, *Lohé Issa Konaté v. The Republic of Burkina Faso*, however, the African Court on Human and Peoples’ Rights (ACtHPR) “directly considered the right to freedom of expression, and the validity of legislation that criminalizes defamation” for the first time in their eight years of existence. *Criminalising Speech in Africa: What Did the African Court on Human and Peoples’ Rights Actually Say About Defamation Laws*, MEDIABELF, <https://mediabelf.wordpress.com/2015/01/16/criminalising-speech-in-africa-what-did-the-african-court-on-human-and-peoples-rights-ac->

ICCPR, undertaken by the global community as a whole to regulate speech that rises to the level of incitement. Further, this Part will specifically discuss ICCPR Article 20(2),³⁹ which imposes an affirmative obligation on states to prohibit inciting speech.

1. The Universal Declaration of Human Rights

In 1948, following the human rights violations committed during World War II, the United Nations adopted the UDHR, which pledged certain fundamental rights to all individuals in the global community.⁴⁰ Unfortunately, the UDHR was not adopted in such a way as to render it a binding legal document, and the United Nations General Assembly recognized that its contents needed to be reduced to treaties.⁴¹ While the UDHR was groundbreaking in international human rights law, it initially served merely as a political proclamation that certain civil and political

tually-say-about-defamation-law/ (last visited Nov. 10, 2017) (unofficial translation). The ACtHPR gave noteworthy credence to laws prohibiting incitement and to the ICCPR, saying:

Apart from serious and very exceptional circumstances for example, defence of international crimes, public incitement to hatred, discrimination or violence or threats of violence against a person or a group of people, because of specific criteria such as race, colour, religion or nationality, the Court is of the view that the violations of laws on freedom of speech and the press cannot be sanctioned by custodial sentences, without going contrary to [the African Charter and the ICCPR].

Id. (emphasis added).

39. ICCPR, *supra* note 1, art. 20.

40. See *History of the Document*, U.N., <http://www.un.org/en/sections/universal-declaration/history-document/index.html> (last visited Oct. 19, 2017). After World War II, some United Nations Member States sought to incorporate a human rights code into the United Nations Charter (“the Charter”). See Christian Tomuschat, *International Covenant on Civil and Political Rights*, U.N., <http://legal.un.org/avl/ha/iccpr/iccpr.html> (last visited Oct. 19, 2017). It was not possible at the time because of the extensive preparation needed to incorporate such a code, but the Charter did ultimately contain references to human rights in the Preamble and a variety of provisions. See *id.* Once the Charter was ratified, and the institutional framework for the United Nations was set, a human rights commission began working on human rights documents, first of which was the UDHR. See *id.*

41. See Tomuschat, *supra* note 40.

freedoms were too important to subject them to state government regulation.⁴²

One of these fundamental principles dealt with inciting speech.⁴³ Article 7 of the UDHR states that “[a]ll are entitled to equal protection against any discrimination in violation of this Declaration and against any incitement to such discrimination.”⁴⁴ Recognition of the need to regulate inciting speech was hugely important, but more persuasive legal authority would be necessary to effectively protect society from those members who promote hateful expression.⁴⁵

2. Inception of the ICCPR

The United Nations General Assembly adopted the ICCPR, and it came into force on March 23, 1976.⁴⁶ This document, the UDHR, and the International Covenant on Economic, Social and Cultural Rights (ICESCR) comprise the International Bill of Rights.⁴⁷ The ICCPR gives binding force to many of the civil and

42. *See id.*

43. *See* G.A. Res. 217 (III) A, Universal Declaration of Human Rights (Dec. 10, 1948). *See, e.g.*, civil rights enshrined in, inter alia, Article 3 (“Everyone has the right to life, liberty and security of person.”), Article 4 (“No one shall be held in slavery or servitude; slavery and the slave trade shall be prohibited in all their forms.”), Article 5 (“No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.”). *Id. See, e.g.*, political rights enshrined in, inter alia, Article 15 (“(1) Everyone has the right to a nationality. (2) No one shall be arbitrarily deprived of his nationality nor denied the right to change his nationality.”) and Article 20 (“(1) Everyone has the right to freedom of peaceful assembly and association. (2) No one may be compelled to belong to an association.”). *Id.*

44. *Id.*

45. *See* Tomuschat, *supra* note 40.

46. *See Summary: International Covenant on Civil and Political Rights (ICCPR)*, CANADIAN C.L. ASS’N (Oct. 27, 2015), <https://ccla.org/summary-international-covenant-on-civil-and-political-rights-iccpr/>.

47. *See id.* The International Bill of Rights is the term for the collection of human rights documents drafted by the United Nations (the UDHR, ICCPR, and ICESCR). *See* Tomuschat, *supra* note 40. The ICESCR covers economic, social and cultural rights, which the United Nations General Assembly considered were independent of the civil and political rights set out in the ICCPR. *See id.* Western nations particularly advocated for separation of the documents into two distinct covenants, reasoning that civil and political rights had to be “respected strictly and without any reservations” whereas economic, social and cultural rights were goals to be achieved, rather than strict rules of the game. *Id.* This view of divided documents ultimately prevailed, but interestingly, many nations have made reservations to the ICCPR, seeming to undermine

political values initially introduced in the UDHR. States who have ratified the ICCPR are bound to “protect and preserve basic human rights . . . [and] compelled to take administrative, judicial, and legislative measures in order to protect the rights enshrined in the treaty and to provide an effective remedy.”⁴⁸ Today, there are seventy-four signatories to the ICCPR, and 172 states have ratified it.⁴⁹

3. Article 20(2): A ‘Prohibition’

The main hallmark of Article 20 is that it imposes an affirmative obligation on states to prohibit the conduct enumerated therein, including incitement.⁵⁰ This provision is closely related

the stated reasons for separation. *Id.* For a list of state signatories and state reservations, please visit: *Chapter IV Human Rights: International Covenant on Civil and Political Rights*, U.N. TREATY COLLECTION, https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=IV-4&chapter=4&clang=_en (last visited Aug. 30, 2018) [hereinafter *Chapter IV Human Rights*].

48. *Id.*

49. See *Chapter IV Human Rights, supra* note 47. Some ratifying parties did so taking reservations to certain provisions. See *id.* Reservations are sometimes also referred to as “declarations” or “understandings,” or collectively called “RUD’s.” See *Reservations, Declarations & Understandings*, EMORY L., http://guide.library.law.emory.edu/treaties_reservations (last visited Oct. 21, 2017). When a State party signs or ratifies a treaty, they may, unless expressly forbidden with regard to the treaty at issue, make a reservation which negates the legal effect of a specific provision with respect to the reserving state. *Id.* In other words, if a state makes a reservation about a certain provision in the treaty, they are alleging that it does not apply to them. See *Reservations, Understandings, and Declarations*, B.C. L. LIBR., <http://law-guides.bc.edu/c.php?g=350921&p=2367411> (last visited Oct. 21, 2017). States may also assert an understanding or a declaration about what they believe to be the meaning of a certain part of the treaty that may be ambiguous on its face. *Id.* The Vienna Convention on the Law of Treaties discusses these RUD’s in Article 19 and notes importantly that none of these can be made if they are incompatible with the treaty’s object and purpose. See *Reservations, Declarations & Understandings, supra*.

50. See *id.*; see U.N. Off. of the High Comm’r on Hum. Rts. [OHCHR], General Comment No. 11: Prohibition of Propaganda for War and Inciting National, Racial or Religious Hatred (Art. 20), ¶ 1, U.N. Doc. CCPR/C/GC/11 (July 29, 1983), available at <https://www.ohchr.org/Documents/Issues/Opinion/CCPRGeneralCommentNo11.pdf> [hereinafter Prohibition of Propaganda]; see U.N. OHCHR, General Comment No. 34, Article 19: Freedoms of Opinion and Expression, ¶ 51, U.N. Doc. CCPR/C/GC/34 (Sept. 12, 2011), available at <https://www2.ohchr.org/english/bodies/hrc/docs/gc34.pdf> [hereinafter Freedoms of Opinion and Expression]. Most other provisions of the ICCPR do not

to Article 19, which guarantees the right to freedom of expression.⁵¹ Under the ICCPR, the right to freedom of expression is so significant that it should never be restricted, except in extreme circumstances.⁵² The prohibitions of Article 20 are one of the only permissible limitations on expression.⁵³ Article 19(3) enumerates the other circumstances, in which it is possible to limit expression, and it lays out a strict test that any Article 19 or 20 restriction on freedom of expression must meet.⁵⁴ Under the test, the restriction is permissible if it is: (1) provided by law; (2) pursues a legitimate aim; and (3) is necessary in a democratic society.⁵⁵

impose such an affirmative obligation on states. U.N. OHCHR, General Comment No. 31, Nature of the General Legal Obligation on State Parties to the Covenant, ¶ 10, U.N. Doc. CCPR/C/21/Rev.1/Add. 13 (Mar. 29, 2004), *available at* www.unhcr.org/4963237716.pdf. Generally, the rest of the document calls upon states to “respect and ensure the rights laid down in the [ICCPR] to anyone within the power or effective control of that State Party.” *Id.*

51. *See* Freedoms of Opinion and Expression, *supra* note 50, ¶ 50; *see* ICCPR, *supra* note 1, art. 19. ICCPR Article 19 states:

(1) Everyone shall have the right to hold opinions without interference. (2) Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice. (3) The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary: (a) For respect of the rights or reputations of others; (b) For the protection of national security or of public order (*ordre public*), or of public health or morals.

Id.

52. *See* Freedoms of Opinion and Expression, *supra* note 50, ¶ 49.

53. *See id.*; *see* ICCPR, *supra* note 1, art. 20.

54. *See* Freedoms of Opinion and Expression, *supra* note 50, ¶ 50; *see* ICCPR, *supra* note 1, art. 19; *see* ICCPR, *supra* note 1, art. 20. For example, freedom of expression can be limited to protect “the rights or reputations of others; [and] for the protection of national security or of public order (*ordre public*) or of public health or morals.” *See* ICCPR, *supra* note 1, art. 19.

55. *See* Freedoms of Opinion and Expression, *supra* note 50, ¶ 49; *see* ICCPR, *supra* note 1, art. 19; *see infra* Part V.A for further discussion on this point.

Article 20(2) specifically states that “any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law.”⁵⁶ In light of the restrictions imposed on this provision by Article 19, it is important to realize that speech does not often rise to the level of incitement.⁵⁷ When it does reach that level, however, it is so threatening to society and to the values in Article 19(3)⁵⁸ that the ICCPR has obligated states to take appropriate legislative measures to suppress the inciting speech.⁵⁹

II. DISPARATE TREATMENT AMONGST STATES OF ARTICLE 20(2)

This Part will illustrate the vastly different ways that states across the global community interpret Article 20(2).⁶⁰ First, it will detail how some countries, namely the United States, prefer their own free speech principles, as they allow freer expression than under the ICCPR. In contrast, this Part will show how

56. ICCPR, *supra* note 1, art. 20.

57. See BUKOVSKA, *supra* note 9, at 1; see ICCPR, *supra* note 1, art. 19; see ICCPR, *supra* note 1, art. 20. In a draft version of General Comment No. 34 on Article 19 of the ICCPR, the Human Rights Committee said that:

Many forms of “hate speech” that, although a matter of concern, do not meet the level of seriousness set out in [A]rticle 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 [A]rticle 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 [A]rticle 19.

BUKOVSKA, *supra* note 9. The final draft of General Comment No. 34 echoed similar sentiments, saying that legislation prohibiting “displays of lack of respect for a religion or other belief system, including blasphemy laws, are incompatible with the ICCPR, except in the specific circumstances envisaged in article 20, paragraph 2.” See *Freedom of Opinion and Expression*, *supra* note 50, ¶ 48.

58. The values enumerated in Article 19(3) are: (a) . . . the rights and reputations of others, (b) . . . the protection of national security or of public order . . . , or of public health or morals.” ICCPR, *supra* note 1, art. 19.

59. See ICCPR, *supra* note 1, art. 20; see *Prohibition of Propaganda*, *supra* note 50; see *Freedom of Opinion and Expression*, *supra* note 50, ¶ 51; see *supra* text accompanying note 51.

60. See ICCPR, *supra* note 1, art. 20.

other countries, such as Ethiopia, abuse Article 20(2),⁶¹ thus seriously infringing on the freedom of expression.

A. Purported Recognition in Countries with Traditionally Free Speech Laws

The United States did not ratify the ICCPR until 1992, and even then, the United States did so with many reservations, understandings and declarations (RUDs).⁶² Many of these RUDs were crafted to ensure that domestic law in the United States would take precedence over its international obligations under the ICCPR.⁶³ One reservation the United States made was to Article 20.⁶⁴ The United States Senate, which ratified the ICCPR, feared that this particular provision would interfere with the freedom of speech right enshrined in the United States

61. *See id.*

62. *See* Kristina Ash, *U.S. Reservations to the International Covenant on Civil and Political Rights: Credibility Maximization and Global Influence*, 3 *NW. J. INT'L HUM. RTS.* 1, 2 (Spring 2005), <http://scholarlycommons.law.northwestern.edu/cgi/viewcontent.cgi?article=1018&context=njihr>. When the United States was considering ratifying the ICCPR, it did so for two primary reasons. *See id.* First, it wanted to affirm its commitment to human rights, and further, it would allow the United States to be a part of the Human Rights Committee which was established by the ICCPR to “monitor compliance.” *Id.* Unfortunately, despite President Carter signing the document in 1977, there was not enough political support in the United States Senate to vote in favor of ratification. *See id.* at 3. The Senate Committee Report claimed that “domestic and international events at the end of 1979 . . . prevented the Committee from moving to a vote on the [ICCPR],” but it is also entirely possible that this was just another failed attempt to ratify an international human rights treaty after the Bricker Amendment proposal. *Id.* The Bricker Amendment, which was proposed in the 1950’s in response to U.S. consideration of ratifying various human rights treaties, sought to severely limit the power of international agreements under the Constitution. *Id.* The Amendment never passed, but it continued to affect U.S. foreign policy for some time. *Id.* Finally, in 1991, President H.W. Bush implored the Senate to reconsider ratifying the ICCPR, and after drafting extensive RUD’s, the Senate voted for ratification of the document. *See id.* Even so, it is worth noting that because of the unprecedented number of RUD’s that the U.S. attached to ratification, the treaty was essentially “rendered . . . powerless under domestic law.” *See id.* at 2–3.

63. *See id.* at 3.

64. *See id.* at 8; *see* ICCPR, *supra* note 1, art. 20. The U.S. reservation to Article 20 is: “That [A]rticle 20 does not authorize or require legislation or other action by the United States that would restrict the right of free speech and association protected by the Constitution and laws of the United States.” *See id.* at 8–9; *Chapter IV Human Rights, supra* note 47.

Constitution under the First Amendment.⁶⁵ The United States made a similar declaration regarding Article 19, stating that it would “whenever possible refrain from imposing *any* restrictions or limitations on the exercise of the rights recognized and protected by the [ICCPR], even when such restrictions are permissible under the [ICCPR].”⁶⁶

Ultimately, the First Amendment does prevail in the United States, protecting even the most egregious hate speech.⁶⁷ Unless the advocacy in question is intended to incite imminent lawless action, and is actually likely to do so, neither legislation nor law enforcement can interfere.⁶⁸ This remains true no matter how provocative or discriminatory the speech in question is.⁶⁹ Even

65. See Ash, *supra* note 62, at 9. The First Amendment to the United States Constitution reads: “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press, or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.” U.S. CONST. amend. I.

66. Ash, *supra* note 62, at 9 (emphasis added) (internal citations omitted); see ICCPR, *supra* note 1, art. 19.

67. See Melissa Block, *Comparing Hate Speech Laws in the U.S. and Abroad*, WNYC RADIO (Mar. 3, 2011), <http://www.npr.org/2011/03/03/134239713/France-Isnt-The-Only-Country-To-Prohibit-Hate-Speech>. The First Amendment protected the Westboro Baptist Church’s right to picket at military funerals toting signs that said, “God Hates Fags.” Jan Wolfe, *Factbox: When Can Free Speech be Restricted in the United States?*, REUTERS (Aug. 14, 2017), <https://www.reuters.com/article/us-virginia-protests-speech-factbox/factbox-when-can-free-speech-be-restricted-in-the-united-states-idUSKCN1AU2E0>.

68. *Brandenburg v. Ohio*, 395 U.S. 444, 449 (1969); Jeff Howard, *The ‘Brandenburg Test’ for Incitement to Violence*, FREE SPEECH DEBATE, <http://freespeechdebate.com/case/the-brandenburg-test-for-incitement-to-violence/> (last visited Oct. 21, 2017). A civil rights activist who threatened that blacks would “have their necks broken” if they did not participate in a boycott of businesses owned by white persons was not liable for inciting violence. Wolfe, *supra* note 67. Furthermore, simply carrying weapons, even firearms, is not enough to rise to the level of inciting violence. *Id.* Carrying arms, using force while yelling outside of a city hall building, and yelling that the government was “damned racketeer[s]” and “damned Fascist[s],” however, rises to the level of being likely to “provoke the average person to retaliation.” See *Chaplinsky v. State of New Hampshire*, 315 U.S. 568, 571–72 (1942). “The lewd and obscene, the profane, the libelous, and the insulting or ‘fighting’ words—those which by their very utterance inflict injury or tend to incite and immediate breach of peace” all give rise to permissible speech limitations under the Constitution. *Id.*

69. See Liptak, *supra* note 5. Indeed, in the United States, “mere advocacy of violence, terrorism or the overthrow of the government is not enough; the

false statements that generally increase scorn or generate further discrimination towards a particular group will not be censored.⁷⁰ These high barriers to overcoming First Amendment protections left the local government in Charlottesville, Virginia largely powerless to protect citizens when white nationalists and counter-protestors clashed at a racially charged demonstration in August 2017.⁷¹ The city government granted the protestors a permit to hold the rally, but when the city tried to obtain an order to move the protest to another location further from downtown due to mounting safety concerns, it was unable to do so.⁷² A federal judge's ruling sided with the protestors.⁷³ The judge held that the city sought to move the protest not because of safety concerns, but rather because of the anticipated content of the speech—a would-be First Amendment violation.⁷⁴ Unfortunately, safety concerns came to fruition that day. One woman was killed at the demonstration and at least thirty-four people were injured.⁷⁵ Two state troopers also died monitoring the event from a helicopter that crashed.⁷⁶

Another unintended consequence of extensive First Amendment protection is that the United States has created a place for hate groups to disseminate messages over the Internet.⁷⁷ Such groups are able to create websites based in the United States to

words must be meant to, and be likely to, produce violence or lawlessness *right away*." *Id.* (emphasis added).

70. *See id.*

71. *See Wolfe, supra* note 67. For more information about the Charlottesville incident: *see* Joe Heim, *Recounting a Day of Rage, Hate, Violence and Death*, WASH. POST (Aug. 14, 2017), https://www.washingtonpost.com/graphics/2017/local/charlottesville-time-line/?utm_term=.173fe54125f5; *see* Benjamin Hart & Chas Danner, *3 Dead and Dozens Injured After Violent White-Nationalist Rally in Virginia*, N.Y. MAG (Aug. 13, 2017), <http://nymag.com/daily/intelligencer/2017/08/state-of-emergency-in-va-after-white-nationalist-rally.html>; *see* Matt Stevens, *White Nationalists Reappear in Charlottesville in Torch-Lit Protest*, N.Y. TIMES (Oct. 8, 2017), <https://www.nytimes.com/2017/10/08/us/richard-spencer-charlottesville.html>.

72. *See Wolfe, supra* note 67.

73. *See id.*

74. *See id.*

75. *See* Maggie Astor, Christina Caron & Daniel Victor, *A Guide to the Charlottesville Aftermath*, N.Y. TIMES (Aug. 13, 2017), <https://www.nytimes.com/2017/08/13/us/charlottesville-virginia-overview.html>.

76. *See id.*

77. *See* Block, *supra* note 67.

circumvent stricter speech laws in their own countries and to bring themselves within the ambit of First Amendment protection.⁷⁸ Some extremist groups have even used United States' servers to carry out their anti-American agenda.⁷⁹ Indeed, intelligence officers, as well as other private experts in the field, point to "dozens of instances" that proponents of the Islamic State looked to United States Internet firms to provide them with a platform to "incite attacks on Americans."⁸⁰ American Internet firms are especially attractive because of the quality of service and the fact that they allow users to remain anonymous, thereby becoming a safe-haven for hate speech.⁸¹

B. A Pattern of Abuse: Productive Democratic Speech Condemned as Incitement

The liberal free speech laws found in the United States are the exception among the global community.⁸² Other democratic countries impose far heavier restrictions on expression than does the United States.⁸³ For example, Germany, France and Denmark have convicted citizens on charges of incitement that likely do not rise to the meet the high standard for the offense as envisaged by the ICCPR.⁸⁴

78. *See id.*

79. Joby Warrick & Candace Rondeaux, *Taliban Using U.S. Firms to Host Web Sites*, WASH. POST (Apr. 9, 2009), <http://www.washingtonpost.com/wp-dyn/content/article/2009/04/08/AR2009040804378.html>.

80. *See id.* "Militants' use of U.S. Web hosts has sparked occasional spats between the United States and its allies, as well as endless debates over whether it is better to shut down the Web sites when they're discovered or to let them continue to operate." *Id.* Arguably the most shocking instance of extremists using U.S. servers as a host was a Taliban website that shared content globally, attempting to entice new followers and update existing followers about "suicide bombings, rocket attacks and raids against U.S. and allied troops." *Id.* In this instance, the Texas firm that rented web space to the militant group for just about \$70 USD a month had no idea that this was a Taliban-linked group. *See id.*

81. *See id.*

82. *See Held Dear in U.S., Free Speech Perplexing Abroad*, NAT'L PUB. RADIO (Sept. 19, 2012), <http://www.npr.org/2012/09/19/161439562/held-dear-in-u-s-free-speech-perplexing-abroad>.

83. *See id.*

84. *See* BUKOVSKA, *supra* note 9; *see Held Dear in U.S., Free Speech Perplexing Abroad*, *supra* note 82. In these countries, "Holocaust denial is specifically criminalized." *See id.* While this type of speech is clearly "hurtful, offensive and

There remains, however, a vast difference in enforcement of incitement laws between countries who impose speech restrictions and countries who abuse freedom of expression provisions in order to suppress speech. News headlines from countries in many different parts of the world are fraught with stories about opposition leaders being on trial for charges of incitement.⁸⁵ In many of these cases, it is not difficult to see that the criminal charges are part of a ploy to “misuse the criminal justice system to silence dissent.”⁸⁶ For example, a journalist convicted in Ethiopia for allegedly inciting violence against the Ethiopian government faces up to ten years of imprisonment after a “groundless ruling.”⁸⁷ This move has been dubbed a “bid to silence critics” by an international rights group.⁸⁸ As evidence, this journalist was the Editor-in-Chief of *Negere Ethiopia*—a magazine operated by a government opposition party, the Semayawi Party.⁸⁹ To further prove the government’s intentions to penalize any government critics and maintain uncontested control, all 547 members of the Ethiopian parliament belong to the same political party.⁹⁰ Minority dissident groups also claim that the government is guilty of “constant harassment and intimidation.”⁹¹

even in some cases inflammatory” it does rise to the high level that would necessitate prohibition under Article 20. BUKOVSKA, *supra* note 9; *see* ICCPR, *supra* note 1, art. 20.

85. *See* Boureima Balima, *Niger Opposition Leader to be Tried on Incitement and Sedition Charges*, REUTERS (May 18, 2017), <https://www.reuters.com/article/us-niger-politics/niger-opposition-leader-to-be-tried-on-incitement-and-sedition-charges-idUSKCN18E340>; *see* Clement Uwiringiyimana, *Rwanda Charges Critic of President With Inciting Insurrection*, REUTERS (Oct. 4, 2017), <https://www.reuters.com/article/us-rwanda-politics/rwanda-charges-critic-of-president-with-inciting-insurrection-idUSKCN1C915S>; *see* Noah Browning, *UAE Arrests Prominent Activist for Incitement: State News*, REUTERS (Mar. 21, 2017), <https://www.reuters.com/article/us-emirates-activist/uae-arrests-prominent-activist-for-incitement-state-news-idUSKBN16S0MC>.

86. Maasho, *supra* note 6.

87. *Id.*

88. *Id.*

89. *See id.*

90. *See id.*

91. *Id.*

III. CHALLENGES IN REGULATING INCITING SPEECH

This Part will discuss two significant challenges to regulating inciting speech.⁹² First, courts, tribunals, United Nations commissions and other bodies have limited power to impose a standard for incitement. Rather, they can only influence the inception of a universally accepted standard for incitement because there is no authorized legislature in international law.⁹³ Second, the widespread use of the Internet and other technologies that facilitate instant communication presents new challenges for regulating inciting speech as hateful messages can reach mass audiences in seconds.⁹⁴

C. Limitations on International Bodies Who Have Made, or May Try to Make, a Statement Regarding a Standard for Incitement

This section assesses two prominent actors in international law—the European Court of Human Rights (ECtHR) and the International Law Commission (ILC)—in light of their potential to effectively pronounce a threshold for incitement that other states would follow.⁹⁵ Specifically, this section will discuss the ECtHR and the ILC in terms of their influence on the global community, as well as their limitations on the international plane.

1. The European Court of Human Rights

In 1950, the European Convention on Human Rights (ECHR) was one of the first signed instruments to give binding effect to

92. This Part does not purport to be exhaustive of all of the challenges in regulating inciting speech.

93. N. N. Singh, *The Absence of a Sovereign Legislature and Its Consequences for International Law*, 12 MALAYA L. REV. 277, 277 (1970), available at https://heinonline.org/HOL/Page?handle=hein.journals/sjls12&div=16&g_sent=1&casa_token=&collection=journals.

94. James Banks, *Regulating Hate Speech Online*, 24 INT'L REV. L., COMPUTERS & TECH. 233, 234 (2010).

95. There are many other international law bodies that could be similarly assessed in terms of their potential to successfully dictate a universal standard for incitement. Even if two different actors were selected, the point remains that while each body may have a certain sphere of influence, each also has a number of limitations that would ultimately make it an ineffectual choice for assessing the threshold for incitement.

some of the rights expressed in the UDHR.⁹⁶ In 2006, the ECtHR recognized that the ECHR deals with inciting speech vis-à-vis the ECHR's freedom of expression provision, even though the document never officially uses any variation of the term "incitement."⁹⁷ The ECtHR explained that "it may be considered necessary in certain democratic societies to sanction or even prevent all forms of expression which spread, incite, promote, or justify hatred based on intolerance."⁹⁸

Although the ECtHR has extended the ECHR to regulate incitement, incitement has not been adopted as a provision of the ECHR.⁹⁹ As such, application of incitement laws to cases is largely left to the prerogatives of the ECtHR.¹⁰⁰ Generally, the ECtHR evaluates incitement in terms of hate speech. The ECtHR asks whether the speech in question rises to a level that undermines the values expressed in the ECHR or whether it constitutes hate speech, but will not likely pose a risk to the ECHR's values.¹⁰¹ The ECtHR's approach provides more of a framework

96. See Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 213 U.N.T.S. 221 [hereinafter ECHR]. The ECHR protects basic human rights of all forty-seven state members of the Council of Europe—an organization founded after World War II to "protect human rights and the rule of law, and to promote democracy." *What is the European Convention on Human Rights?*, EQUALITY & HUM. RTS. COMM'N, <https://www.equalityhumanrights.com/en/what-european-convention-human-rights> (last updated Apr. 19, 2017). The European Court of Human Rights administers the provisions of the ECHR. See *id.*

97. *Hate Speech*, EUR. CT. H.R. (June 2018), http://www.echr.coe.int/Documents/FS_Hate_speech_ENG.pdf. Under Article 10, the Freedom of Expression provision, free speech "may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary." ECHR, *supra* note 96, art. 10.

98. *Hate Speech*, *supra* note 97.

99. See BUKOVSKA, *supra* note 9.

100. See *id.* at 6.

101. *Hate Speech*, *supra* note 97. "Human Rights, as they are put down in the European Convention on Human Rights . . . cover basic rights and freedoms like the right to life; the right to liberty and security; the right to a fair trial; the right to freedom of thought, conscious and religion or the right to freedom of expression. They also ban certain things like; torture; discrimination; slavery and forced labour or punishment without law." *Core Values*, EUR. HUM.

for condemning inciting speech than did the UDHR.¹⁰² It is, however, still too imprecise and inconsistent to be relied on as an effective means of regulating inciting speech.¹⁰³ Furthermore, the application of incitement laws in ECtHR cases is a secondary consideration to the principles enumerated in the ECHR, whereas regulation of speech likely to incite various evils demands the full attention of the international community.¹⁰⁴

The ECtHR could, however, be an effective forum to consider the proper threshold for prohibiting speech likely to incite discrimination, hostility or violence.¹⁰⁵ Donna Artusy¹⁰⁶ explained that

[a]lthough the [ECtHR] maintains jurisdiction over a smaller number of states, it has a more significant influence over human rights protection than other courts, including the European Court of Justice, the International Court of Justice, and the International Criminal Court.¹⁰⁷

The primary reason is that the ECtHR allows individuals to bring their own claims, rather than solely allowing states to exercise diplomatic protection on behalf of individuals.¹⁰⁸ As such, Artusy concluded, the ECtHR “cover[s] a much wider range of issues and consequently number of people.”¹⁰⁹ The ECtHR’s breadth of relevant experience resulting from the large number

RTS. WATCHDOG, <http://www.europewatchdog.info/en/council-of-europe/core-values/> (last visited Nov. 12, 2017).

102. Neither the ECHR nor the UDHR have specific provisions for incitement, as discussed. The ECtHR adopted the concept of incitement through case law, however, so it more directly addresses incitement than the UDHR.

103. See BUKOVSKA, *supra* note 9, at 6.

104. See *id.*

105. ICCPR, *supra* note 1, art. 20.

106. Artusy is a graduate of the Georgetown University School of Foreign Service. Donna V. Artusy & David V. Gioe, *Information Dominance Between War and Peace: China as the “Informationized” State*, 31 INT’L J. INTELLIGENCE & COUNTERINTELLIGENCE 626 (Sept. 10, 2018).

107. Donna V. Artusy, *The Evolution of Human Rights Law in Europe: Comparing the European Court of Human Rights and the ECJ, ICJ, and ICC*, 6 INQUIRIES J. 1, 1 (2014), <http://www.inquiriesjournal.com/articles/936/the-evolution-of-human-rights-law-in-europe-comparing-the-european-court-of-human-rights-and-the-ecj-icj-and-icc>.

108. See *id.*

109. *Id.*

of cases that come before it would prove useful in examining the threshold for incitement.¹¹⁰

In contrast, the major pitfall to the ECtHR's potential effectiveness as an arbiter of incitement is that its decisions are not binding, even on ECHR signatories.¹¹¹ State signatories are supposed to comply with the court's verdicts, but the ECtHR has no enforcement power.¹¹² Effecting global change, then, would be difficult when the ECtHR lacks real authority over even its own state signatories.¹¹³ The coordination costs of implementing the ECtHR's suggestions worldwide would likely be too high.¹¹⁴

2. The International Law Commission

The United Nations General Assembly established the ILC, which hosted its first annual meeting in April 1949.¹¹⁵ The ILC's objective, as stated in Article 1, paragraph 1 of the statute of the ILC, is "the promotion of the progressive development of international law and its codification."¹¹⁶ This allows the ILC to address new or emerging subjects of international law ("progressive development") and to particularize rules in areas where

110. *See id.*

111. *See id.*

112. *See Profile: European Court of Human Rights*, BBC NEWS (Feb. 5, 2015), <http://www.bbc.com/news/world-europe-16924514>. Although there is no specific mechanism for enforcement, "members of the Council of Europe can be expelled for ignoring judgments." Artusy, *supra* note 107, at 3. The ECtHR has yet to take advantage of this option to date. *See id.*

113. *See Artusy, supra* note 107, at 3.

114. *See id.* ("The European Court of Human Rights has been criticized as having less impact because it does not hold power over as many countries quantitatively...").

115. *About the Commission, Origin and Background: Drafting and Implementation of Article 13, Paragraph 1*, INT'L L. COMM'N, <http://legal.un.org/ilc/drafting.shtml> (last visited Oct. 1, 2018) [hereinafter *Drafting and Implementation of Article 13, Paragraph 1*].

116. *About the Commission, Organization, Programme and Methods of Work: Object of the Commission*, INT'L L. COMM'N, <http://legal.un.org/ilc/work.shtml> (last visited Oct. 1, 2018). This is similar to the purpose of the U.N. General Assembly. *Drafting and Implementation of Article 13, Paragraph 1, supra* note 115. Under Article 13 of the United Nations Charter "[t]he General Assembly shall initiate studies and make recommendations for the purpose of: (1) . . . encouraging the progressive development of international law and its codification." *Id.* In order to fulfill this purpose, the General Assembly adopted a resolution establishing the Committee on the Progressive Development of International Law and its Codification, who, in turn, proposed the adoption of an international law commission. *Id.*

there is robust precedent (“codification”).¹¹⁷ When considering an issue, the ILC always enlists feedback from state governments and from the United Nations General Assembly.¹¹⁸

The ILC is arguably the best forum to make a statement regarding the proper threshold for incitement. In some instances, the ILC’s reports have gained acceptance as pronouncements of customary international law, and its work is often cited in the dispute resolution process by international courts and tribunals.¹¹⁹ The suggestions that it collects from states when undertaking to evaluate a new issue especially bolsters the ILC’s credibility.¹²⁰ The ILC, however, also has its limitations. One potential problem with the ILC assessing the threshold for the criminalization of inciting speech is the amount of time that it can take the ILC to consider a single issue.¹²¹ For example, the ILC worked on the Articles on Responsibility of States for Internationally Wrongful Acts for almost fifty years before it adopted a final draft of the document.¹²²

117. *See id.* Once the ILC undertakes to evaluate a topic, they then generally appoint a Special Rapporteur to develop the topic, including evaluating the current state of the law, and to make suggestions when the time comes to draft proposals to the General Assembly regarding the topic. *See About the Commission, Organization, Programme and Methods of Work: Structure of the Commission*, INT’L L. COMM’N, <http://legal.un.org/ilc/structure.shtml> (last visited Oct. 1, 2018). The plenary of the ILC then considers the work prepared by the Special Rapporteur; and thereafter, the Drafting Committee is tasked with “harmonizing the various viewpoints and working out generally acceptable solutions.” *Id.* If the ILC approves the preliminary draft, it will be submitted to the General Assembly as well as to governments for their consideration. *See About the Commission, Organization, Programme and Methods of Work: Methods of Work*, INT’L L. COMM’N, <http://legal.un.org/ilc/methods.shtml> (last visited Oct. 1, 2018). Any comments from either institution will be considered in preparing the final draft proposal. *See id.* When a final proposal is completed, the ILC can adopt their drafts in a number of ways including recommending the adoption of a convention on the basis of their work or recommending the report as a draft principal, guideline or conclusion. *See id.*

118. Aniruddha Rajput, *International Law Commission and the International Legislative Process*, INT’L L. SQUARE (Sept. 2, 2016), <https://ilsquare.org/2016/09/02/international-law-commission-and-the-international-legislative-process/comment-page-1/>.

119. *See id.*

120. *See id.*

121. *See id.*

122. James Crawford, Jacqueline Peel & Simon Olleson, *The ILC’s Articles on Responsibility of States for Internationally Wrongful Acts: Completion of the*

D. New Hurdles in the Age of the Internet

The ability to incite discrimination, hostility, or violence is not limited to active, face-to-face solicitation of support to commit heinous acts.¹²³ Today, the Internet facilitates the instant distribution of print messages pictures, videos and more to over 4.2 billion people.¹²⁴ James Banks, Lecturer in Criminology and Associate Researcher at Sheffield Hallam University, described the Internet as the “new frontier for spreading hate.”¹²⁵ Indeed, the Internet has provided hate groups with an “unprecedented means of communicating and recruiting.”¹²⁶

Monitoring and prosecution, in particular, pose huge obstacles to combating inciting speech on the Internet.¹²⁷ Traditional law enforcement officials and techniques have difficulty grappling with hate speech online because of the anonymity afforded by the Internet, as well as the fact that the Internet is not confined to state borders.¹²⁸ In order to successfully deal with hate speech online, law enforcement officials and prosecutors need special Internet and cybersecurity training.¹²⁹ Ideally, this would include establishing new law enforcement units tasked specifically with regulating cyber-crime.¹³⁰ Such training and implementation of new law-enforcement units is a useful tool in combating hate speech online, but is not plausible in every country because of the high costs involved.¹³¹

Second Reading, 12 EUR. J. INT'L L. 963, 963 (2001), <http://ejil.org/pdfs/12/5/1557.pdf>.

123. Banks, *supra* note 94, at 234.

124. *Internet Usage in the World by Regions*, INTERNET WORLD STATS (June 30, 2018), <http://www.internetworldstats.com/stats.htm>.

125. Banks, *supra* note 94, at 234.

126. Peter J. Breckheimer II, *A Haven for Hate: The Foreign and Domestic Implications of Protecting Internet Hate Speech Under the First Amendment*, 75 S. CAL. L. REV. 1493, 1497 (2002), <http://www-bcf.usc.edu/~usclrev/pdf/075603.pdf> (internal citations omitted). “Don Black, former Grand Dragon of the Ku Klux Klan and author of the white-nationalist *Stormfront.org* site, revels in the benefits the Internet has afforded hate organizations such as his own. As the first to establish a site dedicated to intolerance on the Internet, Black has noted that, ‘[a]s far as recruiting, [the Internet has] been the biggest breakthrough I’ve seen in the 30 years I’ve been involved in [white nationalism].’” *Id.*

127. *See id.*; *see Hate on the Internet*, *supra* note 14, at 5–6.

128. Banks, *supra* note 94, at 233.

129. *Hate on the Internet*, *supra* note 14, at 5.

130. *See id.* at 6.

131. *See id.*

Cross-border differences present another challenge to regulating hate speech.¹³² The Internet is a “global network” so international cooperation is necessary to prosecute online hate crimes that take place in one country, but target a person or group of people in another country.¹³³ Thus, when countries have different rules for regulating the Internet, it is nearly impossible to dispose of online content that stems from one country, but that affects another.¹³⁴ The United States, as aforementioned, has become a targeted host country for radical online content because of the formidable First Amendment protections.¹³⁵ For this reason, the United States often presents problems for other countries attempting to regulate the Internet within their own borders.¹³⁶

IV. EVALUATION OF ARTICLE 19'S PREVIOUSLY PROPOSED SOLUTION

This Part explains the solution that ARTICLE 19 previously proposed for assessing instances of incitement. This Part also critiques ARTICLE 19's solution, addressing whether it validly reflects the intentions of Article 20(2)¹³⁷ and whether it provides more or less clarity to states attempting to regulate the same.

A. ARTICLE 19's Guidelines for Evaluating Incitement Cases

This section explains the general goals of the ARTICLE 19 solution. It proceeds to address two key components of the solution: the definition of key terms related to incitement and the six-part test for adjudicating incitement cases.

1. General Themes of ARTICLE 19's Guidelines

ARTICLE 19 advocates for a “greater consensus” globally on the criminalization of inciting speech.¹³⁸ In fact, ARTICLE 19's solution proposes that criminal sanctions should often not be employed in incitement cases.¹³⁹ Rather, ARTICLE 19 advocates

132. *See id.* at 3.

133. *Hate on the Internet*, *supra* note 14, at 6; *see also* Banks, *supra* note 94, at 235.

134. *See* Banks, *supra* note 94, at 235.

135. *See infra* Part II.A; *see* Block, *supra* note 67.

136. *See* Banks, *supra* note 94, at 234.

137. *See* ICCPR, *supra* note 1, art. 20.

138. *See Prohibiting Incitement*, *supra* note 8, at 1.

139. *See id.*

for creativity in sanctioning individuals spreading inciting messages through a variety of civil and administrative punishments.¹⁴⁰ In addition, ARTICLE 19's approach focuses on remedial measures aimed at making reparations to the victims.¹⁴¹ With these goals in mind, ARTICLE 19 sets forth a list of recommendations it believes will help facilitate agreement on a threshold for regulating inciting speech.¹⁴² The suggestions are supported by "international standards" established by the UDHR, the ICCPR, the ECHR, the American Convention on Human Rights and the African Charter on Human and People's Rights.¹⁴³

2. Defining Key Terms

ARTICLE 19 emphasizes the importance of defining key terms relevant to the offense of incitement.¹⁴⁴ It provides actual definitions of such words to be used under a specific methodology for evaluating incitement cases.¹⁴⁵ For example, the word discrimination means:

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 of 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.¹⁴⁶

ARTICLE 19 also identifies "hatred," "discrimination," "violence," and "hostility" as words relevant to the offense of incitement, and defines those terms as well.¹⁴⁷

140. *See id.*

141. *See id.*

142. *See id.* at 19–27.

143. *See id.* at 9–17.

144. *See id.* at 19.

145. *See id.*

146. *See id.*

147. *See id.* The definition of hatred is: "a state of mind characterized as 'intense and irrational emotions of opprobrium, enmity and detestation towards the target group.'" *See id.* The definition of violence is: "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." *See id.* The definition of hostility is: "a manifested action of an extreme state of mind. Although the

3. ARTICLE 19's Six-Part Test

ARTICLE 19 advances a six-part test for evaluating incitement cases.¹⁴⁸ It urges that analyzing incitement cases under its six-part test will standardize jurisprudence on incitement offenses.¹⁴⁹ ARTICLE 19 reasons that its test provides courts with a "framework" to assess incitement on a case-by-case basis.¹⁵⁰ ARTICLE 19 proceeds to provide pertinent considerations with regard to each element of the test.¹⁵¹ For example, under the first part of the test, "context," ARTICLE 19 implores courts to consider the "existence of conflicts within society," the "existence and history of institutionalized discrimination," the "history of clashes and conflicts," "the legal framework" and "the media landscape."¹⁵²

B. A Critique of ARTICLE 19's Solution

This section critiques the ARTICLE 19 solution. First, it addresses problems with the proposed definitions, including, *inter alia*, ARTICLE 19's methodology for defining the terms. It then critiques the six-part test, which further confuses the threshold for incitement rather than clarifying it.

term implies a state of mind, an action is required. Hence, hostility can be defined as the manifestation of hatred." *See id.*

148. *See Prohibiting Incitement, supra* note 8, at 27. As stated in the Introduction, ARTICLE 19 proposes that states consider all of the following elements when adjudicating incitement cases: "(1) context of the expression; (2) speaker/proponent of the expression; (3) intent of the speaker/proponent of the expression to incite to discrimination, hostility or violence; (4) content of the expression; (5) extent and magnitude of the expression (including its public nature, its audience and means of dissemination); [and] (6) likelihood of the advocated action occurring, including its imminence." *Id.* All of these elements, they say, should be strictly assessed. *See id.* at 2.

149. *See id.* at 27, 29.

150. *See id.* at 27, 29.

151. *See id.* at 29–40.

152. *See id.* at 29–30.

1. Problems with Article 19's Proposed Definitions

There are two preeminent problems with the definitions used by ARTICLE 19.¹⁵³ First, the ARTICLE 19 definitions lead Article 20(2)¹⁵⁴ away from being a standard to guide the international community and dangerously towards a strict rule.¹⁵⁵ Second, ARTICLE 19 took the proposed definitions from various international sources.¹⁵⁶ This solution is inappropriate for a myriad of reasons, the chief concern as a matter of international law being that this assumes state consent.¹⁵⁷ ARTICLE 19's recommendations, which impose definitions conceived for other documents, ignore the legislative history of Article 20(2), thereby defying the intentions of the state parties who drafted it.¹⁵⁸ ARTICLE 19's proposed expansion of the protected groups by making the current list "non-exhaustive"¹⁵⁹ suffers the same problem since Article 20(2) only focuses on "any advocacy of national, racial or religious hatred that constitutes incitement."¹⁶⁰

The drafting of Article 20(2) was highly contentious among states.¹⁶¹ Supporters of this provision argued that individuals

153. See *Prohibiting Incitement*, *supra* note 8, at 19.

154. See ICCPR, *supra* note 1, art. 20.

155. See *infra* Part V.A for further discussion on standards versus rules, and the dangerous pitfalls of the latter with regard to regulating inciting speech.

156. See *Prohibiting Incitement*, *supra* note 8, at 19. The definitions for the terms hatred and hostility are both taken from the Camden Principles of Freedom of Expression and Equality. See *id.* The meaning of discrimination was adapted from those set forth in the Convention on the Elimination of All Forms of Discrimination against Women and the Convention on the Elimination of All Forms of Racial Discrimination. See *id.* Finally, the definition of violence is adapted from one offered by the World Health Organisation in their 2002 report, World Report on Violence and Health. See *id.*

157. See generally Duncan B. Hollis, *Why State Consent Still Matters- Non-State Actors, Treaties, and the Changing Sources of International Law*, 23 BERKELEY J. INT'L L. 137 (2005), available at <https://scholarship.law.berkeley.edu/cgi/viewcontent.cgi?article=1283&context=bjil>. "Only if all concerned parties consent, whether by treaty, adjudication, or arbitration, does an actual determination of the legal norm, at least with respect to those parties, become possible." See *id.* at 144.

158. See Mona Elbahtimy, *The Right to be Free from the Harm of Hate Speech in International Human Rights Law* 1, 9 (U. of Cambridge, Working Paper No. 7, 2014), <https://www.free-expression.group.cam.ac.uk/pdfs/elbahtimy>.

159. See *Prohibiting Incitement*, *supra* note 8, at 19–21.

160. ICCPR, *supra* note 1, art. 20.

161. See Elbahtimy, *supra* note 158, at 10.

would abuse their right to exercise expression freely.¹⁶² Opponents feared that states would abuse the incitement provision by putting too many limitations on expression.¹⁶³ Toby Mendel, Executive Director at the Center for Law and Democracy,¹⁶⁴ explained that because of the disagreement between states, “[p]roposals to restrict Article 20(2) to incitement to violence were rejected, but so were proposals to extend it, for example to include ‘racial exclusiveness’, on the basis of concern about free speech.”¹⁶⁵ The article was eventually adopted, but conflicting opinions about its contents persisted.¹⁶⁶ Fifty states voted in favor of enactment, while eighteen voted against and fifteen states abstained from voting.¹⁶⁷ Since the inception of the ICCPR, the Human Rights Committee—the United Nations organ responsible for interpreting the ICCPR—has abstained from revisiting the provision prohibiting incitement, including leaving key terms, such as “hatred,” “hostility” and “incitement,” undefined in Article 20(2).¹⁶⁸ The serious disagreement at the time of drafting the incitement provision indicates that the state parties did not intend to strictly define key terms in Article 20(2), as suggested by ARTICLE 19. Nor did they intend to expand the scope of the incitement provision, as further urged by ARTICLE 19. The subsequent failure of the Human Rights Committee to address these issues not only reinforces the state’s intentions at the time the ICCPR entered into force, but also suggests that the provision is supposed to remain the way that it was drafted.

2. Problems with ARTICLE 19’s Six-Part Test

The ARTICLE 19 framework for evaluating incitement cases is problematic because it broadens the scope of Article 20(2),¹⁶⁹

162. *See id.*

163. *See id.*

164. *Who We Are*, CENTRE L. & DEMOCRACY, <https://www.law-democracy.org/live/about-us/who-we-are/> (last visited Dec. 14, 2018).

165. Toby Mendel, *Hate Speech Rules Under International Law* 1, 3, CENTRE L. & DEMOCRACY (Feb. 2010), <http://www.law-democracy.org/wp-content/uploads/2010/07/10.02.hate-speech.Macedonia-book.pdf>.

166. *See* Elbahtimy, *supra* note 158, at 10.

167. *See id.*

168. *See id.*; *see infra* Part V for further discussion on this point.

169. *See* ICCPR, *supra* note 1, art. 20.

which, as discussed,¹⁷⁰ is contrary to the intentions of the drafters of the provision.¹⁷¹ Furthermore, this will likely exacerbate the problem of divergent interpretations of the article not only among states, but within states as well. ARTICLE 19 proposes its own six-part test for evaluating incitement cases; however, ARTICLE 19 also emphasizes the importance of complying with the three-part test laid out in Article 19(3).¹⁷² As discussed, limitations on expression under Article 19(3) must be provided by law, must pursue a legitimate aim, and must be necessary in a democratic society.¹⁷³ This test is different than the additional test that ARTICLE 19 conceived of, yet the organization provides no suggestions for how to reconcile the two methods. ARTICLE 19 seemingly wants courts to consider incitement cases under the test it has laid out and to then consider whether they also comply with the test under Article 19(3).¹⁷⁴ With so many considerations for each prong of the test, any judge could easily make a case fit into the ARTICLE 19 framework.

V. SOLUTION

This Part proposes that the best way to evaluate incitement cases is by applying a standard that allows decision-makers to make fact-centric determinations concerning whether a case truly reaches the level of incitement. This Part further argues that by attempting to understand incitement in light of Article 19(3) of the ICCPR, as envisioned by the drafters, there already is a standard in place for evaluating these cases. The final step towards realizing a universal threshold, therefore, is a concerted effort by states to interpret the standard and apply it uniformly.

A. Realizing Advantages of a Flexible Standard in Lieu of a Strict Rule

Rules and standards, in general, are both imperfect methods for grappling with different legal issues.¹⁷⁵ The disadvantages of

170. See *supra* Part IV.B.1.

171. See Elbahtimy, *supra* note 158, at 9–10.

172. See *Prohibiting Incitement*, *supra* note 8, at 41; see ICCPR, *supra* note 1, art. 19.

173. See *supra* Part I.B.3.

174. See ICCPR, *supra* note 1, art. 19.

175. See *Rules Versus Standards (Public Choice)*, WHAT-WHEN-HOW, <http://what-when-how.com/public-choice/rules-versus-standards-public-choice/> (last visited Jan. 15, 2018) [hereinafter *Rules Versus Standards*].

rules compared to the advantages of standards, however, make a standard the better method for grappling with incitement cases.¹⁷⁶ Rules are inflexible.¹⁷⁷ While rules provide clear tests, they effectively prevent adjudicators from considering the unique circumstances of each dispute before reaching a decision.¹⁷⁸ In contrast, standards facilitate fact-centric determinations because they are, to a degree, “open-ended.”¹⁷⁹

The evaluation of expression demands a fact-specific determination. Consider, for example, the publicized photo shoot depicting American comedian, Kathy Griffin, purporting to hold the excised head of current United States President, Donald Trump.¹⁸⁰ The public response to the stunt was overwhelmingly negative, and Griffin was fired from her position as the co-host of CNN’s live New Year’s Eve Show.¹⁸¹ Squatty Potty—a toilet footstool company—also suspended advertisements starring Griffin.¹⁸² Griffin’s stunt, however, was not a true threat to President Trump,¹⁸³ and it would be unimaginable to see her criminalized for these actions. Indeed, one of the foundational free expression cases, *Handyside v. the United Kingdom*, decided by the ECtHR, emphasizes that freedom of expression applies “not only

176. *See id.*

177. *See id.*

178. *See id.*

179. *Id.*

180. Melissa Chan, ‘He Broke Me.’ Kathy Griffin Says Trump Family Ruined Her Life Over Controversial Photo, *TIME* (June 2, 2017), <http://time.com/4803225/kathy-griffin-trump-photo-head/>. The following articles present more information about the Kathy Griffin stunt: Andrea Mandell, *CNN Fires Kathy Griffin Over Offensive Donald Trump Photo*, *USA TODAY* (May 31, 2017), <https://www.usatoday.com/story/life/people/2017/05/31/cnn-fires-kathy-griffin-over-offensive-trump-photo/102349176/>; Randy Cordova, *Anderson Cooper Hopes Kathy Griffin ‘Bounces Back’ From Photo*, *USA TODAY* (June 10, 2017), <https://www.usatoday.com/story/news/nation-now/2017/06/10/anderson-cooper-kathy-griffin-trump/386393001/>; Andrea Mandell, *Kathy Griffin Isn’t Sorry About Her Trump Photo Anymore*, *USA TODAY* (Aug. 29, 2017), <https://www.usatoday.com/story/life/people/2017/08/29/kathy-griffin-isnt-sorry-her-trump-photo-anymore/614332001/>; Chancellor Agard, *Kathy Griffin Bloody Trump Pic Defended by Photographer*, *ENT. WKLY.* (May 30, 2017), <http://ew.com/news/2017/05/30/kathy-griffin-trump-head-photo-tyler-shields/>.

181. *See* Chan, *supra* note 180.

182. *See id.*

183. *See id.*

to 'information' or 'ideas' that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that *offend, shock or disturb* the State or any sector of the population."¹⁸⁴

Conversely, had the same photographs been taken by a known, anti-American terrorist, the threat of the photographs would be more serious. This is the type of expression that the prohibition on incitement endeavors to criminalize.¹⁸⁵ Even though the expression in both cases was the same, the facts dictate the need to criminalize the expression or not.¹⁸⁶ A rule would disallow this type of judgment call, while a standard facilitates a discretionary ruling on this issue.¹⁸⁷

To be sure, standards also facilitate inconsistency to an extent.¹⁸⁸ Considering facts in cases of criminalizing incitement, however, is so crucial that it takes primacy over consistency, which can be dealt with in other ways. Namely, a concerted effort by states, which is necessary regardless, can and will be the only way to truly overcome problems regarding inconsistency. In addition, standards are known for being more difficult to interpret for people trying to regulate their conduct, as compared to rules, which clearly set out what conduct is prohibited thereunder.¹⁸⁹ Here, though, it is clear when speech is intentionally and inherently hostile or violent towards a person or group of people; so any notion that a person could not foresee the consequences of spreading hateful content is meritless.

*B. Accepting the True Intentions of Article 20(2)*¹⁹⁰

Freedom of expression is a fundamental human right.¹⁹¹ The ICCPR embodies this concept, and implores states to respect it.¹⁹² The right to freedom of expression, which is enshrined in

184. *Handyside v. United Kingdom*, App. No. 5493/72, 1 Eur. H.R. Rep. 737, ¶ 49 (1976) (emphasis added).

185. ICCPR, *supra* note 1, art. 20.

186. *See Rules Versus Standards*, *supra* note 175.

187. *See id.*

188. *See id.*

189. *See id.*

190. *See* ICCPR, *supra* note 1, art. 20.

191. *See* *Freedom of Opinion and Expression*, *supra* note 50, ¶ 2.

192. ICCPR, *supra* note 1, art. 19; *see generally* *Freedom of Opinion and Expression*, *supra* note 50.

Article 19, involves both the right to share and to consume information and opinions.¹⁹³ This right, however, is not absolute, and the prohibitions of Article 20(2) are one of the few permissible limitations on freedom of expression.¹⁹⁴ Even speech likely to incite discrimination, hostility or violence, however, must comply with the three-part test from Article 19(3).¹⁹⁵ Indeed, this three-part test is the standard by which incitement cases should be evaluated; the onus is ultimately on the courts to apply this standard in a way that effectuates the purpose of Article 20(2),¹⁹⁶ including respecting the free speech principles that are sacred under the ICCPR.¹⁹⁷

C. Isolating Inappropriate Instances of Incitement

Since a standard for incitement already exists, the true challenge to achieving uniform practice by states regarding a threshold for criminalizing inciting speech is for courts to interpret the contents of Article 19(3).¹⁹⁸ Surveying past instances of criminalization of incitement would be an effective tool to determine the appropriate threshold under Article 20(2).¹⁹⁹ Ruling out inappropriate instances of incitement and publicizing the same would, in particular, be very instructive to states. One possible method for beginning to interpret the standard under Article 19(3) would be to survey prior cases considered by various international courts and tribunals regarding expression under either Article 19(3) or Article 20(2).²⁰⁰ Many ECtHR decisions refer specifically to the three-part test enshrined in Article 19(3),²⁰¹ and proffer detailed reasoning for why cases meet or do not meet one or all of the three prongs.²⁰²

193. *See id.*

194. *See infra* Part I.B.3.

195. *See id.*

196. *See* ICCPR, *supra* note 1, art. 20.

197. *See id.*; *See* ICCPR, *supra* note 1, art. 19.

198. *See* ICCPR, *supra* note 1, art. 19. Recall that the three-part test under Article 19(3) of the ICCPR dictates that any restrictions on expression—even those cases that fall under Article 20(2)—must be provided by law, must pursue a legitimate aim, and must be necessary in a democratic society. *See* Freedoms of Opinion and Expression, *supra* note 50, ¶ 22.

199. *See* ICCPR, *supra* note 1, art. 20.

200. *See* ICCPR, *supra* note 1, art. 19; *see also* ICCPR, *supra* note 1, art. 20.

201. *See* ICCPR, *supra* note 1, art. 19.

202. All international courts and tribunals should be taken into account in order to determine a threshold that is representative of all parts of the world.

CONCLUSION

States have incorrectly dealt with instances of speech likely to incite discrimination, hostility or violence for too long. Provisions prohibiting incitement are essential to protect individual rights and communities, so the international community needs to prioritize correct application of Article 20(2)'s mandate. Regardless of who undertakes to evaluate the issue of prohibiting speech likely to incite discrimination, hostility or violence,²⁰³ there are certain analytical steps necessary to determine a threshold that is both accurate in light of the intentions of Article 20(2)²⁰⁴ and viable on the universal stage. Viability depends on the advancement of a standard, which will be necessarily flexible in order to withstand the test of time, to guide the international community. Such a standard is preferable to a strict rule that will allow states to continue to abuse the criminalization of inciting speech. This is what application of the ARTICLE 19 framework will facilitate—continued abuse. With too many considerations to balance, courts can more easily classify an instance of expression as incitement. Moreover, the ARTICLE 19 framework is unnecessary because a viable standard for regulating incitement already exists. The three-part test under Article 19(3)²⁰⁵ is supposed to guide states adjudicating incitement cases.²⁰⁶ The true challenge then, is for states to apply the existing standard consistently. States can only overcome this challenge through a concerted effort to understand the appropriate

This note merely advocates that the ECtHR is a good place to start because of the vast number of cases that they have considered regarding expression under the ICCPR, and the clear language used in the decisions that specifically references the three-part test. The following cases are examples of ECtHR decisions that address whether restrictions on expression are provided by law: *Sunday Times v. United Kingdom*, App. No. 6538/74, 2 Eur. H.R. Rep. 245 (1979); *Malone v. United Kingdom*, App. No. 8691/79, 7 Eur. H.R. Rep. 14 (1984); *Müller v. Switzerland*, App. No. 10737/84, 13 Eur. H.R. Rep. 212 (1988). The following case is an example of a ECtHR decision that addresses whether restrictions on expression pursue a legitimate aim: *İ.A. v. Turkey*, App. No. 42571/98, Eur. Ct. H.R. (2005). The following cases are examples of ECtHR decisions that address whether restrictions on expression are necessary in a democratic society: *Sürek v. Turkey* (No. 4), App. No. 24762/94, Eur. Ct. H.R. (1999); *Castells v. Spain*, App. No. 11798/85, 14 Eur. H.R. Rep. 445 (1992); *Cumpănă v. Romania*, App. No. 33348/96, 41 Eur. H.R. Rep. 14 (2004).

203. See *infra* Part III.A.

204. See ICCPR, *supra* note 1, art. 20.

205. See ICCPR, *supra* note 1, art. 19.

206. See *infra* Part I.B.3.

bounds of Article 19(3).²⁰⁷ Of course, this type of in-depth survey of decades or more of case law is no simple feat. The problems regarding inconsistent application of criminal incitement, including both over-criminalization and under-criminalization of expression, however, are crucial and demand this type of effort by states.

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207. See ICCPR, *supra* note 1, art. 19.

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