

# THE RIGHT TO INSULT IN INTERNATIONAL LAW

Amal Clooney and Philippa Webb\*

## ABSTRACT

*States all over the world are enacting new laws that criminalize insults, and using existing insult laws with renewed vigour. In this article, we examine state practice, treaty provisions, and case law on insulting speech. We conclude that insulting speech is currently insufficiently protected under international law and regulated by confused case law and commentary. We explain that the three principal international treaties that regulate speech provide conflicting guidance on the right to insult in international law, and the treaty provisions have been interpreted in inconsistent ways by international courts and United Nations bodies. We conclude by recommending that international law should recognize a “right to insult” and, drawing on U.S. practice under the First Amendment, we propose eight recommendations to guide consideration of insulting speech in international law. These recommendations would promote coherence in international legal standards and offer greater protection to freedom of speech.*

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\* Amal Clooney is a barrister at Doughty Street Chambers and a Visiting Professor at Columbia Law School. Philippa Webb is a barrister at 20 Essex Street Chambers and Reader (Associate Professor) in Public International Law at King’s College London. We thank Matthew Nelson, Anna Bonini, Katarzyna Lasinska, Raphaele Rafin, Tiffany Chan, Deborah Tang, Ollie Persey, and Mirka Fries for excellent research assistance. We are grateful to Professor Guglielmo Verdirame, Professor Michael Posner, Professor Vince Blasi, and Nani Jansen for comments.

## INTRODUCTION

Freedom of speech is under attack. States all over the world are enacting new laws that criminalize insults and are using existing insult laws with renewed vigour. Today, in many states, it is a criminal offence to insult royalty, rulers, or religion.<sup>1</sup> Prosecutions for such insults are on the rise. The number of journalists who are being imprisoned across the world is, today, at its highest point in over twenty-five years.<sup>2</sup>

Under international law, speech is primarily regulated by three treaties: the International Covenant on Civil and Political Rights, the Convention on the Elimination of Racial Discrimination, and the Convention on the Prevention and Punishment of the Crime of Genocide. What emerges from the wording of these legal provisions is that, at one end of the spectrum, speech that intentionally incites genocide *must* be criminalized, and speech inciting violence *may* be criminalized. At the other end of the spectrum, speech that is merely disturbing or shocking should not be a crime.<sup>3</sup>

In between these two poles is insulting speech that incites hatred, hostility or discrimination, but not violence. This falls into a more controversial grey zone, but international human rights bodies currently allow states to imprison individuals for such speech.<sup>4</sup> This

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1. "In more than 100 of the world's states, journalists can be imprisoned for 'insulting' government officials and institutions." RUTH WALDEN, *INSULT LAWS: AN INSULT TO PRESS FREEDOM* 7 (2000), <https://freedomhouse.org/sites/default/files/Insult%20Law%20Report.pdf>.

2. See *2016 prison census, 259 journalists jailed worldwide*, COMMITTEE FOR THE PROTECTION OF JOURNALISTS (Dec. 1, 2016), <https://cpj.org/imprisoned/2016.php>; see also *World Press Freedom Index 2015: decline on all fronts*, REPORTERS WITHOUT BORDERS (Feb. 12, 2015), <https://rsf.org/en/news/world-press-freedom-index-2015-decline-all-fronts> (describing press freedom in 2015).

3. See generally Human Rights Comm., General Comment No. 34, U.N. Doc. CCPR/C/GC/34 (Sept. 12, 2011) (describing the application of art. 19 of the ICCPR on freedoms of opinion and expression) [hereinafter General Recommendation No. 34]; *Handyside v. United Kingdom*, App. No. 5493/72, ¶ 49 (Eur. Ct. H.R. Dec. 7, 1976).

4. See *infra* Section IV. The African Court on Human and Peoples' Rights held, in *Lohé Issa Konaté v. Burkina Faso*, that imprisonment is acceptable for public incitements to hatred or discrimination, with violence unnecessary. *Lohé Issa Konaté v. Burkina Faso*, App. No. 004/2013, ¶ 165 (Afr. Ct. H.P.R. Dec. 5, 2014). The Inter-American Court of Human Rights accepted, in *Mémoli v. Argentina*, that should the requirements of necessity and proportionality be met, criminal defamation is permissible. *Mémoli v. Argentina*, ¶ 126 (Inter-Am. Ct. H.R. Aug. 22, 2013).

Article argues that international standards should be interpreted or amended to provide that such speech should not be criminalized. Instead, imprisonment for speech should be reserved for the most dangerous forms of insulting speech that intentionally and directly incite imminent or concretely-identified violence or criminal offences.

## I. STATE PRACTICE ON INSULTING SPEECH

States all around the world are imprisoning journalists and others for insults. Insults may result from a lack of awareness or indifference as to how the words will be received, or they may be deliberately provocative and attention-seeking. Insulting speech may stigmatise minorities and be harmful to relations between communities. But it can also challenge those in power or blow the whistle on unlawful conduct. In many jurisdictions such speech is punished under the guise of national security or blasphemy laws, simply to silence dissent. Indeed, it is currently a crime in many countries around the world to insult one of the three “Rs”—rulers, religion, or royals—and people are being prosecuted for such insults in criminal and military courts.

### A. Insulting Rulers

#### 1. Defamation Laws

In most countries, a person who harms another person’s reputation through an oral or written insult can be sued for defamation in the civil courts and may have to pay damages to the offended party. But to protect free expression, many laws on defamation have exceptions for certain types of speech. This includes speech that is true, speech that reflects an opinion, and speech about a matter of public interest. These exceptions are intended to ensure that political speech remains protected from the civil penalties that would otherwise apply.

But in many countries, defamation can also be a criminal offence, without exception for political speech. Criminal defamation laws are widespread around the world, still exist in a number of U.S. states,<sup>5</sup> and are prevalent in Europe. Twenty-three of the

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5. Fifteen U.S. States and two territories have criminalized libel. *See Special Report: Criminal Libel in the United States*, INTERNATIONAL PRESS INSTITUTE (Sept. 2015), <http://legaldb.freemedia.at/special-report-criminal-libel->

twenty-eight member states of the European Union (E.U.) criminalize defamation,<sup>6</sup> and in twenty countries imprisonment—as opposed to fines—is the penalty.<sup>7</sup>

Prosecutions under criminal defamation laws are routine even in some European countries.<sup>8</sup> In the last five years alone, journalists in fifteen E.U. countries have been convicted of defamation in criminal trials.<sup>9</sup>

## 2. Sedition

In addition to criminal defamation laws that apply to all types of insults, many countries have criminal sedition laws that make it a crime to insult the government specifically. Throughout history, sedition laws have been used to silence minority views and have thus been called “the hallmark of an unfree society.”<sup>10</sup> Gandhi, Galileo, and Nelson Mandela were all at one time prosecuted for sedition.<sup>11</sup>

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in-the-united-states/ [hereinafter *Special Report*]; see also *Libel and Insult Laws: A Matrix On Where We Stand And What We Would Like To Achieve*, OSCE 171 (2005), <http://www.osce.org/fom/41958?download=true> (describing libel and insult laws in the OSCE). However, for criminal sanctions, the plaintiff must prove the statement was knowingly false or made with a reckless disregard for truth or falsity. *Garrison v. Louisiana*, 379 U.S. 64, 81 (1964). This is in line with the precedent the Court established in *New York Times v. Sullivan* that the statement may be criminalized only if it is made with actual malice, regardless of whether the individual is considered a public or private figure. See *New York Times v. Sullivan*, 376 U.S. 254, 283 (1964). See also Eugene Volokh, *No, there's no "hate speech" exception to the First Amendment*, WASH. POST (May 7, 2015), [https://www.washingtonpost.com/news/volokh-f/wp/2015/05/07/no-theres-no-hate-speech-exception-to-the-first-amendment/?utm\\_term=.6fb47d495bc5](https://www.washingtonpost.com/news/volokh-f/wp/2015/05/07/no-theres-no-hate-speech-exception-to-the-first-amendment/?utm_term=.6fb47d495bc5) (describing U.S. First Amendment jurisprudence). Studies indicate that the number of criminal libel prosecutions or threatened prosecutions has diminished to less than three per year, but this may be under-representative as many cases never reach public attention. See *Special Report*.

6. INTERNATIONAL PRESS INSTITUTE, *Out of Balance: Defamation Law in the European Union*, <http://legaldb.freemedia.at/wp-content/uploads/2015/05/IPI-OutofBalance-Final-Jan2015.pdf> (last visited Jan. 2, 2017). Five E.U. states: Cyprus, Estonia, Ireland, Romania, and the United Kingdom have abolished them. *Id.*

7. *Id.*

8. *Id.*

9. *Id.* (citing Bulgaria, Croatia, the Czech Republic, Denmark, Finland, France, Germany, Greece, Hungary, Italy, Lithuania, Malta, Poland, Portugal, and Spain).

10. TIMOTHY GARTON ASH, *FREE SPEECH: TEN PRINCIPLES FOR A CONNECTED WORLD* 331 (2016); see also Harry Kalven Jr., *The New York Times Case: A Note on the Central Meaning of the First Amendment*, 1964 SUP. CT. REV. 191, 205

Indian law, even today, criminalizes a speaker who “brings or attempts to bring into hatred or contempt, or excites or attempts to excite disaffection towards the Government”.<sup>12</sup> Other countries have laws with the same elements but a different name. For example, most Arab countries have laws that make it a crime to “instigat[e] hatred and disrespect against the ruling regime”.<sup>13</sup> Similarly, China

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(1964) (stating that if a society “makes seditious libel an offense, it is not a free society no matter what its other characteristics.”). In some countries, such as the United States, sedition requires a conspiracy or act to violently overthrow the government, so the same objections would not apply. *See, e.g.*, 18 U.S.C. § 2384 (2006) (codifying seditious conspiracy).

11. Mohandas Gandhi was prosecuted and convicted for sedition in 1922. NORVAL MORRIS & DAVID J. ROTHMAN, *THE OXFORD HISTORY OF THE PRISON: THE PRACTICE OF PUNISHMENT IN WESTERN SOCIETY* 365 (1998). Galileo was summoned to Rome in 1633 and ordered to recant his work, *Dialogue*, as against the teachings of the church. Giorgio de Santillana, *The Crime of Galileo, in MAKERS OF THE WESTERN TRADITION: PORTRAITS FROM HISTORY* 276 (J. Kelley Sowards ed., 1991). Nelson Mandela was charged with numerous offences relating to sedition and treason from the early 1950s, and ultimately convicted for conspiring to overthrow the state. He was sentenced to life imprisonment following the *Rovonia* Trial in 1964. *Nelson Mandela's life and times*, BBC NEWS (June 8, 2013), <http://www.bbc.co.uk/news/world-africa-12305154>.

12. PEN. CODE, sec. 124A (India). Domestic courts in India interpreted this to cover any speech that brings the Government into “hatred or contempt”, but in 1962 the Supreme Court narrowed its scope, requiring incitement to violence. *See India: Drop Sedition Charges Against Journalist*, HUMAN RIGHTS WATCH (Oct. 12, 2012), <https://www.hrw.org/news/2012/10/12/india-drop-sedition-charges-against-cartoonist>. This requirement is currently being ignored in practice and was not reiterated in a 2016 case that upheld the constitutionality of the crime of sedition under Indian law. *See Stifling Dissent: The Criminalization of Peaceful Expression in India*, HUMAN RIGHTS WATCH (May 24, 2016), <https://www.hrw.org/report/2016/05/24/stifling-dissent/criminalization-peaceful-expression-India>.

13. *See, e.g., Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression*, ¶ 51, U.N. Doc. A/67/357 (Sept. 7, 2012) (describing the law in Bahrain) [hereinafter *2012 Report of the Special Rapporteur*]; *see also* PRESS LAW, Law No. 90-07, art. 97 (1990) (Alg.); Law No. 96 of 1996 (Press Law), arts. 176, 184–185 (Egypt); PENAL LAW (1995) (Iran); Revolutionary Command Council Res. No. 840 of 1986 (Iraq); Press Act, Law No. 206 (1968) (Iraq); PRESS AND PUBLICATIONS LAW, art. 37 (1998) (Jordan); PRESS AND PUBLICATIONS LAW, 3/1961, arts. 23, 24, and 28 (Kuwait); Decree No. 104 of 1977, art. 23 (Leb.) (modifying certain portions of the law of September 14, 1962, concerning publications); Audio-Visual Media Law of 1994 (Leb.) (prohibiting the broadcast of material defaming the Head of State or religious leaders); PRESS CODE, art. 41 (1958 am. 1973) (Morocco) (stating that “[a]ny insult by one of the means listed in Art. 38 (including speech, writings, publications, and posters) against Our Majesty or the royal princes or princesses is punishable by five to 20 years imprisonment and a fine of 100,000 to 1 million dirhams [c. \$10,200-102,000 U.S.]”); Press and Publications Law, art. 6 (1982)

criminalizes “incitement of subversion of State power”.<sup>14</sup> And in Europe, many states have laws that make it a crime to insult the head of state or other political figures. For instance, Cyprus makes it a crime to insult the army or a foreign head of State.<sup>15</sup> In Denmark, attacking a public official “with insults, abusive language or other offensive words or gestures” is punishable by up to six months’ imprisonment.<sup>16</sup> In Germany, defaming the president can result in a prison term of up to five years.<sup>17</sup>

These laws do not simply exist on paper: prosecutions for sedition are taking place all over the world. In Malaysia, a cartoonist named Zunar faces up to forty-three years for sedition for posting nine cartoons on Twitter that mocked the government and its sham trial of opposition leader Anwar Ibrahim.<sup>18</sup> In India, an actress was charged with sedition after she stated in a political speech that “Pakistan is not hell, people there are just like us.”<sup>19</sup> In Botswana, an editor faces three years in prison for sedition because a story in his newspaper claiming that President Ian Khama failed to report a road traffic accident<sup>20</sup> was deemed “likely to cause disaffection or hostility

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(Saudi Arabia); PRESS CODE arts. 48, 59 (1975 am. 1988, 1993) (Tunis.); PENAL LAW, arts. 197–98 (1994) (Yemen).

14. See, e.g., *China’s Rights Defenders*, HUMAN RIGHTS WATCH (2007), <https://www.hrw.org/chinas-rights-defenders> (profiling several human rights activists imprisoned in China). More examples can be found in an October 2016 report by the U.N. Special Rapporteur on Freedom of Expression. See *Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression*, ¶ 43, U.N. Doc. A/71/373 (Sept. 6, 2016) [hereinafter *2016 Report of the Special Rapporteur*].

15. INTERNATIONAL PRESS INSTITUTE, *supra* note 6.

16. CRIM. CODE, § 121 (Den.)

17. STRAFGESETZBUCH [STGB] [PENAL CODE], § 90 (Ger.).

18. See Cameron Ochse, *Malaysia: Cartoonist Zunar arrested on charges of sedition*, X INDEX (Nov. 28, 2016), <https://www.indexonensorship.org/2016/11/malaysia-cartoonist-zunar-arrested-charges-sedition/#.WDxeReimuy8.twitter>; see also *Malaysian political cartoonist Zunar arrested under sedition law*, REUTERS (Nov. 26, 2016), <http://www.reuters.com/article/us-malaysia-politics-arrest-idUSKBN13LOJW> (describing the case against Zunar).

19. *‘Sedition’ charge against actor Ramya: A look at recent cases where it was invoked*, THE INDIAN EXPRESS (Aug. 23, 2016), <http://indianexpress.com/article/india/india-news-india/ramya-divya-spandana-sedition-cases-2016-pakistan-2992459/>.

20. Marianne Thamm, *Botswana: Newspaper editor faces two-year sentence on archaic charge of sedition*, DAILY MAVERICK (Jan. 9, 2017), <https://www.dailymaverick.co.za/article/2017-01-09-botswana-newspaper-editor-faces-two-year-jail-sentence-on-archaic-charge-of-sedition/#.WHQQdIXXKUK>. The defendant, Outsa Mokona, has appealed a recent decision of the High Court in which he sought to challenge the constitutionality of Botswana’s sedition laws.

towards the head of state or the government.”<sup>21</sup> And in Turkey, over two thousand people have been prosecuted in a two-year period since Recep Tayyip Erdoğan became President for the crime of insulting him.<sup>22</sup>

### 3. Anti-Discrimination Laws

Anti-discrimination laws that criminalize “hate speech” targeting minorities are also widespread, and can be applied to a broad range of political speech. Such laws exist all over the world, including in Europe, and they often carry criminal penalties. South Africa, which already allows civil penalties for expressions that “promote or propagate hatred” is also considering a new law that would criminalize hate speech.<sup>23</sup> The speech would be defined broadly as a direct or electronic communication that “advocates hatred” and incites others to harm or causes contempt or ridicule.<sup>24</sup> The law would punish an offender with up to ten years in prison.<sup>25</sup>

Such laws are routinely used to prosecute speakers around the world. In the Netherlands, a far-right politician was convicted for hate speech after he called for “fewer Moroccans” in the country.<sup>26</sup> In Germany, the government threatened to prosecute Facebook if it did not remove hate speech targeting Jews from the website swiftly

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21. See PENAL CODE, §§ 50–51 (Bots.).

22. See, e.g., *Ex-Miss Turkey sentenced for insulting Erdogan*, BBC NEWS (May 31, 2016), <http://www.bbc.com/news/world-europe-36419723> (reporting that Merve Buyuksarac was given a fourteen-month suspended prison sentence for insulting President Erdogan).

23. See *The Prevention and Combating of Hate Crime and Hate Speech Bill, November 2016*, DEPT OF JUST. AND CONST. DEV., REPUBLIC OF SOUTH AFRICA, <http://www.justice.gov.za/legislation/hcbill/hatecrimes.html> (last visited Jan. 27, 2017).

24. See *Prevention and Combating of Hate Crimes and Hate Speech Bill*, § 4 (Draft 2016), <http://www.justice.gov.za/legislation/hcbill/2016-HateCrimes-HateSpeechBill.pdf> (S. Afr.) (establishing a three-year penalty for first-time offenders and a ten-year penalty for second-time offenders).

25. *Id.*, §§ 1, 4, and 6; see also Norimitsu Onishi, *Jail Time for Using South Africa’s Worst Racial Slur?*, N.Y. TIMES (Oct. 27, 2016), <http://www.nytimes.com/2016/10/28/world/africa/south-africa-hate-speech.html> (describing the impact of the proposed new hate speech law in South Africa).

26. The prosecution did not ask for a fine or imprisonment and no such penalty was imposed. See *Netherlands trial: Geert Wilders guilty of incitement*, BBC NEWS (Dec. 9, 2016), <http://www.bbc.com/news/world-europe-38260377>.

enough.<sup>27</sup> And in Turkey, a former Minister and Member of Parliament who took part in a meeting about human rights in which he criticized governmental policies was convicted of “incitement to hatred and hostility.”<sup>28</sup>

#### 4. Terrorism Laws

Many countries’ terrorism laws are worded in such vague terms that they capture speech that is merely insulting to the state’s officials or even private actors. For instance, in Saudi Arabia, anti-terror legislation criminalizes “insult to the reputation of the state.”<sup>29</sup> And in Kyrgyzstan, Article 11 of the Law on Countering Extremist Activity prohibits the dissemination of extremist materials that call for a “breach of national dignity.”<sup>30</sup>

In Tunisia, a journalist was charged with terrorism for publishing a photograph of Seifeddine Rezgui, the perpetrator of a terrorist attack that killed thirty-eight foreigners, emerging from a car before he began shooting.<sup>31</sup> In Russia, a blogger received a two-year sentence for conveying support for the ideology and practices of

27. See Mark Scott & Melissa Eddy, *Facebook Runs Up Against German Hate Speech Laws*, N.Y. TIMES (Nov. 28, 2016), <http://www.nytimes.com/2016/11/28/technology/facebook-germany-hate-speech-fake-news.html>.

28. See *Güzel v. Turkey*, App. No. 65849/01, ¶¶ 6–8 (Eur. Ct. H.R. July 7, 2006); see also *Yarar v. Turkey*, App. No. 57258/00 (Eur. Ct. H.R. Dec. 19, 2006) (similarly involving “incitement to hatred and hostility” laws in Turkey).

29. *Saudi Arabia: New Terrorism Regulations Assault Rights*, HUMAN RIGHTS WATCH (Mar. 20, 2014), <https://www.hrw.org/news/2014/03/20/saudi-arabia-new-terrorism-regulations-assault-rights>.

30. See *Kyrgyzstan: Law on Countering Extremist Activity*, ARTICLE 19 9 (Dec. 2015), <https://www.article19.org/data/files/medialibrary/38221/Kyrgyzstan-Extremism-LA-Final.pdf>; see also *Radicalisation and extremism in Kyrgyzstan: Perceptions, dynamics and prevention*, SAFERWORLD 2 (Feb. 25, 2016), <http://www.saferworld.org.uk/resources/view-resource/1040-radicalisation-and-extremism-in-kyrgyzstan-perceptions-dynamics-and-prevention> (describing the law in Kyrgyzstan); U.S. DEPT OF STATE, INTERNATIONAL RELIGIOUS FREEDOM REPORT 2008: KYRGYZ REPUBLIC (2008), <https://www.state.gov/j/drl/rls/irf/2008/108502.htm> (describing religious freedom in Kyrgyzstan). The term “breach of national dignity” has also been translated as “humiliation of national dignity” in some publications. See, e.g., *Joint Submission to the U.N. Periodic Review of Kyrgyzstan: For consideration at the 21<sup>st</sup> Session of the U.N. working group in January/February 2015*, ARTICLE 19 & PEN INTERNATIONAL ¶ 23 (June 11, 2014), <http://www.pen-international.org/wp-content/uploads/2014/07/ARTICLE-19-Joint-Submission-to-UPR-of-Kyrgyzstan.pdf>.

31. *Tunisia: Journalist, Blogger Facing Charges*, HUMAN RIGHTS WATCH (Aug. 6, 2015), <https://www.hrw.org/news/2015/08/06/tunisia-journalist-blogger-facing-charges>.

terrorism over an online post entitled “Who Did Putin’s Falcons Actually Bomb?” that criticized Russia’s military actions in Syria.<sup>32</sup> And in Spain, two puppeteers were arrested on charges of “glorifying terrorism” because their Madrid Carnival puppet show depicted a policeman trying to catch a witch who was holding up a sign linking herself to Al Qaeda and the secessionist group ETA.<sup>33</sup> The puppeteers responded that their arrest proved their show’s point—that the country’s counterterrorism laws are used for witch-hunts.<sup>34</sup>

### 5. Fake News Laws

Many countries make it a crime to publish “fake” or “false” news, which can in turn be interpreted by prosecutors and judges as being any information that the government considers to be insulting. Many countries in the Arab region include this offence in their penal codes,<sup>35</sup> and some countries in South Asia provide similar penalties.<sup>36</sup>

More of these laws are being adopted around the world. In 2013, The Gambia introduced a new offence of “spreading of false news against the government or public officials” punishable by up to fifteen years in prison or a fine of sixty-four thousand euros.<sup>37</sup> In China, a 2013 law established that it should be a crime to be a rumour-monger, defined as an individual who intentionally posts a false rumour that is reposted five hundred times or more, or viewed

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32. *Russia jails blogger over post criticizing military action in Syria*, COMMITTEE TO PROTECT JOURNALISTS (Dec. 20, 2016), <https://www.cpj.org/2016/12/russia-jails-blogger-over-post-criticizing-militar.php>.

33. Raphael Minder, *Crackdowns on Free Speech Rise Across a Europe Wary of Terror*, N.Y. TIMES (Feb. 24, 2016), [http://www.nytimes.com/2016/02/25/world/europe/spain-europe-protest-free-speech.html?\\_r=0](http://www.nytimes.com/2016/02/25/world/europe/spain-europe-protest-free-speech.html?_r=0).

34. *Id.*

35. *See, e.g.*, PENAL CODE, art. 188 (1937) (Egypt); PENAL CODE, arts. 133–34, 168–69 (1976) (Bahr.); CYBERCRIME LAW NO. 5, arts. 29 and 38 (2012) (U.A.E.); ROYAL DECREE 7/74 (PENAL CODE), art. 135 (Oman); *see generally*, Matt J. Duffy, *Arab Media Regulations: Identifying Restraints on Freedom of the Press in the Laws of Six Arabian Peninsula Countries*, 6 BERKELEY J. MID. EAST. & ISLAM. L. 1 (2014) (describing media laws in six Arab countries and how they affect journalism).

36. *See, e.g.*, *Bangladesh journalists could face 14 years in prison for refuting rumor*, COMMITTEE TO PROTECT JOURNALISTS (Aug. 12, 2016), <https://cpj.org/2016/08/bangladesh-journalists-could-face-14-years-in-pris.php> (describing the law in Bangladesh).

37. *Internet users targeted by changes to information law*, REPORTERS WITHOUT BORDERS (July 5, 2013), <https://rsf.org/en/news/internet-users-targeted-changes-information-law>.

five thousand times or more.<sup>38</sup> And in Qatar, a 2014 law makes it a “cybercrime” to create a website that spreads false news in order to jeopardise the safety or “general order” of the state.<sup>39</sup> Egyptian prosecutors used a similar law in 2014 to prosecute the entire senior staff of Al Jazeera television for broadcasting “false news . . . abroad regarding the internal situation in the country” even though there was no evidence that any of the broadcasts contained material that was unproven or falsified.<sup>40</sup>

## 6. Public Order Laws

Many countries criminalize disturbances of public order, but then use such laws to criminalize speech that is insulting to the ruling authorities. For instance, in Russia the all-female band Pussy Riot was sentenced to two years’ imprisonment for hooliganism for singing a punk song which opened with the line: “Virgin Mary, Mother of God, banish Putin, banish Putin, banish Putin!”<sup>41</sup> And in China, a well-known free speech activist named Yang Maodong was sentenced to six years’ imprisonment for “gathering a crowd to disrupt order in a public place” and “picking quarrels and provoking trouble” after he held up banners calling on public officials to disclose their assets and for China to ratify the International Covenant on Civil and Political Rights.<sup>42</sup>

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38. See Jonathan Kaiman, *China cracks down on social media with threat of jail for 'online rumours'*, THE GUARDIAN (Sept. 10, 2013), <https://www.theguardian.com/world/2013/sep/10/china-social-media-jail-rumours>.

39. See Peter Kovessy, *Qatar's Emir signs new cybercrime legislation into law*, DOHA NEWS (Sept. 16, 2014), <http://dohanews.co/qatars-emir-signs-law-new-cybercrime-legislation/>.

40. See, e.g., Public Statement, Amnesty International, Egypt: Journalists jailed or charged for challenging the authorities’ narratives (May 3, 2015), <https://www.amnesty.org/download/Documents/MDE1215732015ENGLISH.pdf>.

41. See Carol Rumens, *Pussy Riot's Punk Prayer is Pure Protest Poetry*, THE GUARDIAN (Aug. 20, 2012), <https://www.theguardian.com/books/2012/aug/20/pussy-riot-punk-prayer-lyrics>.

42. See *Chinese activist Yang Maodong jailed for six years*, BBC NEWS (Nov. 27, 2015), <http://www.bbc.com/news/world-asia-china-34941406>; *China: Harsh prison sentences against Guo Feixiong and two other activists the latest act of political persecution*, AMNESTY INTERNATIONAL (Nov. 27, 2015), <https://www.amnesty.org/en/latest/news/2015/11/china-harsh-prison-sentences-against-guo-feixiong-latest-act-of-political-persecution/>.

## 7. Other Laws Ostensibly Unrelated to Speech

In many politically-motivated cases, individuals are being pursued because of speech that is insulting to the ruling regime, but they are charged with crimes that are ostensibly unrelated to speech. For instance, in Azerbaijan journalists have routinely been charged with crimes such as tax evasion, illegal entrepreneurship, and abuse of power in cases where the European Court of Human Rights has later found that there was no reasonable suspicion of a criminal offence.<sup>43</sup>

### B. Insulting Religion

Insulting religion, like insulting rulers, is widely criminalized around the world. Although blasphemy has been de-criminalized in many Western countries, it remains an offence in many others and it is often expressed in vague terms that cast a wide net over insulting speech. It is, for example, a crime to “incit[e] religious unrest” in Turkmenistan, and to “promote division between religious believers and non-believers” in Vietnam.<sup>44</sup> Other countries criminalize “contempt of heavenly religions”, “outraging religious feelings”, “promoting one’s own individual opinion on issues that are in disagreement among Islamic scholars”, “inciting people to disputes”, and “talking about religions other than Islam”.<sup>45</sup>

Prosecutions for blasphemy are routine in some countries and carry the harshest penalties. In Saudi Arabia, a blogger named Raif Badawi published atheist views online and was sentenced to ten

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43. See, e.g., *Rasul Jafarov v. Azerbaijan*, App. No. 69981/14 (Eur. Ct. H.R. March 17, 2016); *Yagublu v. Azerbaijan*, App. No. 31709/13, ¶ 62 (Eur. Ct. H.R. Nov. 5, 2015); *Ilgar Mammadov v. Azerbaijan*, App. No. 15172/13 (Eur. Ct. H.R. May 22, 2014). Anar Mammadli, Intigam Aliyev, Emin Huseynov, Leyla Yunus and Arif Yunus have also faced charges of fraud, tax evasion, illegal entrepreneurship, and treason in Azerbaijan. See “*Deeply distressing*” – *U.N. experts condemn latest prison sentencing of rights defenders in Azerbaijan*, OHCHR (Aug. 20, 2015), <http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=16337>.

44. See *Report of the Special Rapporteur on freedom of religion or belief*, ¶ 252, U.N. Doc. A/HRC/7/10/Add.1, 28 (Feb. 28, 2008), ¶ 252; *Report submitted by Mr Abdelfattah Amor, Special Rapporteur, Addendum, Visit to Viet Nam*, ¶¶ 26–7, 110, U.N. Doc. E/CN.4/1999/58/Add. 2 (Dec. 29, 1998); *2012 Report of the Special Rapporteur*, *supra* note 13, ¶ 51.

45. *2012 Report of the Special Rapporteur*, *supra* note 13, ¶ 52.

years in prison and one thousand lashes for insulting Islam.<sup>46</sup> In Iran, members of the heavy metal band Confess face execution for supposed “satanic” lyrics.<sup>47</sup> In Myanmar, a café owner from New Zealand was sentenced to two-and-a-half years’ imprisonment and hard labour for insulting Buddhism by using an image of Buddha wearing headphones in a post on Facebook.<sup>48</sup> In Singapore, a teenager was convicted of “wounding religious feelings” and disseminating obscene images after he posted a video containing “remarks against Christianity”.<sup>49</sup> And in Greece, a man who created a satirical Facebook page comparing a deceased Orthodox monk with a pasta dish was charged with “malicious blasphemy and insulting religion” and sentenced to ten months in prison.<sup>50</sup>

### C. Insulting Royalty

In some countries, it is not only criminal to insult rulers or religion; it is also a crime to insult royals. Thailand considers it a crime—known as *lèse-majesté*—to insult the monarchy, and it is punishable by up to fifteen years in prison.<sup>51</sup> Malaysia and Morocco have similar laws.<sup>52</sup> Even in Europe, insulting the King or Queen is

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46. See *Saudi Arabia: Possible New Flogging for Prominent Blogger*, HUMAN RIGHTS WATCH (June 11, 2015), <https://www.hrw.org/news/2015/06/11/saudi-arabia-possible-new-flogging-prominent-blogger>. It appears the “insulting Islam” conviction led to ten years in prison and a thousand public lashes. The balance of ten years in prison was for setting up a liberal website.

47. See Loulla-Mae Eleftheriou-Smith, *Metal band Confess reportedly jailed and facing execution for ‘blasphemy’ in Iran*, THE INDEPENDENT (Feb. 17, 2016), <http://www.independent.co.uk/news/world/middle-east/metal-band-confess-reportedly-jailed-and-facing-execution-for-blasphemy-in-iran-a6879466.html>.

48. PENAL CODE, arts. 295–96 (Burma).

49. See *2016 Report of the Special Rapporteur*, *supra* note 14; PENAL CODE, §§ 298 and 292(1) (Sing.).

50. *Greece: Conviction of Blogger Another Blow to Freedom of Expression*, AMNESTY INTERNATIONAL (Jan. 20, 2014), <https://www.amnesty.org/en/documents/eur25/001/2014/en/>.

51. Article 112 of the Thai Penal Code provides that: “[w]hoever, defames, insults or threatens the King, the Queen, the Heir-apparent or the Regent, shall be punished with imprisonment of three to fifteen years.” PENAL CODE, art. 112 (Thai.).

52. See PENAL CODE, art. 179 (Morocco); PRESS CODE, art. 41 (2003) (Morocco); see also *Morocco: Free Student Imprisoned for ‘Insulting’ King*, HUMAN RIGHTS WATCH (July 16, 2013), <https://www.hrw.org/news/2013/07/16/morocco-free-student-imprisoned-insulting-king> (describing the laws in Morocco).

punishable by up to five years in prison in countries such as the Netherlands<sup>53</sup> and Norway.<sup>54</sup>

Such laws have been used to impose severe penalties in a number of recent cases, particularly where the trials are administered by military courts. For instance, a factory worker in Thailand who posted a sarcastic message about the King's dog on the internet currently faces up to thirty-seven years in prison for *lèse-majesté*.<sup>55</sup> And in Morocco, an eighteen-year-old was convicted of this crime after he changed the national slogan on a school blackboard from "God, the Nation, the King" to "God, the Nation, Barca"—a tribute to his favourite football club.<sup>56</sup>

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53. Wetboek van Strafrecht (Criminal Code), art. 111 (Neth.). It is noted that on 22 April 2016, a draft bill was introduced into Dutch Parliament proposing the repeal of a number of provisions of the Dutch Criminal Code relating to *lèse-majesté*, including Article 111. The Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression indicated that such repeal would "ensure better conformity of the Dutch legislation with the standards of international human rights law." Letter of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression to Mr Roderick van Schreven of the Permanent Mission of the Kingdom of the Netherlands to the United Nations, 3–4, U.N. Doc. OL NLD (2/2016) (Oct. 14, 2016) [hereinafter Letter of the Special Rapporteur].

54. Article 101 of the Norwegian Criminal Code provides that "[a]ny person who defames the King or the Regent" may be punished by up to five years' imprisonment." CRIM. CODE, art. 101 (Nor.). However, since the 1990s, countries such as Hungary (1994), the Czech Republic (1998) and, more recently, Belgium (2005 – foreign heads of state), France (2004 – foreign heads of state, 2013 – French president), and Romania (2014) have removed the offence from their legal orders. In Italy and Spain, the legislation has been applied in only one or two cases over the past 25 years. Poland and the Netherlands reveal more cases but the prosecutions have mostly resulted in either acquittal or a fine. In addition, the German Constitutional Court stated that harsh political criticism, even if unjust, biased, or stubborn, does not meet the definition of insult. See Roberto Frifrini, *Insulting the president, an anachronism within the law*, TODAY'S ZAMAN (Jan. 20, 2016); PATTI MCCracken, INSULT LAWS: AN INSULT TO PRESS FREEDOM 7 (2000).

55. See Thomas Fuller, *Thai Man May Go to Prison for Insulting King's Dog*, N.Y. TIMES (Dec. 14, 2015), [http://www.nytimes.com/2015/12/15/world/asia/thailand-lese-majeste-tongdaeng.html?\\_r=0](http://www.nytimes.com/2015/12/15/world/asia/thailand-lese-majeste-tongdaeng.html?_r=0).

56. *Moroccan schoolboy spared prison*, BBC NEWS (Nov. 12, 2008), <http://news.bbc.co.uk/2/hi/africa/7725187.stm>.

## II. LEGAL PROVISIONS GOVERNING INSULTING SPEECH IN INTERNATIONAL LAW

### A. The International Legal Framework

The international law framework governing freedom of expression is contained in treaty law: Articles 19 and 20 of the International Covenant on Civil and Political Rights (ICCPR),<sup>57</sup> Article 4 of Convention on the Elimination of Racial Discrimination (CERD),<sup>58</sup> and the specific prohibition on “direct and public incitement to commit genocide” in Article III(c) of the Genocide Convention.<sup>59</sup> There are also relevant but broadly-worded provisions on freedom of expression in the Universal Declaration of Human Rights (UDHR).<sup>60</sup>

Implementation of the ICCPR and CERD is monitored by U.N. treaty bodies,<sup>61</sup> and disputes arising under the Genocide

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57. International Covenant on Civil and Political Rights, *opened for signature* Dec. 16, 1966, arts. 19, 20, S. Exec. Doc. E, 95-2 (1978), 999 U.N.T.S. 171, 178 (entered into force Mar. 23, 1976) [hereinafter ICCPR].

58. International Convention on the Elimination of All Forms of Racial Discrimination, *opened for signature* Mar. 7, 1966, art. 4, S. Exec. Doc. C, 95-2 (1978), 660 U.N.T.S. 195, 218 (entered into force Jan. 4, 1969) [hereinafter CERD].

59. Convention on the Prevention and Punishment of the Crime of Genocide, *opened for signature* Dec. 9, 1948, art. III(c), 78 U.N.T.S. 277, 280 (entered into force Jan. 12, 1951) [hereinafter Genocide Convention].

60. See Universal Declaration of Human Rights, G.A. Res. 217A (III), U.N. GAOR, 3d Sess., U.N. Doc. A/810 (Dec. 10, 1948) [hereinafter UDHR]. Article 26 of the UDHR promotes “understanding, tolerance and friendship among all nations, racial or religious groups”; Article 7 provides explicit protection against hate speech in that all people “are entitled to equal protection against any discrimination in violation of [the] Declaration and against any incitement to such discrimination”; Article 29 imposes limits and restrictions on these fundamental freedoms, including freedom of expression, but only to the extent as to secure “due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society”. *Id.*

61. The U.N. Human Rights Committee and the U.N. Committee on the Elimination of Racial Discrimination respectively monitor the ICCPR and the CERD. See *Human Rights Committee: Monitoring civil and political rights*, OHCHR, <http://www.ohchr.org/EN/HRBodies/CCPR/Pages/CCPRIndex.aspx> (last visited Jan. 27, 2017); *Committee on the Elimination of Racial Discrimination: Monitoring racial equality and non-discrimination*, OHCHR, <http://www2.ohchr.org/english/bodies/cerd/> (last visited Jan. 27, 2017).

Convention can be adjudicated by the International Court of Justice.<sup>62</sup> These treaties exist alongside regional conventions that apply in many countries, including the European, African, and Inter-American human rights treaties. States' obligations under these treaties are supervised by the respective regional courts.

## 1. Legal Protections for Speech in International Law

### i. International Treaties

The principal international human rights treaties, including the ICCPR and CERD, were drafted by diplomats from around the world as part of the inter-state negotiations that led to the creation of the United Nations and the adoption of the UDHR in the years following World War II. The first drafters were a small committee led by Eleanor Roosevelt, and over two decades various drafting committees contributed to the negotiations until the text was submitted to the U.N. General Assembly for final consideration and adoption.<sup>63</sup>

The drafting history of the provisions on free speech shows that the delegates negotiating the language of these treaties had in mind the recent experience with Nazi Germany and were keen to prevent the dissemination of totalitarian and racist theories by propaganda.<sup>64</sup> In many of the discussions, free speech advocates pushed for less sweeping language that would ensure that speech could only be criminalized if it incited violence.<sup>65</sup> But the majority of diplomats who drafted these provisions believed that a prohibition of incitement to violence alone was not sufficient to prevent the recurrence of Nazi-style crimes, and that speech inciting "hatred" and "discrimination" should also explicitly be prohibited.<sup>66</sup> The treaties took years to negotiate, but eventually, in 1965, CERD was adopted by the U.N. General Assembly, and the ICCPR was adopted in the same way the following year.

The result was that the three principal legal provisions governing speech at the international level—Articles 19 and 20 of the

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62. See Genocide Convention, *supra* note 59, art. IX, at 282.

63. See *History of the Document*, UNITED NATIONS, <http://www.un.org/en/sections/universal-declaration/history-document/> (last visited Jan. 27, 2017).

64. WIBKE K. TIMMERMANN, *INCITEMENT IN INTERNATIONAL LAW* 141–42 (2016).

65. *Id.*

66. *Id.*

ICCPR and Article 4 of CERD—allow insulting speech to be silenced if it constitutes discriminatory “hate speech” targeting minorities on the basis of race, nationality or religion even if there is no criminal intent or risk that it will lead to violence. Similar provisions are found in the regional human rights instruments applied by the human rights courts that operate in Europe, Africa, and the Americas.

a. Article 19 of the ICCPR

Article 19 of the ICCPR sets out the general “right to freedom of expression.” But this is not an absolute right. Article 19(3) provides for permissible restrictions on speech in the following terms:

The exercise of the [right to freedom of expression] 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.<sup>67</sup>

The drafting history of Article 19(3) shows that many states considered incitement to discrimination, hatred, and violence as limitations to free speech that could have been included in this provision, but ultimately these were considered redundant given that they were expressly provided for in Article 20.<sup>68</sup>

b. Article 20 of the ICCPR

Article 20 of the ICCPR imposes further restrictions on the right to freedom of expression in the following terms:

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67. Pursuant to Article 4 of the ICCPR, the right to freedom of expression can also be derogated from in times of emergency. *See* ICCPR, *supra* note 57.

68. *See* JEROEN TEMPERMAN, RELIGIOUS HATRED AND INTERNATIONAL LAW: THE PROHIBITION OF INCITEMENT TO VIOLENCE OR DISCRIMINATION 31–62 (2015).

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

Article 20 establishes a positive obligation on states to prohibit speech that constitutes “propaganda for war” or “advocacy of” certain types of hatred through “adopt[ing] the necessary legislative measures prohibiting the actions referred to therein.”<sup>69</sup>

This provision was first proposed by a Soviet diplomat during the ICCPR drafting negotiations in 1947. In his view, it would be “a powerful weapon . . . to restrict the dissemination of Nazi-Fascist propaganda.”<sup>70</sup> During the drafting process, various delegations opposed this on free speech grounds. The U.S. delegation, for instance, warned that “any criticism of public or religious authorities might all too easily be described as incitement to hatred and consequently prohibited.”<sup>71</sup> Similarly, the United Kingdom objected to vague terms such as “hatred” that are “not easy to define as a penal offence” and bore too great a risk of abuse.<sup>72</sup> By the time Article 20 came before the U.N. General Assembly, most nations were in favour of it, though some objected on the basis that it should be restricted to incitement to violence. It was ultimately adopted with fifty-two votes in favour, nineteen votes against, and twelve abstentions.<sup>73</sup>

The U.N. Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression has clarified that Article 20 does not require states to *criminalize* speech, although according to the Rapporteur criminalization would be appropriate in

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69. Human Rights Comm., General Comment No. 11, ¶ 1, U.N. Doc. CCPR/C/GC/11 (July 29, 1983).

70. U.N. Comm. on Hum. Rts. Drafting Comm., 2nd Sess., 28th mtg. at 3, U.N. Doc. E/CN.4/AC.1/SR.28 (May 18, 1948); *see also* TEMPERMAN, *supra* note 68, at 52 (describing the drafting history of the ICCPR).

71. U.N. Comm. on Hum. Rts., 6th Sess. 174th mtg. ¶ 25, U.N. Doc. E/CN.4/SR.174 (May 6, 1950).

72. *Id.* ¶¶ 38, 63; U.N. GAOR, Third Committee, 16th Sess., 1078th mtg. ¶ 17, U.N. Doc. A/C.3/SR/1078 (Oct. 19, 1961).

73. *See* U.N. GAOR, Third Committee, 16th Sess., 1083rd mtg., U.N. Doc. A/C.3/SR.1083 (Oct. 25, 1961); *see also* TEMPERMAN, *supra* note 68, at 47 n. 88 (describing the drafting history and adoption of the ICCPR).

“serious and extreme instances of incitement to hatred” determined according to a seven-part test.<sup>74</sup>

c. Article 4 of CERD

The third speech-related provision in the international legal framework—Article 4 of CERD—requires states to outlaw racially-motivated hate speech:

States Parties condemn all propaganda and all organizations which are based on ideas or theories of superiority of one race or group of persons of one colour or ethnic origin . . . and, to this end, with due regard to the principles embodied in the Universal Declaration of Human Rights and the rights expressly set forth in article 5 of this Convention [which protects “[t]he right to freedom of opinion and expression”] . . . :

(a) Shall declare an offence punishable by law all dissemination of ideas based on racial superiority or hatred, incitement to racial discrimination, as well as all acts of violence or incitement to such acts . . . .<sup>75</sup>

Unlike Articles 19(3) and 20 of the ICCPR, the plain language of Article 4 of CERD (“shall declare an offence punishable by law”) requires the criminalization of speech.<sup>76</sup> The “due regard”<sup>77</sup> clause in

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74. 2012 Report of the Special Rapporteur, *supra* note 13, ¶ 47; see also Nazila Ghanea, *Intersectionality and the Spectrum of Racist Hate Speech: Proposals to the U.N. Committee on the Elimination of Racial Discrimination*, 35 HUM. RTS. Q. 935, 938 (2013) (describing the requirements of Article 20).

75. The remainder of Article 4 of CERD establishes that States “. . . (b) Shall declare illegal and prohibit organisations, and also organized and all other propaganda activities, which promote and incite racial discrimination, and shall recognize participation in such organizations or activities as an offence punishable by law; (c) Shall not permit public authorities or public institutions, national or local, to promote or incite racial discrimination.” Racially motivated speech is prohibited (but not criminalized) in various jurisdictions. See CERD, *supra* note 58; see, e.g., *Racial Discrimination Act 1975* (Cth) ss 18C and 18D (Austl.) (on which a Parliamentary inquiry was launched in November 2016 to examine whether such a law unreasonably burdens free speech).

76. See Comm. on the Elimination of Racial Discrimination, General Recommendation No. 35, ¶ 12, U.N. Doc. CERD/C/GC/35 (Sept. 26, 2013) (“The Committee recommends that the criminalization of forms of racist expression should be reserved for serious cases, to be proven beyond reasonable doubt, while

Article 4 has been interpreted in different ways by states and scholars, possibly to try to alleviate or modify this requirement.<sup>78</sup> But the Committee on the Elimination of Racial Discrimination, the U.N. body that monitors implementation of CERD, avoids the balancing exercise that a “due regard” clause would usually entail. The Committee in its General Recommendation No. 35 instead emphasizes that Article 4 levies on states an obligation to “effectively sanction as offences punishable by law” any “dissemination of ideas based on racial or ethnic superiority or hatred, by whatever means” and even *all* “expression of insults, ridicule or slander of persons or groups or justification of hatred, contempt or discrimination” on the grounds of their race, colour, descent, or national or ethnic origin.<sup>79</sup> Such insults must, pursuant to Article 4, be qualified as a criminal offence.<sup>80</sup>

#### d. Summary of Free Speech Provisions in International Treaties

There is a tension among the three key provisions in international human rights treaties governing speech. First, Article 20(2) of the ICCPR goes further than Article 19(3). Whereas Article

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less serious cases should be addressed by means other than criminal law, taking into account, *inter alia*, the nature and extent of the impact on targeted persons and groups. The application of criminal sanctions should be governed by principles of legality, proportionality and necessity.” [hereinafter CERD, General Recommendation No. 35].

77. States are to give “due regard to the principles embodied in the Universal Declaration of Human Rights and the rights expressly set forth in article 5 of this Convention.” *Id.* ¶ 19. Article 5 of CERD lists, *inter alia*, the right to freedom of opinion and expression. *See* CERD, *supra* note 58, art. 5.

78. Karl Joseph Partsch observed that there are “three different schools of thought.” The first, supported by the United States, is that due regard clause means parties are not required or authorized to take action incompatible with the human rights referred to in the clause. The second, adopted by Canada, is that the clause requires a balance to be struck between the human rights in issue and the obligations under CERD. The third school of thought is that the protection of human rights may not be invoked to avoid enacting legislation to give effect to CERD. Karl Joseph Partsch, *Racial Speech and Human Rights: Article 4 of the Convention on the Elimination of All Forms of Racial Discrimination*, in *STRIKING A BALANCE: HATE SPEECH, FREEDOM OF EXPRESSION AND NON-DISCRIMINATION* 24–5 (Sandra Coliver ed., 1992).

79. CERD, General Recommendation No. 35, *supra* note 76, ¶ 13.

80. *Id.*; *see also Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression*, ¶ 31, U.N. Doc. A/66/290 (Aug. 10, 2011) [hereinafter *2011 Report of the Special Rapporteur*] (clarifying the requirements of Article 4).

19 *allows for* a restriction of speech in the interest of “respect of the rights or reputations of others”, Article 20 *requires* the restriction of any speech that constitutes advocacy of national, racial or religious hatred—as long as it incites “discrimination”.<sup>81</sup> Article 4 of CERD then goes further than Article 20 of the ICCPR by requiring the *criminalization* of certain “hate speech” of a racist nature. In addition, whereas Article 20 of the ICCPR requires that advocacy of hatred must lead to “incitement” of discrimination, hostility or violence, under CERD no incitement is needed—any racist “ideas” must be subject to a criminal ban.

Each of these human rights treaties has been widely ratified<sup>82</sup> and many of their provisions now reflect customary international law. However, a large number of states have entered reservations to the articles on freedom of expression in the ICCPR and CERD.<sup>83</sup> Seven states have entered declarations or reservations to Article 19 of the ICCPR and seventeen states have entered declarations or reservations to Article 20. Most of these reservations are based on a desire to expand protections for speech or to preserve existing broadcast licensing arrangements, so no other states have objected to these reservations.<sup>84</sup> For instance, the U.S. entered a reservation to Article 4 of CERD, stating that it “does not accept any obligation under this Convention, in particular under Articles 4 and 7, to restrict [the right to free expression and other rights] . . . protected by the Constitution and laws of the United States.”<sup>85</sup> Similarly,

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81. The Human Rights Committee has, however, clarified that even if a statement complies with Article 20 it must also comply with Article 19(3). *See* *Ross v. Canada*, Comm. No. 736/1997, ¶ 10.6 (Hum. Rts. Comm. Oct. 18, 2000).

82. The ICCPR has 168 parties, CERD has 177 parties, and the Genocide Convention has 147 parties. Some states have entered declarations or reservations. *See infra* note 83.

83. Twenty states have entered declarations or reservations to Article 4. No states have objected to these reservations. *See International Convention on the Elimination of All Forms of Racial Discrimination: Declarations and Reservations*, U.N. TREATY COLLECTION, [https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=IV-2&chapter=4&clang=\\_en](https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-2&chapter=4&clang=_en) (last visited Jan. 27, 2017) [hereinafter *Declarations and Reservations*].

84. The lack of objections to such reservations does not necessarily indicate approval of their content, but suggests that they are not controversial. Pakistan was a notable exception to the pro-free-speech tenor to the reservations, but it withdrew its reservation to Article 19 after twenty-three states objected. In addition, Malta’s purported reservation is more speech-restrictive in that it preserves existing laws that prohibit public officers from engaging in active political discussion during hours of work.

85. *Declarations and Reservations*, *supra* note 83.

Denmark, Finland, and Iceland have objected to Article 20(1) on the basis that “a prohibition of propaganda for war could limit the freedom of expression.”<sup>86</sup>

As Judge Meron stated in a case at the International Criminal Tribunal for Rwanda involving speech that was alleged to have incited genocide:

The number and extent of the reservations [to the speech-related provisions in international treaties] reveal that profound disagreement persists in the international community as to whether mere hate speech is or should be prohibited, indicating that Article 4 of the CERD and Article 20 of the ICCPR do not reflect a settled principle [on insulting speech]. Since a consensus among states has not crystallized, there is clearly no norm under customary international law criminalizing mere hate speech.<sup>87</sup>

This means that the requirements of international human rights law for each state will be determined on a case-by-case basis, with regard to the precise treaty obligations in place for each country.

#### ii. Regional Human Rights Treaties governing Free Expression

The equivalent of Article 19 of the ICCPR in regional human rights treaties is Article 10 of the European Convention on Human Rights (ECHR),<sup>88</sup> Article 13 of the Inter-American Convention,<sup>89</sup> and

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86. *Id.*

87. Nahimana et al. v. The Prosecutor, Partly Dissenting Opinion of Judge Meron, ICTR-99-52-A, ¶ 5 (ICTR Appeals Chamber Nov. 28, 2007).

88. [European] Convention for the Protection of Human Rights and Fundamental Freedoms, *opened for signature* Nov. 4, 1950, art. 10, Europ. T.S. No. 5, 213 U.N.T.S. 221, 230 (entered into force Sept. 3, 1953) [hereinafter ECHR].

89. American Convention on Human Rights, *opened for signature* Nov. 22, 1969, art. 13, O.A.S.T.S. No. 36, 1144 U.N.T.S. 143, 148 (entered into force July 18, 1978) [hereinafter American Convention]. This is more protective of speech than its regional equivalents in some ways as it explicitly prohibits prior restraint. However, unlike the ECHR, it has a provision outlawing “[a]ny 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.” *Id.*

Article 9(2) of the African Charter.<sup>90</sup> Article 10 of the ECHR has a longer list of what may constitute a permissible restriction on speech than Article 19(3) of the ICCPR, but there is no equivalent in the ECHR to the speech-restrictive provisions in Article 20 of the ICCPR nor Article 4 of CERD.

The European Court has, however, used Article 17 of the ECHR to restrict speech. This is a general provision that provides that:

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

Article 17 has been interpreted to mean that speech which is so odious that it could not possibly be protected under Article 10 of the Convention can be dealt with under Article 17, which allows a case to be struck out without examination of the merits. This is a drastic “guillotine”<sup>91</sup> provision because it does not involve any balancing of the right to free expression against the other values protected in Article 10.<sup>92</sup>

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90. African Charter on Human and People’s Rights, *adopted* June 27, 1981, art. 9, 21 I.L.M. 58 (entered into force Oct. 21, 1986) [hereinafter African Charter]. This is a pithy provision that reads “[e]very individual shall have the right to express and disseminate his opinions within the law.” *Id.* However, the African Commission of Human and Peoples’ Rights has interpreted it in line with international standards. *See, e.g.*, Media Rights Agenda, Constitutional Rights Project, Media Rights Agenda and Constitutional Rights Project v. Nigeria, Comm’n Nos. 105/93, 128/94, and 152/96, ¶ 36 (Afr. Comm’n H.P.R. Nov. 6, 2000); Article 19/Eritrea, Comm’n No. 275/03, ¶ 105 (Afr. Comm’n H.P.R. May 30, 2007).

91. TEMPERMAN, *supra* note 68, 230 n. 108.

92. Article 5 of the ICCPR is analogous to Article 17 of the ECHR, but the Human Rights Committee has not used it to strike out cases without considering the merits under Article 19 or 20 of the ICCPR. Although the Committee observed in one case that Article 5 of the ICCPR might apply to freedom of expression, it ultimately ruled on other grounds and has not used Article 5 in this manner since. *See* M.A. v. Italy, Comm’n No. 117/1981, ¶ 13.3 (Hum. Rts. Comm. Apr. 10, 1984).

### iii. Other International Law Sources relating to Free Expression

In addition to international and regional treaties, the meaning of the treaty law on freedom of expression has been elaborated upon by various non-treaty sources which add some detail to the applicable legal standards for speech. These include U.N. mechanisms,<sup>93</sup> regional courts and commissions, and NGOs.<sup>94</sup>

Some soft law sources have sought to limit the permissible restrictions on insults under these treaty standards. For instance, the United Nations, through soft law,<sup>95</sup> has reached a high degree of consensus in rejecting the concept of “defamation of religions” and finding blasphemy laws incompatible with freedom of speech.<sup>96</sup> Other soft law guidance is also more protective of speech than the treaty

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93. See, e.g., *Human Rights Bodies*, OHCHR, <http://www.ohchr.org/EN/HRBodies/Pages/HumanRightsBodies.aspx> (last visited Jan. 27, 2017) (describing the Office of High Commissioner of Human Rights, the treaty bodies monitoring the ICCPR and CERD, the Human Rights Council, and Special Procedures (e.g., Special Rapporteur on Freedom of Opinion and Expression)); OSCE, JOINT STATEMENT ON RACISM AND THE MEDIA BY THE U.N. SPECIAL RAPPORTEUR ON FREEDOM OF OPINION AND EXPRESSION, THE OSCE REPRESENTATIVE ON FREEDOM OF THE MEDIA AND THE OAS SPECIAL RAPPORTEUR ON FREEDOM OF EXPRESSION (2001) [hereinafter OSCE, JOINT STATEMENT].

94. See, e.g., ICCPR, *supra* note 57, art. 19.

95. “Soft law” can be defined as “normative provisions contained in non-binding texts.” COMMITMENT AND COMPLIANCE: THE ROLE OF NON-BINDING NORMS IN THE INTERNATIONAL LEGAL SYSTEM 292 (Dinah Shelton ed., 2000). In this article we are using “soft law” in contrast to the “hard law” of binding treaties and customary rules.

96. Except in the specific circumstances envisaged in Article 20(2) of the ICCPR. See Human Rights Council, *Combating intolerance, negative stereotyping and stigmatizing of, and discrimination, incitement to violence and violence against, persons based on religion or belief*, U.N. Doc. A/HRC/RES/16/18 (Apr. 12, 2011); Human Rights Council, *Combating intolerance, negative stereotyping and stigmatizing of, and discrimination, incitement to violence and violence against, persons based on religion or belief*, U.N. Doc. A/HRC/RES/19/25 (Apr. 10, 2012); Human Rights Council, *Combating intolerance, negative stereotyping and stigmatizing of, and discrimination, incitement to violence and violence against, persons based on religion or belief*, U.N. Doc. A/HRC/RES/22/31; G.A. Res. 66/167, U.N. Doc. A/RES/67/167 (Mar. 27, 2012); G.A. Res. 67/178, U.N. Doc. A/RES/67/178 (Mar. 28, 2013); General Comment No. 34, *supra* note 3, ¶ 48. On the factors behind the rejection of the discourse of defamation of religions at the U.N. in 2011, see Sejal Parmar, *Uprooting “defamation of religions” and planting a new approach to freedom of expression at the United Nations*, in THE UNITED NATIONS AND FREEDOM OF EXPRESSION AND INFORMATION: CRITICAL PERSPECTIVES 373–427 (Tarlach McGonagle & Yvonne Donders eds., 2015).

framework,<sup>97</sup> and has helped put some flesh on the bones of the terms “hatred,” “discrimination,” “hostility,” “violence,” and “incitement.”<sup>98</sup> The U.N. High Commissioner has counselled that States’ legislation should include “robust definitions” of key terms like “hatred,” “discrimination,” “violence,” and “hostility.”<sup>99</sup> And NGOs like Article 19 have sought to define these terms.<sup>100</sup> But such guidance is piecemeal and does not go far enough. Much of it is buried in long U.N. reports or on NGO websites that are not widely accessed, and in some cases their authority is uncertain. In addition, such guidance is not binding, nor is it universally applied.

### III. WHEN CAN INSULTS BE CRIMINALIZED UNDER INTERNATIONAL HUMAN RIGHTS LAW?

Legal provisions in international treaties governing speech are applied in individual cases by regional courts and U.N. human rights bodies, and are subject to commentary from various U.N. sources. According to this international case law, the issue of whether an insult can be criminalized is highly dependent on context.<sup>101</sup> An

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97. See OSCE, JOINT STATEMENT, *supra* note 93; 2011 Report of the Special Rapporteur, *supra* note 80, ¶ 28; Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, ¶¶ 81–2, U.N. Doc. A/HRC/4/27 (Jan. 2, 2007) [hereinafter 2007 Report of the Special Rapporteur]; Rabat Plan of Action, OHCHR, [http://www.ohchr.org/Documents/Issues/Opinion/SeminarRabat/Rabat\\_draft\\_outcome.pdf](http://www.ohchr.org/Documents/Issues/Opinion/SeminarRabat/Rabat_draft_outcome.pdf) (last visited Jan. 27, 2017) [hereinafter *Rabat Plan of Action*].

98. For instance, the NGO Article 19 proposed the Camden Principles on Freedom of Expression and Equality, as well as a seven-part test to determine what constitutes “incitement”: 1. Severity; 2. Intent; 3. Content; 4. Extent, in particular the public nature of the speech; 5. Likelihood or probability of action; 6. Imminence; and 7. Context. See *Towards an interpretation of article 20 of the ICCPR: thresholds for the prohibition of incitement to hatred: Work in Progress*, ARTICLE 19 (Feb. 8–9, 2010), [http://www2.ohchr.org/english/issues/opinion/articles1920\\_iccpr/docs/CRP7Callamard.pdf](http://www2.ohchr.org/english/issues/opinion/articles1920_iccpr/docs/CRP7Callamard.pdf).

99. Human Rights Council, *Annual report of the United Nations High Commissioner for Human Rights: Report of the United Nations High Commissioner for Human Rights on the expert workshops on the prohibition of incitement to national, racial or religious hatred*, ¶ 21, U.N. Doc. A/HRC/22/17/Add.4 (Jan. 11, 2013).

100. *Camden Principles on Freedom of Expression and Equality*, ARTICLE 19 (Apr. 2009), <https://www.article19.org/data/files/pdfs/standards/the-camden-principles-on-freedom-of-expression-and-equality.pdf> [hereinafter *Camden Principles*].

101. See, e.g., CERD, General Recommendation No. 35, *supra* note 76, ¶ 15; Pavel Kozlov v. Belarus, Comm’n No. 1986/2010, ¶ 7.5, U.N. Doc. CCPR/C/111/D/1986/2010 (Hum. Rts. Comm. July 24, 2014); News Verlags GmbH

insult made at a private dinner may have a different impact from the same insult made by a presidential nominee at a public rally or by a religious leader in a neighbourhood where sectarian tensions are running high. Speech, in other words, has to be looked at in context.

The context of an insult can be distilled into seven factors: (i) *what* was said, (ii) *who* said it and to *whom*, (iii) *how* was it said, (iv) *when* was it said, (v) *where* it was said, (vi) *what intent* the speaker had, and (vii) *what impact* the statement had.<sup>102</sup> Each of these factors will be addressed in turn.

#### A. What Was Said?

Under international human rights law, the content, nature, and tone of a statement affects its level of protection. Political speech, or commentary on public figures, for instance, generally receives more protection than other speech.<sup>103</sup> So public officials, including

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& Co. KG v. Austria, App. No. 31457/96, ¶ 52 (Eur. Ct. H.R. Jan. 11, 2000); Feldek v. Slovakia, App. No. 29032/95, ¶¶ 77, 83 (Eur. Ct. H.R. July 12, 2001); Sürek v. Turkey (No. 1), App. No. 26682/95, ¶ 62 (Eur. Ct. H.R. July 8, 1999); Nilsen and Johnsen v. Norway, App. No. 23118/93, Grand Chamber, ¶ 48 (Eur. Ct. H.R. Nov. 25, 1999); Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism (Articles 13 and 29, American Convention on Human Rights), Advisory Opinion OC-5/85, ¶ 69 (Inter-Am. Ct. H.R. Nov. 13, 1985); Ivcher-Bronstein v. Peru, ¶ 154 (Inter-Am. Ct. H.R. Feb. 6, 2001); Ricardo Canese v. Paraguay, ¶¶ 105-6 (Inter-Am. Ct. H.R. Aug. 31, 2004); Tristán Donoso v. Panama, ¶ 123 (Inter-Am. Ct. H.R. Jan. 27, 2009); Lohé Issa Konaté v. Burkina Faso, App. No. 004/2013, ¶¶ 145, 155–56 (Afr. Ct. Hum. P. R. Dec. 5, 2014). Temperman notes that the CERD did not adopt this approach before 2013. See TEMPERMAN, *supra* note 68, 251.

102. See, e.g., Vereinigung Bildender Künstler v. Austria, App. No. 68354/01, ¶ 33 (Eur. Ct. H.R. Jan. 25, 2001).

103. General Comment No. 34 of the Human Rights Committee provides that “the value placed by the Covenant upon uninhibited expression is particularly high in the circumstances of public debate in a democratic society concerning figures in the public and political domain.” General Comment No. 34, *supra* note 3, ¶ 34. See also Agnes Callamard, *Expert Meeting on the Links Between Articles 19 and 20 of the ICCPR: Freedom of Expression and Advocacy of Religious Hatred that Constitutes Incitement to Discrimination, Hostility or Violence*, ARTICLE 19 5 (Oct. 2–3, 2008), <https://www.article19.org/data/files/pdfs/conferences/iccpr-links-between-articles-19-and-20.pdf> (describing stringent restrictions on political speech in Europe); Colombani and others v. France, App. No. 51279/99, ¶ 56 (Eur. Ct. H.R. June 25, 2002) (“As to the limits of acceptable criticism, they are wider with regard to a politician acting in his public capacity than in relation to a private individual.”).

heads of state, are expected to withstand more extensive public criticism than ordinary citizens.<sup>104</sup>

Satirical speech is also given special protection as it is a form of artistic expression and social commentary.<sup>105</sup> Any interference with a speaker's right to use these forms of expression must therefore be assessed with particular care.<sup>106</sup> The European Court upheld this principle in *Eon v. France* when it reviewed the conviction of a man who had been charged with the crime of "insulting the President" for waving a placard reading "*Casse toi, pauv' con*"<sup>107</sup> at then-President Sarkozy at a public event. This phrase was chosen because Sarkozy said the same words to a farmer who refused to shake his hand at an agricultural show.<sup>108</sup> The European Court held that the conviction violated the man's right to free speech under the ECHR because the intention of the comment was satirical and its criminalization would have a deterrent effect on free debate of questions of general interest. Additionally, the imposition of a criminal sanction was held to be disproportionate and unnecessary in a democratic society in a case involving satirical speech of this kind.<sup>109</sup>

The fact that speech is political or satirical speech will not always mean it is protected, however. In many cases courts and human rights bodies have considered the nature of the speech but ultimately found that convictions for political speech, satirical speech, and even cartoons that are insulting or critical were appropriate under international or regional human rights law standards.<sup>110</sup>

When it comes to the content of speech, the question of truthfulness is also relevant. The right to freedom of expression covers speech that is both true and false,<sup>111</sup> and as a result, under

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104. See, e.g., *Pakdemirli v. Turkey*, App. No. 35839/97, ¶ 45 (Eur. Ct. H.R. Feb. 22, 2005); *Artun and Güverner v. Turkey*, App. No. 755f10/01, ¶ 26 (Eur. Ct. H.R. June 26, 2007).

105. *Künstler Vereinigung Bildender v. Austria*, App. No. 8354/01, ¶ 33 (Eur. Ct. H.R. Jan. 25, 2007); *Alves da Silva v. Portugal*, App. No. 41665/07, ¶ 27 (Eur. Ct. H.R. Oct. 20, 2009); *Tuşalp v. Turkey*, App. Nos. 32131/08 and 41617/08, ¶ 48 (Eur. Ct. H.R. Feb. 21, 2012).

106. *Eon v. France*, App. No. 26118/10, ¶ 60 (Eur. Ct. H.R. Mar. 14, 2013).

107. Translates to "Get lost, you sad prick."

108. *Eon v. France*, App. No. 26118/10 (Eur. Ct. H.R. Mar. 14, 2013).

109. *Id.* ¶ 61.

110. See, e.g., *M'Bala v. France*, App. No. 25239/13 (Eur. Ct. H.R. Oct. 20, 2015); *Leroy v. France*, App. No. 36109/03 (Eur. Ct. H.R. Oct. 2, 2008).

111. See, e.g., Lyrissa Barnett Lidsky, *Where's the Harm? Free Speech and the Regulation of Lies*, 65 WASH. & LEE L. REV. 1091 (2008) (considering the lack of regulation of verifiably false speech under U.S. First Amendment

international law, states should not criminalize a statement simply because it is false, unless it also meets additional requirements by, for example, inciting hatred, hostility or discrimination. In addition, the U.N. Human Rights Committee has stated that truth should be a defence to defamation, “in particular penal defamation laws.”<sup>112</sup> It has also found that statements of opinion, as opposed to fact, should not be criminalized even if they are insulting because, unlike facts, which can be shown to be true, opinions “are not, of their nature, subject to verification.”<sup>113</sup>

## B. Who Said It and to Whom?

According to cases applying international human rights law, the identity of the speaker also matters. His or her relationship with—and influence over—the audience will inevitably affect the power of his or her words. Issues include whether the speaker is a public or private figure, a politician or a journalist.

As a general rule, the more privileged and powerful the speaker is relative to the targeted person or group, the greater the potential harm.<sup>114</sup> Journalists and politicians have a special status because their speech contributes to public dialogue and awareness. Attempts to criminalize their speech will therefore be subject to stricter scrutiny<sup>115</sup> because such speech is in need of special

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jurisprudence); Human Rights Comm., *Concluding Observations of the Human Rights Committee: Cameroon*, ¶ 24, U.N. Doc. CCPR/C/79/Add.116 (Nov. 4, 1999).

112. General Comment No. 34, *supra* note 3, ¶ 47. The U.N. Special Rapporteur on Freedom of Expression agrees. *See Contribution of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression*, ¶ 12, U.N. Doc A/CONF.189/PC.2/24 (Mar. 22, 2001).

113. General Comment No. 34, *supra* note 3, ¶ 47.

114. *See* CERD, General Recommendation No. 35, *supra* note 76. *Compare* ¶ 22 (“regarding public authorities or public institutions, racist expressions emanating from such authorities or institutions are regarded by the Committee as of particular concern, especially statements attributed to high-ranking officials. Without prejudice to the application of the offences in subparagraphs (a) and (b) of article 4, which apply to public officials as well as to all others, the “immediate and positive measures” referred to in the chapeau may additionally include measures of a disciplinary nature, such as removal from office, where appropriate, as well as effective remedies for victims”) with ¶ 25 (“The Committee considers that the expression of ideas and opinions made in the context of academic debates, political engagement or similar activity, and without incitement to hatred, contempt, violence or discrimination, should be regarded as legitimate exercises of the right to freedom of expression, even when such ideas are controversial”).

115. *See Incal v. Turkey*, App. No. 22678/93, Grand Chamber ¶ 46 (Eur. Ct. H.R. June 9, 1998) (“interferences with the freedom of expression of a

protection.<sup>116</sup> But in other cases, this factor makes the court lean the other way: politicians<sup>117</sup> and journalists<sup>118</sup> have been said to have a special responsibility not to promote hate speech, and on that basis convictions for racist speech by such speakers may be more likely to stand.

If a politician is not the speaker but the target of the speech, this will not, however, protect him or her from criticism. Indeed, insulting political speech receives a higher degree of protection than other insults. As the U.N. Human Rights Committee, interpreting the ICCPR in its General Comment No. 34, has said:

[A]ll public figures, including those exercising the highest political authority such as heads of state and government, are legitimately subject to criticism and political opposition. Accordingly, the Committee expresses concern regarding laws on such matters [as] defamation of the head of state and the protection of the honour of public officials . . . . States parties should [also] not prohibit criticism of institutions, such as the army or the administration.<sup>119</sup>

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politician . . . call for the closest scrutiny on the Court's part"); *Colombani and others v. France*, App. No. 51279/99, ¶ 65 (Eur. Ct. H.R. June 25, 2002) (referring to “the safeguard afforded by Article 10 to journalists in relation to reporting on issues of general interest” so long as they are acting in good faith).

116. In European Court terms, the margin of appreciation in this area is narrow. *See, e.g., Incal v. Turkey*, App. No. 22678/93, Grand Chamber ¶ 46 (Eur. Ct. H.R. June 9, 1998).

117. *Erbakan v. Turkey*, App. No. 59405/00, ¶ 64 (Eur. Ct. H.R. July 6, 2006) (it is especially important that politicians avoid disseminating comments in their public speeches that are likely to foster intolerance); *Feret v. Belgium*, App. No. 15615/07, ¶¶ 73–6 (Eur. Ct. H.R. July 16, 2009); *Le Pen v. France*, App. No. 18788/09, (Eur. Ct. H.R. Apr. 20, 2010) (hate speech by politicians may cause more damage than that of ordinary citizens). *See also 2012 Report of the Special Rapporteur, supra* note 13, ¶ 81 (recommending particular sanctions against politicians and public figures who engage in hate speech).

118. *See, e.g., Sürek v. Turkey (No. 1)*, App. No. 26682/95, ¶ 63 (Eur. Ct. H.R. July 8, 1999); *Erdoğan and İnce v. Turkey*, App. Nos. 25067/94 and 25068/94, Grand Chamber ¶ 54 (Eur. Ct. H.R. July 8, 1999). The U.N. Special Rapporteur has also emphasized the need for media accountability in reporting, including promoting the adoption of “voluntary ethical codes and standards that do not allow hate speech and promote high standards of professional journalism.” *2012 Report of the Special Rapporteur, supra* note 13, ¶ 74.

119. General Comment No. 34, *supra* note 3, ¶ 38; *see also Colombani and others v. France*, App. No. 51279/99 (Eur. Ct. H.R. June 25, 2002) (noting that the limits of acceptable criticism are wider for politicians acting in their political capacity).

An illustrative case is *Konaté v. Burkina Faso*,<sup>120</sup> the first African Court on Human and Peoples' Rights case to address freedom of expression. A journalist named Lohé Konaté published articles in a weekly publication calling a senior prosecutor "a rogue officer" and alleging that he was involved in money laundering.<sup>121</sup> A criminal court sentenced Konaté to twelve months' imprisonment for the crimes of defamation, public insult, and contempt.<sup>122</sup> But the African Court found that this violated Article 9 of the African Charter (the equivalent of Article 19 of the ICCPR and Article 10 of the ECHR).<sup>123</sup> The Court held that although the interference with Konaté's speech was "provided by law" and served the "legitimate objective" of protecting the honour and reputation of magistrates,<sup>124</sup> it was neither necessary nor proportionate as the target was a public figure,<sup>125</sup> and the author was a journalist performing his duties, meaning that a higher degree of tolerance was expected and there was no justification for criminal sanctions.<sup>126</sup>

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120. Lohé Issa Konaté v. Burkina Faso, App. No. 004/2013 (Afr. Ct. Hum. P. R. Dec. 5, 2014). For cases on politicians, see *POEM and FASM v. Denmark*, Commc'n No. 22/2002, ¶ 7 (CERD Apr. 15, 2003) (note that while the complaint was held to be inadmissible due to the non-exhaustion of domestic remedies, the CERD Committee cited paragraph 115 of the Programme of Action adopted by the World Conference against Racism, Racial Discrimination, Xenophobia and Related Intolerance in Durban, which "underlines the key role that politicians and political parties can play in combating racism, racial discrimination, xenophobia and related intolerance and encourages political parties to take concrete steps to promote equality, solidarity and non-discrimination in society"); *TBB-Turkish Union in Berlin/Brandenburg v. Germany*, Commc'n No. 48/2010 (CERD Apr. 4, 2013).

121. Konaté wrote two articles and published another in the publication, *L'Ouragan*, entitled, "Contrefaçon et trafic de faux billets de banque – Le Procureur du Faso 3 policiers et un cadre de banque, parrains des bandits" ("Counterfeiting and laundering of fake bank notes – the Prosecutor of Faso, 3 Police Officers and a Bank Official – Masterminds of Banditry"), "Le Procureur du Faso: un torpilleur de la justice" ("The Prosecutor of Faso – a saboteur of Justice") and "Déni de justice – Procureur du Faso: un justicier voyou?" ("Miscarriage of Justice – the Prosecutor of Faso: a rogue officer"). *Lohé Issa Konaté v. Burkina Faso*, App. No. 004/2013, ¶ 3 (Afr. Ct. Hum. P. R. Dec. 5, 2014).

122. The judgment against Konaté was also subsequently confirmed by the Ouagadougou Court of Appeal. *Konaté v. Burkina Faso*, ¶¶ 4–5, 7.

123. *Id.* ¶ 164.

124. *Id.* ¶ 132–38.

125. *Id.* ¶ 164.

126. *Id.* ¶ 156.

Other human rights courts and bodies have reached a similar result. In upholding the conviction of a public school teacher in Canada for allegedly anti-Semitic speech, the Human Rights Committee highlighted not only his leadership role but also the vulnerability of the target group, school children.<sup>127</sup> Similarly, in *Handyside v. United Kingdom*, the European Court showed deference to the United Kingdom's ban on an allegedly scandalous book, taking into account that the intended audience of the speech were children.<sup>128</sup>

But this is an area of slippery definitions. The development of technology means that anyone with a smartphone is potentially a "journalist" who can instantaneously spread their opinion on social media.<sup>129</sup> And the notion of a "public figure" in our digital age has become more diffuse. The European Court has, for example, included within the status of "public figure" members of a royal family<sup>130</sup> and a television actor on a long-running show.<sup>131</sup>

### C. How Was It Said?

When international courts look into the contextual factor of "how" insulting speech was delivered, this can encompass various sub-factors: whether the insult was made in public or private, or made in private and then leaked; whether it was oral or written; whether it was made online; and whether it was spontaneous or pre-meditated.

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127. *Ross v. Canada*, Comm'n No. 736/1997, ¶ 11.6 (Hum. Rts. Comm. Oct. 18, 2000).

128. *Handyside v. United Kingdom*, App. No. 5493/72, ¶¶ 49, 52 (Eur. Ct. H.R. Dec. 12, 1976). In this case, the speech was "The Little Red Schoolbook", which urged young people to take a liberal attitude in sexual matters. *Id.* ¶ 9.

129. General Comment No. 34, *supra* note 3, ¶ 44 (journalism as "a function shared by a wide range of actors, including professional full-time reporters and analysts, as well as bloggers and others who engage in forms of self-publication in print, on the Internet or elsewhere"); *Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, Frank La Rue*, ¶ 4, U.N. Doc. A/HRC/20/17 (June 4, 2012) (the definition of journalists "includes all media workers and support staff, as well as community media workers and so-called "citizen journalists" when they momentarily play that role").

130. *Von Hannover v. Germany* (No. 2), App. Nos. 40660/08 and 60641/08 (Eur. Ct. H.R. Feb. 7, 2012).

131. *Axel Springer AG v. Germany*, App. No. 39954/08 (Eur. Ct. H.R. Feb. 7, 2012).

In the European Court case of *Gündüz v. Turkey*, for instance, the applicant made insulting comments on a live television show and was convicted for inciting hatred and hostility on the basis of religion.<sup>132</sup> He was fined and sentenced to two years' imprisonment.<sup>133</sup> The Court found that his conviction breached the ECHR partly on the basis that the insults were made on a live television program.<sup>134</sup> In its words, "the Court cannot overlook the fact that . . . the applicant's statements were made orally during a live television broadcast, so that he had no possibility of reformulating, refining or retracting them before they were made public."<sup>135</sup>

#### D. When and Where Was It Said?

Insults in the immediate aftermath of an event, when emotions are raw, may be judged differently by a court than an insult made at a less volatile time. The passage of time may mean that such insults come to be viewed as part of a historical debate, and protected from criminalization on this basis.

In *Perinçek v. Switzerland*, for instance, the European Court considered whether the denial of the Armenian genocide could be criminalized on the basis that such denial was an insult to memory of the victims.<sup>136</sup> The applicant, a Turkish politician, said at a press conference in Switzerland in 2005 that "the allegations of the Armenian genocide are an international lie" and then denied the Armenian genocide on two further occasions.<sup>137</sup> The Swiss courts convicted him of the crime of "racial discrimination" and imposed a

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132. *Gündüz v. Turkey*, App. No. 35071/97, ¶¶ 10–1, 13–4 (Eur. Ct. H.R. Dec. 4, 2003).

133. *Id.* ¶ 14.

134. *Id.* ¶ 49.

135. *Id.* ¶¶ 46–49. He had described contemporary secular institutions as "impious" (*dinsiz*), fiercely criticized secular and democratic principles and openly called for the introduction of the shariah. *See also* *Fuentes Bobo v. Spain*, App. No. 39293/98 (Eur. Ct. H.R. Feb. 29, 2000) (similarly involving statements made on television).

136. Such submissions were made by the French Government, the Switzerland-Armenia Association, and the Coordinating Council of the Armenian Organisations in France. *Perinçek v. Switzerland*, App. No. 27510/08, Grand Chamber (Eur. Ct. H.R. Oct. 15, 2015). In particular see the Joint Dissenting Opinion of Judges Spielmann, Casadevall, Berro, De Gaetano, Sicilianos, Silvis, and Küris at ¶¶ 2, 4, as well as the Additional Dissenting Opinion of Judge Silvis, joined by Judges Casadevall, Berro and Küris, *id.* at ¶ 9.

137. *Id.* ¶¶ 13–6.

suspended sentence and a fine.<sup>138</sup> In determining that Mr Perinçek's freedom of expression should not have been restricted, the Grand Chamber of the European Court highlighted that the events he spoke of occurred one hundred years ago and that the speech took place in Switzerland, which does not have a large Armenian or Turkish community. These factors were relevant to the Court's finding that his speech was not likely to incite violence or racial hatred.<sup>139</sup>

In contrast, in the *Leroy* case, the "when" and "where" factors swung the other way.<sup>140</sup> Leroy had published a cartoon in a French newspaper showing the burning twin towers in New York with a caption, "We have all dreamt of it . . . Hamas did it."<sup>141</sup> The European Court approved Leroy's conviction for condoning terrorism, and in doing so highlighted that the speech was made in the politically-sensitive Basque region of France where such extreme statements may very well foster instability. The Court also emphasised that the cartoon was published on 13 September 2001, just two days after the twin towers had been attacked.<sup>142</sup>

#### E. What Intent Did the Speaker Have?

Cases applying international human rights law sometimes, but not always, require intent in the "advocacy of . . . hatred"<sup>143</sup> in Article 20 of the ICCPR and in the "incitement" to discrimination, hostility or violence under that article as well as Article 4 of CERD.<sup>144</sup> However, this requirement is not applied consistently or rigorously.<sup>145</sup> This means that insulting speech can be prohibited and even

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138. *Id.* ¶ 22.

139. *Id.* ¶ 176.

140. *Leroy v. France*, App. No. 36109/03 (Eur. Ct. H.R. Oct. 2, 2008).

141. *Id.* ¶ 6 ("Nous en avons tous rêvé . . . le Hamas l'a fait").

142. *Id.* ¶ 45.

143. *See, e.g., 2012 Report of the Special Rapporteur, supra* note 13, ¶ 44(b) (defining "advocacy" as "explicit, *intentional*, public and active support and promotion of hatred towards the target group") (emphasis added).

144. OSCE, JOINT STATEMENT, *supra* note 93 ("no one should be penalized for the dissemination of "hate speech" unless it has been shown that they did so with the intention of inciting discrimination, hostility or violence"); CERD, General Recommendation No. 35, *supra* note 76, ¶ 16 ("States parties should take into account, as important elements in the incitement offences . . . the intention of the speaker").

145. *See, e.g., Venice Commission, Study No. 406/2006: Report on the Relationship between Freedom of Expression and Freedom of Religion*, COUNCIL OF EUROPE ¶ 89(a) (suggesting that "recklessness" may be sufficient in incitement proceedings).

criminalized on very broad grounds, even where the speaker did not intend to bring about hatred, discrimination, hostility or violence.

The Human Rights Committee has on occasion suggested that an intent to incite discrimination, hostility or violence should be required if speech is to be criminalized under international standards.<sup>146</sup> And in its 2013 General Recommendation on racial hate speech the CERD Committee published new guidance that State parties should recognize as “important elements” of any offence of incitement “the intention of the speaker and the imminent risk or likelihood that the conduct desired or intended by the speaker will result from the speech in question.”<sup>147</sup> Nevertheless, both the CERD Committee and the Human Rights Committee have allowed convictions for hate speech to stand even where there was no analysis of intent,<sup>148</sup> including in recent years.<sup>149</sup>

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146. See, e.g., *Faurisson v. France*, where three concurring committee members, Elizabeth Evatt and David Kretzmer, and co-signed by Eckart Klein, ultimately agreed that the author’s freedom of expression was validly restricted by prohibiting his denial of the Holocaust, noting that the law itself under which the author was convicted imposed restrictions that “do not meet the proportionality test. They do not link liability to the intent of the author, nor to the tendency of the publication to incite to anti-Semitism”. *Faurisson v. France*, Commc’n No. 550/1993, ¶ 9 (Hum. Rts. Comm. Nov. 8, 1996); see also *id.*, Individual Opinion of Rajsoomer Lallah, at ¶ 6 (the relevant domestic law did not link liability either to the intent of the author nor to the prejudice that it causes to respect for the rights or reputations of others); OSCE, JOINT STATEMENT, *supra* note 93.

147. CERD, General Recommendation No. 35, *supra* note 76, ¶ 16.

148. See, e.g., *Faurisson v. France*, ¶ 9.6 (where the Committee concluded that France legitimately interfered with this Holocaust denier’s speech since his negationist speech acts “read in their full context, were of a nature as to raise or strengthen anti-semitic feelings” but did not analyze the speaker’s intent). *But see id.*, Individual Opinion by Elizabeth Evatt and David Kretzmer, co-signed by Eckart Klein (concurring), ¶ 9.

149. See, e.g., *A.K. and A.R. v. Uzbekistan*, Commc’n No. 1233/2003 (Hum. Rts. Comm. Mar. 31, 2009); *The Jewish community of Oslo et. al. v. Norway*, Commc’n No. 30/2003 (CERD Apr. 15, 2005); *Vassilari et al. v. Greece*, Commc’n No. 1570/2007, ¶ 2 (Hum. Rts. Comm. Mar. 19, 2009). In an Individual Opinion, Committee member Amor argued that “[t]he court hearing the case found no violation of that law, as ‘doubts remained regarding the . . . intention to offend the complainants by using expressions referred to in the indictment. The authors took their case to the Committee, claiming to be the victims of a violation by the State party of article 20, paragraph 2 . . . of the Covenant, because the court ‘failed to appreciate the racist nature of the impugned letter and to effectively implement the [Greek law] aimed at prohibiting dissemination of racist speech’. This allegedly ‘discloses a violation of the State party’s obligation to ensure prohibition of the advocacy of racial hatred that constitutes incitement to discrimination,

The European Court has been similarly inconsistent in its treatment of intent. In some cases, intent seems to be dispositive of whether insulting speech can be criminalized. For instance, in *Jersild v. Denmark*, the Grand Chamber of the European Court dealt with the conviction of a television presenter for taking part in a programme that included offensive racist speech, such as “a nigger is not a human being, it’s an animal, [and] that goes for all the other foreign workers as well, Turks, Yugoslavs and whatever they are called.”<sup>150</sup> The Court held that the conviction violated Article 10 of the ECHR because this speech was presented as part of a documentary about the Greenjackets, a group of racist youths based in Copenhagen who Jersild interviewed for a news program.<sup>151</sup> Mr. Jersild did not intend to “aid and abet” the dissemination of the Greenjackets’ racist views, and his conviction therefore violated the ECHR.<sup>152</sup> Similarly, in other cases where the Court finds that the speaker’s intent was to

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hatred or violence’. Was it advocacy of racial hatred or just words? Was a racist offence committed or not? Was there the intention to offend, and who must prove this? These are questions that should be discussed, analysed and assessed on the merits.” *Id.*, Individual Opinion of Abdelfattah Amor, ¶ 4. *See also* Zündel v. Canada, Comm’n No. 953/2000, ¶¶ 6.5, 9 (Hum. Rts. Comm. July, 27, 2003) (where the applicant expressly denied that he had any intention to incite hatred against Jewish people at the press conference, neither the State party nor the Committee dealt with this argument. The applicant’s case was ultimately dismissed by the Committee on grounds of admissibility.).

150. *Jersild v. Denmark*, App. No. 15890/89, ¶ 11 (Hum. Rts. Comm. Sept. 23, 1994). “Just take a picture of a gorilla, man, and then look at a nigger, it’s the same body structure and everything, man, flat forehead and all kinds of things”: this was said not by the interviewer but by the members of the extremist group, the Greenjackets, he was interviewing. The interviewer was convicted of aiding and abetting the statements that were “threatening, insulting or degrading” to immigrants in Denmark. *Id.* ¶ 12.

151. *Id.* ¶¶ 34–5, 37.

152. However, seven judges dissented on the basis that Jersild should have added “at least a clear statement of disapproval . . . [a] journalist’s good intentions are not enough in such a situation, especially in a case in which he has himself provoked the racist statements.” *See id.*, Joint Dissenting Opinion of Judges Ryssdal, Bernhardt, Spielmann, and Loizou, ¶ 3. Judges Gölcüklü, Russo, and Valticos considered that “the journalist responsible for the broadcast in question made no real attempt to challenge the points of view he was presenting, which was necessary if their impact was to be counterbalanced, at least for the viewers.” *Id.*, Joint Dissenting Opinion of Judges Gölcüklü, Russo, and Valticos. In other words, there needed to be a “significant reaction on the part of the commentator”. *Id.*

contribute to a genuine debate, this is deemed protected speech which should not be criminalized.<sup>153</sup>

In some cases the European Court seems to require a specific intent to incite violence in order for speech to be criminalized; but in other cases an intent to incite lesser harms will do.<sup>154</sup> And in yet other cases the Court seems to lower the bar to a standard of recklessness<sup>155</sup> or neglects to analyse the intent of the speaker entirely.<sup>156</sup> For instance, the Court concluded that a far right politician's conviction and six-month prison sentence in Romania for "nationalist chauvinist propaganda" could stand without any discussion of his intent.<sup>157</sup> The police had found posters with slogans like "Stop Romania becoming a country of Roma . . . Romania needs children not gays" at the politician's home.<sup>158</sup> According to the Court, these slogans "by their content" aimed to instigate hatred against these minorities and "by their nature" could create "tensions" in the population.<sup>159</sup> This was considered sufficient for the Court to find that the speech was "contrary to the fundamental values of the Convention and a democratic society", so the case was thrown out under Article 17 of the Convention without even considering the balancing exercise required under Article 10 that protects free speech.<sup>160</sup>

#### F. What Impact Did the Statement Have?

Under international human rights law, the final contextual factor that is relevant to the question of whether insulting speech can

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153. See, e.g., *Perinçek v. Switzerland*, App. No. 27510/08, Grand Chamber ¶¶ 230, 258–68 (Eur. Ct. H.R. Oct. 15, 2015); *Giniewski v. France*, App. No. 64016/00 ¶¶ 43, 50–1, 55 (Eur. Ct. H.R. Jan. 31, 2006).

154. Compare *Gündüz v. Turkey*, App. No. 35071/97, ¶¶ 48, 51 (Eur. Ct. H.R. Dec. 4, 2003) with *Féret v. Belgium*, App. No. 15615/07, ¶ 73 (Eur. Ct. H.R. July 16, 2009), ("La Cour estime que l'incitation à la haine ne requiert pas nécessairement l'appel à tel ou tel acte de violence ou à un autre acte délictueux").

155. See, e.g., *TEMPERMAN*, *supra* note 68, at 207–38 (commenting that in the *Leroy* case the Court "implicitly bases Leroy's criminal culpability on a degree of *mens rea* somewhere in between 'knowledge' and 'recklessness'").

156. See, e.g., *Molnár v. Romania*, App. No. 16637/06, ¶ 22 (Eur. Ct. H.R. Oct. 23, 2012) (dismissed under Article 17).

157. *Id.* ¶¶ 23–5; see also *Norwood v. United Kingdom*, App. No. 23131/03 (Eur. Ct. H.R. Nov. 16, 2004) (dismissing an application under Article 17 without a discussion of intent).

158. *Molnár v. Romania*, ¶ 8.

159. *Id.* ¶ 23.

160. *Id.*

be criminalized is the likely or foreseeable impact of an insult and whether such an impact is imminent or not. It seems clear from the case law of both the Human Rights Committee and the regional human rights courts that there is no need to show that the harm that was incited—the discrimination, hostility or violence—actually occurred. But some cases suggest that likely imminent harm may be necessary instead.<sup>161</sup>

In an early draft of its General Comment No. 34, the Committee stated that, in order to come within the prohibition on speech in Article 20, an insulting statement must be “likely to trigger imminent acts”; but this language did not appear in the final draft.<sup>162</sup> Some of the case law of the Committee hints that there is a requirement to show that such harm was foreseeable<sup>163</sup> but this standard is not applied clearly or consistently. In its 2013 General Recommendation on racial hate speech, the CERD Committee published new guidance that State parties should recognize as “important elements” of any offence of incitement “the imminent risk or likelihood that the conduct desired or intended by the speaker will result from the speech in question.”<sup>164</sup> But in many cases both the Human Rights Committee and the CERD Committee have sanctioned criminal convictions for speech without explicitly taking into account whether a prohibited impact was foreseen, likely or imminent.<sup>165</sup>

Confusion also reigns at the European Court when it comes to the relevance of the impact of insulting speech. Some cases seem to

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161. See also *Camden Principles*, *supra* note 100, principle 12.1 (stating that the term “incitement” refers to statements about national, racial or religious groups which create an imminent risk of discrimination, hostility or violence against persons belonging to those groups).

162. See also CERD, General Recommendation No. 35, *supra* note 76, ¶ 16 (“States parties should take into account, as important elements in the incitement offences . . . the imminent risk or likelihood that the conduct desired or intended by the speaker will result from the speech in question”); *Camden Principles*, *supra* note 100, principle 12.1 (stating that a statement should be one that “creates an imminent risk” before it can be criminalized; Rabat Plan of Action, *supra* note 97, ¶ 22 (“likelihood, including imminence” is relevant).

163. *A.W.P. v. Denmark*, Commc’n No. 1879/2009, ¶ 6.5 (Hum. Rts. Comm. Nov. 1, 2013); *Andersen v. Denmark*, Commc’n No. 1868/2009, ¶ 6.4 (Hum. Rts. Comm. July 26, 2010).

164. CERD, General Recommendation No. 35, *supra* note 76, ¶ 16.

165. See *Ross v. Canada*, Commc’n No. 736/1997, ¶ 7.1 (Hum. Rts. Comm. Oct. 18, 2000); *Faurisson v. France*, Commc’n No. 550/1993, ¶ 8.3 (Hum. Rts. Comm. Nov. 8, 1996); *A.K. and A.R. v. Uzbekistan*, Commc’n No. 1233/2003 (Hum. Rts. Comm. Mar. 31, 2009); *The Jewish community of Oslo et. al. v. Norway*, Commc’n No. 30/2003 (CERD, Aug. 15, 2005).

require that the speaker intends to incite violence *and* that violence might objectively ensue in order for the speech to lose the protection of Article 10 of the ECHR. For instance, in *Gündüz*, the Court suggested that merely calling for shariah law, without calling for violence to introduce it, could not be criminalized in Turkey without violating the ECHR's free speech protections.<sup>166</sup> But in many other cases, there is no analysis of the intended or actual impact at all, and yet the Court finds that a conviction was permissible.<sup>167</sup>

#### IV. ANALYSIS AND CRITICISM OF THE CURRENT POSITION IN INTERNATIONAL LAW

A review of state practice shows that laws outlawing insulting speech which give effect to states' obligations under Article 20 of the ICCPR and Article 4 of CERD<sup>168</sup> are prevalent around the world including in Europe, Canada, and Australia.<sup>169</sup> And prosecutions for such speech have led to an alarming number of journalists and others being imprisoned for it.<sup>170</sup> International courts and human rights bodies reviewing such speech analyze various contextual factors in determining whether such speech can be restricted, but in many cases such bodies have approved the imposition of civil or even criminal penalties being imposed at the national level. In the authors' view, the right to insult is not sufficiently protected under international law. Laws outlawing insulting speech are inherently capable of abuse, as the analysis of state practice above has shown. Yet international standards have proved to be confusing and ultimately inadequate in reining in national laws that restrict free speech.

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166. *Gündüz v. Turkey*, App. No. 35071/97, ¶ 51 (Eur. Ct. H.R. Dec. 4, 2003); *see also* *Temel v. Turkey*, App. No. 16853/05, ¶ 62 (Eur. Ct. H.R. Feb. 1, 2011) (noting that the relevant statement did not incite violence).

167. *See* TEMPERMAN, *supra* note 68, at 253 (citing *Glimmerveen and Hagenbeek v. The Netherlands*, App. Nos. 8348/78 and 8406/78 (Eur. Comm'n H.R. Oct. 11, 1979)); *X. Ltd. and Y. v. United Kingdom*, App. No. 8710/79 (Eur. Comm'n H.R. May 7, 1982); *Otto-Preminger-Institut v. Austria*, App. No. 13470/87 (Eur. Ct. H.R. Sept. 20, 1994); *Wingrove v. United Kingdom*, App. No. 17419/90 (Eur. Ct. H.R. Nov. 25, 1996); *Murphy v. Ireland*, App. No. 44179/98 (Eur. Ct. H.R. July 10, 2003); *İ.A. v. Turkey*, App. No. 42571/98 (Eur. Ct. H.R. Sept. 13, 2005).

168. *See* *J.R.T. and the W.G. Party v. Canada*, Comm'n No. 104/1981, ¶ 6.2 (Hum. Rts. Comm. Apr. 6, 1983).

169. *See supra* Part II.

170. *See supra* note 2.

### A. Insufficient Protection of Speech

Two treaty provisions in particular allow speech to be silenced on very broad grounds: Article 20(2) of the ICCPR and Article 4 of CERD.<sup>171</sup> Article 4 is even more restrictive of speech than Article 20 since it explicitly requires the outlawing of speech as a crime, rather than as a civil offence.<sup>172</sup> And it casts an even broader net over speech since it requires the criminalization of “*all dissemination of ideas*” that are racist, even if they don’t involve incitement to any specified harm.<sup>173</sup> This creates criminal liability which is very broad indeed and would capture a significant amount of speech in any society.

Although Article 4 is limited to speech that is discriminatory on *racial* grounds, this simply highlights the arbitrary nature of the standard. Why is racial discrimination more damaging than discrimination based on religious, ethnic or sectarian grounds, or political grounds or grounds of sexual orientation? Article 4 is not only oppressive in a free society—it also fails to protect the interests of victims of discrimination on an equal basis.<sup>174</sup>

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171. See ICCPR, *supra* note 57, art. 20(2); CERD, *supra* note 58, art. 4.

172. See ICCPR, *supra* note 57, art. 20(2); CERD, *supra* note 58, art. 4. The Human Rights Committee has made clear that Article 20 does not necessarily require that such hate speech be made a criminal, as opposed to a civil, offence, and has clarified that a prohibition under Article 20 must also comply with Article 19(3). See *Rabbae v. The Netherlands*, Comm’n No. 2124/2011, ¶ 10.4 (Hum. Rts. Comm. Nov. 18, 2016).

173. CERD, *supra* note 58, art. 4 (emphasis added).

174. That said, even Article 20(2) of the ICCPR only lists the advocacy of “national, racial or religious hatred” as the basis for prohibited forms of incitement to discrimination, hostility or violence, thereby failing to protect the incitement of discrimination, hostility or violence towards a person or group on the basis of, for example, their gender or sexual orientation, two characteristics clearly protected under international human rights law, when read in light of the non-discrimination provisions in Articles 2(1) and 26 of the ICCPR, as well as other international human rights treaties addressing discrimination. See ICCPR, *supra* note 57. The Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression noted that “individuals and organizations involved in lesbian, gay, bisexual and transgender-related activism or expression even face significant threats of physical violence.” *2016 Report of the Special Rapporteur*, *supra* note 14, ¶ 47. A new mandate has been established for an independent expert to combat discrimination and violence against such minorities. See Human Rights Council, *Protection against violence and discrimination based on sexual orientation and gender identity*, ¶ 3, U.N. Doc. A/HRC/RES/32/2 (July 12, 2016). The point is also astutely made by Eduardo Bertoni in his study on hate speech laws in the context of the Americas, in which he notes that “both the constitutional texts and the regulations that establish the bodies charged with monitoring public anti-discriminatory policies are including a

Such vague and inconsistent bases for restricting speech are inherently open to abuse by undemocratic authorities, and even for well-meaning bodies they lead to decision making that is unpredictable and muddled—leaving citizens confused as to what speech may result in a prison term being meted out. Such vague standards also make it possible for the jurisprudence of international bodies to be content-driven—meaning that a court can, consciously or not, tend to defend speech that it can itself tolerate while condemning that which it finds abhorrent to become a crime.

An analysis of the international case law on insults shows that these concerns are not merely hypothetical. Although the Human Rights Committee, the CERD Committee, the European Court of Human Rights, and other bodies take into account the context of speech in determining whether it can be criminalized, none of these bodies has consistently imposed strict requirements that would be protective of speech, such as an insistence that insulting speech must be accompanied by a requisite criminal intent<sup>175</sup> or a strict requirement that harm, or more specifically violence, will be its direct result.<sup>176</sup> Although these bodies have sometimes alluded to such requirements, they have not applied them strictly or consistently to protect free speech. The courts will also very rarely point to evidence of intent, or allude to empirical, sociological or historical data to back up its conclusions on what impact was objectively foreseeable.<sup>177</sup>

Nor have international bodies shied away from commenting on the inherent “value” of the speech and whether the criticism at issue is “warranted”.<sup>178</sup> Indeed, the European Court seems to consider certain topics such as Holocaust denial to be unprotected speech *per*

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new motive that had been ignored hitherto, to wit, discrimination on the grounds of sexual orientation and of sexual or gender identity, as new “suspect conducts” that might result in a speech being classified as an incitement to violence against one of the collectives concerned.” Eduardo Berton, *A study on the prohibition of incitement to hatred in the Americas*, OHCHR 12, 21 (2011), [http://www.ohchr.org/Documents/Issues/Expression/ICCPR/Santiago/SantiagoStudy\\_en.pdf](http://www.ohchr.org/Documents/Issues/Expression/ICCPR/Santiago/SantiagoStudy_en.pdf).

175. See Berton, *supra* note 174, at 20–22.

176. See *id.*, at 22–23.

177. See, e.g., *supra* notes 156–60 and accompanying text (analysing *Molnár v. Romania*, App. No. 16637/06 (Eur. Ct. H.R. Oct. 23, 2012)); *Glimmerveen and Hagenbeek v. The Netherlands*, App. Nos. 8348/78 and 8406/78, at 196 (Eur. Comm’n H.R. Oct. 11, 1979) (in which the European Commission of Human Rights concluded, after a purely textual assessment, that the racist flyers in question “would certainly encourage discrimination”).

178. See, e.g., *Colombani and others v. France*, App. No. 51279/99, ¶ 56 (Eur. Ct. H.R. June 25, 2002).

*se*,<sup>179</sup> even if no evidence of any specific intent has been shown.<sup>180</sup> This has resulted in jurisprudence that tolerates a high level of criminalization of speech, and a suspicion that restrictions are more likely to be allowed where the court itself does not agree with the content or the viewpoint being expressed. This is particularly true in cases where the European Court throws out a case under Article 17 of the ECHR, without even weighing the value of free-speech against other interests protected under Article 10 of the Convention.<sup>181</sup>

Such international jurisprudence casts a wide criminal net over speech that happens to be critical or insulting. Let us take as an example statements made by Donald Trump during the U.S. presidential election campaign, in which he referred to Mexicans as “rapists”<sup>182</sup> and suggested that all Muslims should be prevented from entering the U.S.<sup>183</sup> This can be said to advocate hatred on national and religious grounds and would certainly inspire discrimination, if not also hostility. Such speech is offensive and insulting, but that should not mean that the speaker should be subjected to legal penalties for saying it, let alone a prison term.

An approach that is more protective of speech—that recognizes that insults should not be met with prison terms—would not mean that there is no action taken against the scourge of racism and other forms of discrimination. Nor would such an approach preclude the criminalization of speech by violent terrorist groups. Where the very purpose of the group is violence, as with ISIS, the recruitment-speech could easily pass the test that requires an intent to incite imminent or concretely-identified violence and a likelihood

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179. See TEMPERMAN, *supra* note 68, at 253; *Kuhnen v. Germany*, App. No. 12194/86 (Eur. Comm’n H.R. May 12, 1988); *Norwood v. United Kingdom*, App. No. 23131/03 (Eur. Ct. H.R. Nov. 16, 2004).

180. *Hennicke v. Germany*, App. No. 34889/97 (Eur. Comm’n H.R. May 21, 1997).

181. See *supra* Part IV.

182. See *Full Text: Donald Trump announces a presidential bid*, WASH. POST (June 16, 2015), [https://www.washingtonpost.com/news/post-politics/wp/2015/06/16/full-text-donald-trump-announces-a-presidential-bid/?utm\\_term=.dbc4361f59f7](https://www.washingtonpost.com/news/post-politics/wp/2015/06/16/full-text-donald-trump-announces-a-presidential-bid/?utm_term=.dbc4361f59f7).

183. See Statement, Donald J. Trump, Donald J. Trump Statement on Preventing Muslim Immigration (Dec. 7, 2015), <https://www.donaldjtrump.com/press-releases/donald-j.-trump-statement-on-preventing-muslim-immigration>; see also Julie Hirschfeld Davis, *Trump Orders Mexican Border Wall to be Built and Plans to Block Syrian Refugees*, N.Y. TIMES (Jan. 25, 2017), <https://www.nytimes.com/2017/01/25/us/politics/refugees-immigrants-wall-trump.html>.

that the speech will produce such violence.<sup>184</sup> But where the speech is merely insulting, criminal penalties should not apply.

Instead, proportionate civil penalties may be imposed by legislation, but there is also a myriad of non-legal tools available. First and foremost, such speech should be heard, debated, rebutted, and vigorously challenged.<sup>185</sup> This way, “bigoted speech is exposed by more speech that decries bigotry”.<sup>186</sup> Politicians and other public officials can play a crucial role in countering hate speech by publicly and formally condemning instances of hate speech.<sup>187</sup> Civil society organizations are also critical in responding to hate speech, by identifying the speech and providing online resources to educate users and expose the falsehoods that underlie hateful messages. For instance, the Southern Poverty Law Centre’s *Intelligence Project* in the U.S. publishes information and details of hate speech to not only aid potential disciplinary action, but to publicly name and shame groups and individuals who are responsible for such speech.<sup>188</sup>

Technology can also be used to expose and counter hate speech effectively.<sup>189</sup> The growing amount of communication

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184. The fact the statement is a call to arms by an extremist group, as opposed to someone making a comment on the internet, is clearly relevant to whether the speech could attract criminal sanction. *See* *Delfi AS v. Estonia*, App. No. 64569/09, Grand Chamber, Joint Dissenting Opinion of Judges Sajó, and Tsotsoria, ¶ 14 (Eur. Ct. H.R. June 16, 2015).

185. Giving the person who delivered the insult the opportunity to reply to an allegation that their speech is hateful can also be remedial. *See* Inter-Am. Comm’n on Hum. Rts., *Annual Report of the Office of the Special Rapporteur for Freedom of Expression*, ¶ 48 (2015).

186. Jessica S. Henry, *Beyond Free Speech: Novel Approaches to Hate on the Internet in the United States*, 18 (2009) 18 INFO. & COMM. TECH. LAW 235, 248. Bollinger promoted the virtues of “an open forum . . . in which bigoted speech is exposed by more speech that decries bigotry, and ultimately illuminates a larger more tolerant truth within society.”; LEE BOLLINGER, *THE TOLERANT SOCIETY: FREEDOM OF SPEECH AND EXTREMIST SPEECH IN AMERICA* 45 (2009).

187. The Special Rapporteur notes that “[a] special responsibility to denounce instances of hate speech continues to rest with public officials . . . [and] [c]lear, formal rejections of hate speech by high-level public officials and initiatives to engage in interreligious or intercultural dialogue play an important role in alleviating tensions and building a culture of tolerance and respect without resorting to censorship.” *2012 Report of the Special Rapporteur*, *supra* note 13, ¶ 37.

188. *See* Henry, *supra* note 186, at 242; Heidi Beirich & Mark Potok, *One NGO’s strategies*, in *HATE CRIMES: RESPONDING TO HATE CRIME* 240 (Barbara Perry & Frederick Lawrence eds., 2009).

189. A number of collaborations between Internet Service Providers and civil society organizations have proven effective in combating hate speech online.

conducted online can be used for harassment, threats or insults, but it can also be used to create communities for constructive dialogue and exchange. A free and fearless press can communicate information and ideas to the public, including reporting on racism and intolerance.<sup>190</sup> Training and community initiatives can increase awareness and improve society's understanding of the effects of racism and discrimination in the community. Even the CERD Committee has recently underlined the importance of an educational approach to eliminating racist hate speech, noting that it is often the product of "indoctrination or inadequate education". The Committee therefore recommends "education for tolerance, and counter-speech . . . [as] effective antidotes to racist hate speech".<sup>191</sup> This can include educating children about other religions to tackle religious discrimination.<sup>192</sup>

The current approach, devaluing speech, is not only wrong in principle: it is not working. There is no compelling evidence that the criminalization of racially-inspired insults has led to a reduction in

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*See Henry, supra note 186, at 235–51.* The Special Rapporteur on minority issues notes that "[w]hile digital media has provided new spaces for minority groups to participate in the public debate, the accessibility, rapidness and relative anonymity provided by the Internet also provide fertile ground for spreading hateful content." However, it is also noted that such content, particularly on social media, can be "flagged by community members as material contravening the site's guidelines". *Report of the Special Rapporteur on minority issues*, ¶¶ 76, 78, U.N. Doc. A/HRC/28/64 (Jan. 5, 2015) [hereinafter *Report of the Special Rapporteur on minority issues*]. For a detailed discussion on the possible application of the policy of "speaking back", including to egregious cases of hate speech, see Katharine Gerber, SPEAKING BACK: THE FREE SPEECH VERSUS HATE SPEECH DEBATE 117–34 (2002).

190. In instances where the press fear reprisals for publishing such material, a number of NGOs share reports of instances of hate speech to generate debate. For example, *Groundviews* is a citizen journalism initiative in Sri Lanka that shares stories and reports to foster debate and improve understanding of the impact of hate speech. *See About, GROUNDVIEWS*, <http://groundviews.org/> (last visited Jan. 27, 2017). Similar initiatives include Norikoe Net (Japan), Umati project (Kenya), Panzagar Movement (Myanmar) and Studio Ijambo (Burundi). Noteworthy also is the Brussels Declaration (2014) of the International Federation of Journalists which recommends that journalists denounce incitement to hatred whenever identified, ensure knowledge of codes and guidelines of media workers, and promote education and training of journalists as well as encouraging diversity in media outlets. *See Brussels Declarations, International Federation of Journalists* (Apr. 25, 2014), <http://www.ifj.org/nc/news-single-view/backpid/191/article/ifj-conference-agrees-declaration-to-stand-up-against-hate-speech/>.

191. CERD, General Recommendation No. 35, *supra* note 76, ¶ 30.

192. GARTON ASH, *supra* note 10, at 271.

racially-inspired violent crime. On the contrary, a study on the effectiveness of criminal laws for hate speech prepared for the U.N. Office of the High Commissioner for Human Rights observed that “the criminal model is not an efficient tool when it comes to addressing the real causes of discrimination”, and that “[t]he massive presence of criminal regulations” does “not seem to have made a meaningful contribution to reducing racism or . . . discriminatory conduct[.]”.<sup>193</sup> And despite robust criminal laws in many E.U. member states targeting hate speech, the European Parliament has recently conceded that hate speech and hate crimes are on the rise.<sup>194</sup> Yet international law allows such speech to be criminalized, and indeed, Article 4 of CERD requires that this be done.

Even from a policy perspective, criminalizing insults is counterproductive because hate speech prosecutions only serve to give a platform and increased publicity to the insulting speaker. This was certainly the case for far-right Dutch politician Geert Wilders,<sup>195</sup> and Armenian genocide-denier Doğu Perinçek, who appears to have traveled to places where he knew he would be arrested for the denial in order to get additional publicity for his cause.<sup>196</sup>

It is time to rethink the current system, which is restricting too much speech unnecessarily. And this means that the treaty standards themselves—and their application in individual cases—need to be clarified or amended.

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193. Bertoni, *supra* note 174, at 12 (concluding that “the current preference lies with a non-punitive model.”).

194. Resolution on Strengthening the Fight Against Racism, Xenophobia and Hate Crime, ¶ B, EUR. PARL. DOC. (2013/2543(RSP)) (2013), <http://www.europa.eu/sides/getDoc.do?pubRef=-//EP//NONSGML+MOTION+B7-2013-0123+0+DOC+PDF+V0//EN>; see also Nadine Strossen, *Regulating Hate Speech on Campus: A Modest Proposal?*, 1990 DUKE L.J., 484, 554–55 (1990) (describing the failures of hate speech laws in the U.K.) [hereinafter Strossen, *Regulating Hate Speech*].

195. See, e.g., *Dutch far-right leader Geert Wilders will face trial for hate speech*, THE ECONOMIST (Oct. 15, 2016), <http://www.economist.com/news/europe/21708848-anti-muslim-populist-called-fewer-moroccans-netherlands-dutch-far-right-leader>.

196. See *Perinçek v. Switzerland*, App. No. 27510/08, Grand Chamber (Eur. Ct. H.R. Oct. 15, 2015); see also Strossen, *Regulating Hate Speech*, *supra* note 194, at 559 (noting that censorship measures can have the unintended effect of “glorifying racist speakers” and giving them additional publicity).

## B. Vague and Anachronistic Grounds for Restricting Speech

International law on free speech is also unduly vague and anachronistic. The general guidelines on protecting speech expressed in Article 19 of the ICCPR are similar to those in the European, African, and Inter-American treaties, setting out a general rule in favour of free speech set against specific categories that justify restrictions.<sup>197</sup> But many of these treaties were adopted more than fifty years ago, and were negotiated at a time in which the horrors of World War II were still fresh in the minds of their drafters and the negotiators.<sup>198</sup> They all allow restrictions on vague grounds such as “respect for the right of others” and anachronistic grounds such as restrictions “for the protection of morals”<sup>199</sup> and a prohibition on “propaganda for war.”<sup>200</sup> These terms are not well defined in the jurisprudence of the U.N. bodies, leaving far too much scope for abuse. The fears voiced by many states during the drafting of the ICCPR and CERD regarding free speech<sup>201</sup> have turned out to be well-founded: the terms used are too vague and susceptible to abuse.<sup>202</sup>

## C. Conflicting Guidance among Human Rights Bodies

In addition to being vague and outdated, a close study of international legal sources reveals inconsistent guidance on the question of when international law permits insults.

International bodies have diverged about whether states’ defamation laws—criminalizing insults that harm a person’s

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197. See Callamard, *supra* note 103, sec. II.

198. TIMMERMANN, *supra* note 64, at 141–42.

199. ICCPR, *supra* note 57, art. 19(3).

200. *Id.* art. 20(1).

201. See, *supra* Part. III (on “International Treaties”).

202. As the U.N. Special Rapporteur on minority issues has observed, “the [l]ack of clear definitions of the content and elements of the prohibition of advocacy of national, racial or religious hatred that constitutes incitement to hatred, in legal systems, may lead to misapplication of the law, including the use of anti-hate speech legislation to persecute and suppress critical or dissenting voices.” *Report of the Special Rapporteur on minority issues*, *supra* note 189, ¶¶ 52, 65. A view echoed by the Special Rapporteur on freedom of religion or belief, who highlighted “the risk that legal provisions prohibiting hate speech are interpreted loosely and applied selectively by the authorities underlines the importance of having unambiguous language and of devising effective safeguards against abuses of the law”. *Joint submission by special procedures to the Office of the High Commissioner for Human Rights*, OHCHR EXPERT WORKSHOP ON EUROPE 6 (Feb. 9–10, 2011).

reputation—are compatible with international law. At one end of the spectrum, the U.N. has spoken out strongly against criminal defamation,<sup>203</sup> finding that states should “consider” decriminalizing defamation<sup>204</sup> and that imprisonment should never be a permissible penalty.<sup>205</sup>

In stark contrast to this position, the U.N. CERD Committee has stated that criminal defamation laws are compatible with international law. In a case involving Denmark, for instance, the Committee found that it did “not consider it contrary to . . . the Convention if . . . the provisions of [a country’s] criminal law [include] a general provision criminalizing defamatory statements” which are racist in nature.<sup>206</sup> The case came before the Committee after a construction worker in Denmark got into an argument about certain payments with his boss. The boss told the worker to “[p]ush off home, you Arab pig”, called him an “immigrant pig” and stated that “both you and all Arabs smell . . . [d]isappear from here, God damned idiots and psychopaths.”<sup>207</sup> The Committee concluded that a criminal defamation action was perfectly permissible and would have constituted an “effective remedy” for the construction worker.<sup>208</sup>

Like the CERD Committee, but unlike the Human Rights Committee, the regional courts have been tolerant of penalizing insults through criminal defamation laws. For instance, the

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203. *Adonis v. The Philippines*, Commc’n No. 1815/2008, ¶¶ 7.7-7.10. (Hum. Rts. Comm. Oct. 26, 2011).

204. “They should not be applied with regard to those forms of expressions that are not, of their nature, subject to verification.” General Comment No. 34, *supra* note 3, ¶ 47.

205. *Id.*; *Adonis v. The Philippines*, ¶ 7.9. The Special Rapporteur also consistently advocates the decriminalization of defamation. In particular see *2007 Report of the Special Rapporteur*, *supra* note 97, ¶ 81. Even so, the Special Rapporteur has, on occasion, implicitly regarded criminal defamation laws as acceptable. See, most recently, with respect to The Netherlands *lèse-majesté* laws. See Letter of the Special Rapporteur, *supra* note 53, at 5; Opinion On Articles 216, 299, 301 And 314 Of The Penal Code Of Turkey, ¶ 57 (Venice Comm’n Mar. 15, 2016). The Venice Commission represents 61 member States, including all 47 members of the Council of Europe. See *Members of the Venice Commission*, Venice Commission, <http://www.venice.coe.int/WebForms/members/countries.aspx?lang=EN> (last visited Jan. 27, 2017).

206. *Ahmad Najaati Sadic v. Denmark*, Commc’n No. 25/2002, ¶ 6.3 (CERD Mar. 21, 2003).

207. *Id.* ¶ 2.1.

208. *Id.* ¶ 6.4; see *TBB–Turkish Union in Berlin/Brandenburg v. Germany*, Commc’n No. 48/2010 (CERD Apr. 4, 2013); *The Jewish community of Oslo et. al. v. Norway*, Commc’n No. 30/2003 (CERD Apr. 15, 2005).

Inter-American Court has held that criminal defamation is legitimate where it “meets the requirements of necessity and proportionality,”<sup>209</sup> including when it is necessary to protect the honour or reputation of another individual or guarantee the right to privacy.<sup>210</sup>

In addition to inconsistent guidance on the question of when international law permits insults to living persons, international law also diverges on the issue of denial laws, which protect against insults to the memories of deceased victims of crime. For instance, states like Switzerland, Austria, and Germany make it a crime to deny the Holocaust on the basis that such denials insult the dignity of the victims of this genocide. While the Human Rights Committee has stated that “[l]aws that penalize the expression of opinions about historical facts are incompatible with the obligations that the Covenant imposes on States parties in relation to the respect for freedom of opinion and expression,”<sup>211</sup> the European Court has gone the other way and held that denial laws *are* compatible with free speech. So, for instance, when a well-known historian wrote a letter to the editor of a German weekly stating that the Nazis had not planned the Holocaust, that most German officers did not know about it, and that Hitler did not intend to murder the Jews, the European Court approved his conviction and three-month sentence for insulting “the dignity of the deceased.”<sup>212</sup>

#### D. Contradictory Case Law within Human Rights Bodies

In addition to inconsistencies between courts and human rights bodies at the international level, an analysis of each body’s jurisprudence reveals an inconsistent approach.

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209. *Mémoli v. Argentina*, ¶ 126 (Inter-Am. Ct. H.R. Aug. 22, 2013).

210. *Id.* ¶ 49; *see Mahmudov and Agazade v. Azerbaijan*, App. No. 35877/04 (Eur. Ct. H.R. Dec. 18, 2008); *Lohé Issa Konaté v. Burkina Faso*, App. No. 004/2013, ¶ 165 (Afr. Ct. Hum. P. R. Dec. 5, 2014) (referring to “public incitement to hatred” as being a sufficient basis for criminal penalties).

211. General Comment No. 34, *supra* note 3, ¶ 49.

212. *Witzsch v. Germany*, App. No. 7485/03, ¶¶ 2–3, 8–9 (Eur. Ct. H.R. Dec. 13, 2005). The CERD Committee for its part adopts a rather confusing middle ground by recommending that, on the one hand “the expression of opinions about historical facts should not be prohibited or punished” but then mandating that “public denials or attempts to justify crimes of genocide and crimes against humanity, as defined by international law, should be declared as offences punishable by law, provided that they clearly constitute incitement to racial . . . hatred.” *See CERD, General Recommendation No. 35, supra* note 76, ¶ 14.

As discussed more fully above, the Human Rights Committee and the European Court have in some cases insisted that, in order to be criminal, speech has to be intended to incite violence.<sup>213</sup> But at other times a lower level of intent or no specific intent is required.<sup>214</sup> Similarly, in some cases, the speech must foreseeably lead to imminent harm in the form of discrimination, hostility or violence; in others, only imminent violence will suffice; and in others still no showing of likely harm is required at all.<sup>215</sup>

Given how prevalent the criminalization of insults is around the world, it would be helpful for international law to set a clear standard that is appropriately protective of speech. Yet this is not the position today. Not only is there a different answer being given at the regional levels and the international level, but also the principal U.N. bodies supervising compliance with the two main treaties governing insulting speech are at odds with each other. The case law within each body is also confused. This leads to questions of what reforms are needed and how they might be achieved.

#### E. What the Law Should Be

We must distil a clear and consistent standard for regulating the right to insult in international law. We recommend that there should be the narrowest possible basis for criminalizing insulting speech, inspired by the approach adopted by U.S. courts under the First Amendment to the U.S. Constitution.

Although First Amendment jurisprudence is beyond the scope of this article, the approach of the U.S. Supreme Court to criminalizing speech is instructive because it is far more protective of speech than the international and regional human rights sources that have been reviewed. First Amendment jurisprudence should consequently serve as a source of inspiration for international bodies that seek to be more protective of speech. Two main principles emerge from a review of U.S. case law that could be incorporated at the international level and by doing so would increase the protections for speech.

First, as a general rule, insulting speech should be protected unless it is intended to and likely to produce imminent violence or

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213. *See supra* notes 143–60 and accompanying text.

214. *See supra* notes 143–60 and accompanying text.

215. *See supra* notes 161–67 and accompanying text.

other unlawful behaviour.<sup>216</sup> Under U.S. law, the First Amendment has been interpreted by the Supreme Court to permit the restriction of speech in very few circumstances. Speech is presumed to be free, and government regulation of speech is justified only if the speech falls into a category that is unprotected by the First Amendment. When it comes to insulting speech, the three relevant categories are: fighting words, incitement to imminent lawless action, and true threats.<sup>217</sup> The doctrines are linked, and there is debate over whether one is the subset of the other.<sup>218</sup>

“Fighting words” are words “which by their very utterance inflict injury or tend to incite an immediate breach of the peace.”<sup>219</sup> This category encompasses insults, but has not been heavily relied on in practice<sup>220</sup> and its contours are very narrow. Offensive words will not suffice; fighting words must “have a direct tendency to cause acts of violence by the person to whom, individually, the remark is addressed.”<sup>221</sup> For this reason, the Supreme Court did not consider the words “Fuck the Draft” to be “fighting words” because this expression, found on a defendant’s jacket, was shown in public generally, not directed at any one person, and neither the defendant nor anyone else engaged in violence as a result of the expression.<sup>222</sup>

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216. U.S. law generally requires a link to violence if insulting speech is to be criminalized. For other types of speech a link to other lawless action can suffice (for instance, falsely shouting “fire” in a public theatre, or producing child pornography). Criminal defamation laws are in a separate category but have been severely curtailed and criticized by the federal Supreme Court, ruled unconstitutional by state Supreme Courts, and have largely fallen into disuse. *See supra* note 5; *infra* note 219.

217. *See generally* *Virginia v. Black*, 538 U.S. 343 (2003) (considering these categories of speech).

218. A number of U.S. States also have criminal defamation laws, including Virginia (VA. CODE. ANN. §§ 18.2–417 (2015)), Florida (FLA. STAT. ANN. §§ 836.01–11 (2010)), Montana (MONT. CODE. ANN. § 45-8-212 (2002)) and New Hampshire (N.H. REV. STAT. ANN. § 644:11). However, very few criminal defamation cases have been prosecuted in U.S. courts. *See supra* note 5. A number of State Supreme Courts have also held that criminal defamation laws are unconstitutional. *See, e.g.*, *I.M.L. v. State*, 61 P.3d 1038 (Utah 2002); *Colorado repeals criminal libel law*, IFEX (Apr. 20, 2012), [https://www.ifex.org/united\\_states/2012/04/20/colorado\\_repeal/](https://www.ifex.org/united_states/2012/04/20/colorado_repeal/).

219. *Chaplinsky v. State of New Hampshire*, 315 U.S. 568, 572 (1942).

220. The Third Circuit called the fighting words category “an extremely narrow one.” *Johnson v. Campbell*, 332 F.3d 199, 212 (3d Cir. 2003).

221. *Chaplinsky*, 315 U.S. at 572.

222. *Cohen v. California*, 403 U.S. 15, 20 (1971). The Court noted that while some may have wished to resort to “lawless and violent proclivities” to remove the jacket from the defendant, “this is an insufficient basis upon which to

The second category, the “incitement” exception to the First Amendment, was defined by the U.S. Supreme Court in *Brandenburg v. Ohio*.<sup>223</sup> The Court held that a prohibition on speech can only be upheld when (a) the advocacy of violence is directed to inciting imminent lawless action, and (b) is likely to produce such action.<sup>224</sup> Although “lawless” action can be read broadly, *Brandenburg* is often read narrowly to apply only to the advocacy of force.<sup>225</sup> In addition, the temporal requirement of imminence has strictly limited the application of the incitement doctrine. In *NAACP v. Claiborne Hardware Co.*, the statement “if we catch any of you going in any of them racist stores, we’re gonna break your damn neck” was held to be “emotionally charged rhetoric” and an “impassioned plea” protected under the First Amendment.<sup>226</sup> The Court found that that the “mere advocacy of the use of force or violence does not remove speech from the protection of the First Amendment”—a more concrete connection between the speech and the violence was required.<sup>227</sup> In this case such a connection was not sufficiently strong because although acts of violence against boycott violators did occur after the speech was made,<sup>228</sup> most occurred weeks or months later<sup>229</sup> and were not clearly caused by it.<sup>230</sup>

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erect, consistently with constitutional values, a governmental power to force persons who wish to ventilate their dissident views into avoiding particular forms of expression.” *Id.* at 16, 23.

223. *Brandenburg v. Ohio*, 395 U.S. 444, 447–49 (1969).

224. DANIEL A. FARBER, *THE FIRST AMENDMENT* 77 (2014); *see also* *Brandenburg*, 395 U.S. at 447 (“[T]he constitutional guarantees of free speech and free press do not permit a State to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action.”).

225. *See* RUSSELL L. WEAVER, *UNDERSTANDING THE FIRST AMENDMENT* 29 (2014).

226. *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 928 (1982).

227. *Id.* at 927.

228. *Id.* at 926.

229. Much turned on the fact that the lower court ordered that the respondents were entitled to recover business losses allegedly sustained as a result of the violence or threats of violence stemming from the speech for a period of seven years, when the “isolated acts of violence” occurred in just one year. *Id.* at 923–24. *Cf. Rice v. Paladin Enterprises*, 128 F.3d 233 (4th Cir. 1997). There is, however, room for debate as to whether the “imminence” requirement should be interpreted in a non-temporal manner in the context of terrorism, particularly when assessing whether the use of online messaging will likely result in harm or where a court is assessing speech that is “to, under the direction of, or in coordination with foreign groups that the speaker knows to be terrorist organizations.” *Holder v. Humanitarian Law Project*, 130 U.S. 1, 26 (2010); *see*

The third category, “true threats,” concerns statements where “the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals.”<sup>231</sup> Although the speaker “need not actually intend to carry out the threat,” it must be sufficiently concrete. The prohibition is supposed to protect individuals from the fear of violence and the disruption caused by fear, as well as from the possibility that the threatened violence will occur. Publishing “Wanted” posters of physicians who performed abortions was on this basis found to be a “true threat,”<sup>232</sup> whereas a young man stating during a political rally that “if they ever make me carry a rifle the first man I want to get in my sights is [President Lyndon B. Johnson]” was found to be “political hyperbole” and thus permitted speech.<sup>233</sup>

All three categories of unprotected insulting speech under U.S. law therefore require a concrete link to violence or breach of the peace if the speech is to be criminalized.

The second principle that can be drawn from U.S. jurisprudence and applied at the international level is that content-based or viewpoint-based restrictions will rarely be compatible with freedom of speech. As U.S. jurisprudence currently stands, within the three categories of “fighting words,” “incitement,” or “true threats,” the line between permissible and impermissible speech should not be based on the content or viewpoint expressed in the speech. In *R.A.V. v. City of St. Paul*, the Supreme Court struck down a statute seeking to criminalize the display of a symbol which “arouses anger, alarm or resentment in others on the basis of race, colour, creed, religion or gender,” such as a burning cross or Nazi swastika.<sup>234</sup> The Court considered this to be related to “fighting words,” but was not prepared to consider it unprotected speech

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United States v. Mehanna, 735 F.3d 32 (1st Cir. 2013); Thomas Healy, *Brandenburg in a Time of Terror*, 94 NOTRE DAME L. REV. 655 (2009); Ronald K. L. Collins & David M. Skover, *What Is War?: Reflections on Free Speech in “Wartime”*, 36 RUTGERS L.J. 833, 834 (2005); Nadine Strossen, *The Regulation of Extremist Speech in the Era of Mass Digital Communications: Is Brandenburg Tolerance Obsolete in the Terrorist Era?*, 36 PEPP. L. REV. 361 (2009).

230. *NAACP v. Claiborne*, 458 U.S. at 918.

231. *Virginia v. Black*, 538 U.S. 343, 359 (2003).

232. *See Planned Parenthood of the Columbia/Williamette, Inc. v. American Coalition of Life Activists*, 290 F.3d 1058, 1076–77, 1088 (9th Cir. 2002).

233. *See Watts v. U.S.*, 394 U.S. 705, 708 (1969).

234. *See R.A.V. v. City of St. Paul*, 505 U.S. 377, 391 (1992).

because it constituted content-based discrimination.<sup>235</sup> By prohibiting fighting words that preached intolerance on the basis of “race, color, creed, religion or gender”, the statute allowed fighting words that preached racial and religious *tolerance*, and this viewpoint-discrimination was unacceptable.<sup>236</sup> The state had “no such authority to license one side of a debate to fight freestyle, while requiring the other to follow Marquis of Queensberry rules.”<sup>237</sup>

To survive a constitutional challenge, a criminal statute must therefore meet the neutrality requirements laid out in *R.A.V.* and either the imminence and intent requirements of *Brandenburg*, the “fighting words” requirement of *Chaplinsky*, or the “true threat” of *Watts*.<sup>238</sup> The combined effect of these doctrines is that insulting speech is well protected, and that a high bar—usually linked to imminent violence—is required for criminalization. In addition, the prohibition on content or viewpoint-based laws means that judges are not basing their decisions on their own preferences about what speech should or should not be heard. This is a very different position to the one that emerges from a review of international jurisprudence on insults and should serve as inspiration to courts that wish to provide more protection to speech.

## V. RECOMMENDATIONS

### A. Eight Recommendations for the Right to Insult in International Law

We believe that international law on insulting speech should be applied in a manner that is more coherent and more protective of speech, in line with the approach espoused by the U.S. Supreme Court under the First Amendment. The difficulty in identifying the relevant international law when it comes to insulting speech, and the conflicting guidance that exists increases the scope for governmental abuse and also limits the relevance of international law when it comes to private actors who may struggle to understand the current international legal rules if they seek to apply them.

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235. *Id.* at 382.

236. *Id.* at 391.

237. *Id.* at 392–93.

238. *See* RODNEY A. SMOLLA, SMOLLA & NIMMER ON FREEDOM OF SPEECH § 12:23 (2016).

As a result, we propose the following eight recommendations to guide consideration of insulting speech in international law.<sup>239</sup>

At the national level:

(1) **The law should recognize a “right to insult”. An insult should only be criminalized if it is intended to incite violence or criminal offences *and* it is likely to produce such violence or offences.**<sup>240</sup> There is a subjective element (intent to incite violence or crime) and an objective element (likelihood that violence or crime would occur). The violence or crime should be imminent or otherwise sufficiently concretely identified. Intent to incite hatred, hostility or discrimination should be insufficient to justify criminal sanctions. Defamation or libel should only attract civil penalties, never imprisonment. There may be aggravated penalties for insults based on race, nationality, ethnicity, gender, and so on, but these should not be criminal and should always be proportionate to the harm done. In order to recognize a higher measure of protection for speech than what is necessarily provided for under international human rights law, national parliaments may need to enact and amend domestic legislation, or even domestic constitutions or bills of rights.<sup>241</sup>

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239. See also Meera Chandramouli, *Protecting Both Sides of the Conversation: Towards a Clear International Standard for Hate Speech Regulation*, 34 U. PA. J. INT'L L. 831, 833 (2013) (arguing that international law should incorporate an imminent violence requirement and “further specificity regarding speech regulation in cases where hate speech is used to indoctrinate violent groups.” Chandramouli examines a narrower range of jurisdictions and legal instruments, with a focus on how United States standards can apply internationally.). Cf. Thomas J. Webb, *Verbal Poison—Criminalizing Hate Speech: A Comparative Analysis and a Proposal for the American System*, 50 WASHBURN L.J. 445 (2011) (arguing for the United States to adopt international standards); Jean-Marie Kamatali, *Limits of the First Amendment: Protecting American Citizens’ Free Speech in the Era of the Internet and Global Marketplace of Ideas*, 33 WIS. INT'L L.J. 587 (2015) (noting that the U.S. cultural symbolism surrounding free speech has made its approach “a hard sell” to other liberal democracies that have the traumatizing experience of Nazi propaganda during the Holocaust).

240. See *Rabbae v. The Netherlands*, Commc’n No. 2124/2011, Individual Opinion of Sarah Cleveland and Mauro Politi (concurring), ¶¶ 6–7 (Hum. Rts. Comm. Nov. 18, 2016).

241. The UK Government has considered making such a change in the context of a plan to repeal the Human Rights Act 1998 and replace it with a

(2) **Insulting the three R's—royalty, rulers, or religion—should not be criminalized.** Laws imposing criminal sanctions for *lèse majesté*, *desacato*, disrespect for authority, disrespect for flags and symbols, defamation of the head of state or public institutions (such as the army or judiciary), the protection of the honour of public officials, sedition, and blasphemy are not in compliance with international law and should be abolished.<sup>242</sup> The only exception should be where the person making the insult intends to incite violence or a criminal offence and where it is likely in the circumstances that such violence or crime would ensue.

(3) **Insulting victims of a historical event through “reversionism” or genocide-denial should not be criminalized.** The position of the Human Rights Committee is to be preferred to that of the European Court of Human Rights because it recognizes that laws penalizing the expression of opinions about historical facts are incompatible with respect for freedom of expression.

(4) **Laws on counter-terrorism, public order or other offences should not be used to prohibit speech that is merely insulting.** Such laws should have precise terms to avoid authorities using these laws to suppress freedom of expression.

At the international level:

(5) **CERD Article 4 should be deleted by the agreement of States Parties or excluded through reservations.** It is both too broad and too narrow. It is too broad because it makes it a criminal offence to disseminate any idea that incites racial discrimination. It is too narrow because it is limited to

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British Bill of Rights. The draft Bill of Rights has not yet been released to the public, but the Government has emphasised the importance of a high level of protection for freedom of expression. See *The Conservative Party Manifesto* (2015), <https://www.conservatives.com/manifesto> (last visited Jan. 23, 2017).

242. General Comment No. 34 of the Human Rights Committee makes positive comments in this direction but stops short of reaching this clear and categorical conclusion. See General Comment No. 34, *supra* note 3, ¶ 38.

*racial* hate speech. These deficiencies cannot be cured by interpretation.

(6) **States should enter reservations to ICCPR Article 20** to prohibit speech only where it intentionally incites violence or a criminal offence that is likely to follow imminently (or is otherwise concretely identified) as a result of the speech.<sup>243</sup>

(7) **Vague and anachronistic concepts should not be relied on to justify the criminalization of insults.** Terms such as “public morals” in Article 19(3) of the ICCPR and “propaganda for war” in Article 20(1) of the ICCPR should be defined more precisely in line with principles (1)–(3), or states should enter reservations or declarations in respect of these terms.

(8) **Article 17 of the ECHR and its equivalent in the ICCPR, Article 5, should not apply to freedom of expression cases,** which should always be subject to a balancing test under Articles 10 and 19 of these conventions, respectively.

These eight recommendations should also guide the private sector when they are requested to remove online content because it is considered insulting by a person, institution or government.<sup>244</sup> The U.N. has stated that businesses should respect human rights<sup>245</sup> and the U.N. Global Compact recommends that companies align their policies with recognized international standards on human rights.<sup>246</sup>

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243. As has been held by the U.S. Supreme Court in *Brandenburg v. Ohio*. See *supra* notes 223–25 and accompanying text.

244. As the U.N. Special Rapporteur on Freedom of Expression observes, “the range of private sector roles in organizing, accessing, populating and regulating the Internet is vast and often includes overlapping categories.” *Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression (Advance Edited Version)*, ¶ 15, U.N. Doc. A/HRC/32/38 (May 11, 2016).

245. *The U.N. Guiding Principles on Business and Human Rights: Relationship to U.N. Global Compact Commitments*, U.N. GLOBAL COMPACT (July 2011), [https://www.unglobalcompact.org/docs/issues\\_doc/human\\_rights/Resources/GPs\\_GC%20note.pdf](https://www.unglobalcompact.org/docs/issues_doc/human_rights/Resources/GPs_GC%20note.pdf).

246. See *The Ten Principles of the U.N. Global Compact*, U.N. GLOBAL COMPACT, <https://www.unglobalcompact.org/what-is-gc/mission/principles> (last visited Jan. 27, 2017). Principle 1 of the U.N. Global Compact states: “Businesses should support and respect the protection of internationally proclaimed human

The decisions made by technology companies are increasingly important since platforms like Google and Facebook are used by billions of people all over the world—they are now the gatekeepers of the information that consumers can access. Governments therefore often seek to influence these companies' policies towards insulting speech.

Although some prominent technology companies have alluded to international human rights law as a guiding principle,<sup>247</sup> companies in fact rely on their own “community standards,” as well as national laws, to determine requests to censor insulting content.<sup>248</sup> But where national laws themselves violate international treaties that apply to that country, technology companies should be entitled to take that into account. These companies should be able to draw inspiration from international law in these areas, and they should, in turn, be as transparent as possible in their decisions on restricting or removing content.

Ultimately, States, as well as private actors, would benefit from legal reform in this area—the tide around the world is turning against free speech, and international law should have a more positive role to play.

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rights.” Principle 2 states: “Businesses should make sure that they are not complicit in human rights abuses.” *Id.*

247. See *Principles*, GLOBAL NETWORK INITIATIVE, <https://globalnetworkinitiative.org/principles/index.php> (last visited Jan. 27, 2017). The Global Network Initiative is an organization which includes Facebook, Google, LinkedIn, Microsoft and Yahoo! as members. The Principles are based on, *inter alia*, Article 19 of the ICCPR. See *id.*

248. For instance, Facebook’s guidelines state that content will be taken down if it is found to violate national law. If it is, Facebook considers a number of issues, such as whether or not the State requesting the content removal is democratic. Facebook would also consider what is at stake, as often the country threatens to block access to the entire site if the removal request is not complied with. In these situations, Facebook will frequently block the content in that country only. See *Community Standards*, FACEBOOK, <https://en-gb.facebook.com/communitystandards#criminal-activity> (last visited Jan. 27, 2017). As a result, criticism of Atatürk can be taken down in Turkey; insults to the Thai King will not show up in Thailand.