

OHCHR Expert Workshop on the Prohibition of Incitement

Santiago, 12-13 October, 2011

Introduction

One of the stated objectives of OHCHR expert seminar for Santiago is “to arrive at a comprehensive assessment of the state of implementation of [the prohibition against incitement to national, racial, or religious hatred in article 20 of the International Covenant on Civil and Political Rights (ICCPR)] in conformity with international human rights law” in the Americas region. Another is “to identify possible actions at all levels” that can be taken to ensure that the prohibition against such incitement is fully implemented while ensuring full respect for freedom of expression. In an effort to advance these objectives, the Jacob Blaustein Institute for the Advancement of Human Rights (JBI) submits the following recommendations regarding thresholds for the prohibition of incitement to hatred and other aspects of article 20(2).

I. The limitations to which restrictions based on Article 20 are subject must be clearly articulated, and seminar participants should discourage the imposition of restrictions on expression that do not adhere to these limitations.

At present, States appear to have adopted highly divergent opinions regarding the scope of the conduct that article 20 obliges them to prohibit. Ambiguity regarding the definition and proper application of article 20 creates a serious risk that States will implement or adopt laws that restrict freedom of expression to a greater degree than that required by article 20, and in ways that are ultimately impermissible under the ICCPR.

The jurisprudence of the Human Rights Committee, the expert body which implements the ICCPR, has clarified some of the restrictions to which measures enacted on the basis of article 20(2) are subject. Specifically, and most recently in its General Comment No. 34 on Article 19 of the ICCPR, the Committee has found that “[t]he acts that are addressed in article 20 are all subject to restriction pursuant to article 19, paragraph 3. As such, a limitation that is justified on the basis of article 20 must also comply with article 19, paragraph 3.”ⁱ This means that prohibitions against advocacy of national, racial, or religious hatred that constitutes incitement to hostility, discrimination, or violence are permissible only where they are (1) provided by law, (2) imposed for a permissible purpose (for respect of the rights or reputations of others or for the protection of national security, public order, public health, or morals), and (3) necessary to achieve one of those grounds and proportionate to the harm the law intends to prevent or punish, and “the least intrusive instrument amongst those which might achieve their protective function.”ⁱⁱ

Other UN expert mechanisms have similarly emphasized that *all* restrictions on freedom of expression, whether or not they are intended to implement ICCPR article 20, must conform with the criteria in article 19(3). In their joint submission for the Expert Workshop on the Americas, Heiner Bielefeldt, Special Rapporteur on freedom of religion or belief, and Frank La Rue, Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, emphasize that “any measure to implement article 20 of the ICCPR will have to withstand the clear test that article 19(3) imposes for restrictions on freedom of expression,” and that “any limitations on freedom of expression should be clearly and

narrowly defined,” “necessary and proportionate to the objective they propound to achieve,” and must constitute “the least intrusive means so far as freedom of expression is concerned.”ⁱⁱⁱ

Additionally, Bielefeldt and La Rue have identified a number of additional limitations on the proper application of article 20(2), noting in their submission to the Americas workshop that that individuals should only be punished for incitement under article 20(2) where there is evidence of intent, and that “[a]n independent judiciary and respect for the rules of due process are...essential preconditions” to the prohibition of incitement pursuant to article 20(2).^{iv}

Independent experts within the UN and regional human rights systems have emphasized that these restrictions on article 20(2) measures are particularly necessary in order to guard against abuse of such measures by State officials. Ambeyi Ligabo, the Organization for Security and Cooperation in Europe representative on freedom of the media; Ignacio J. Alvarez, the Organization of American States special rapporteur on freedom of expression; and Faith Pansy Tlakula, the African Commission on Human and Peoples’ Rights special rapporteur on freedom of expression, have noted that “[i]n many countries, overbroad rules in this area are abused by the powerful to limit non-traditional, dissenting, critical, or minority voices, or discussion about challenging social issues.”^v

Conclusions:

- Measures enacted on the basis of article 20(2) are also subject to the restrictions set out in article 19(3); that is, they must be provided by law, they may only be imposed for one of the grounds articulated in article 19(3), and they must be “necessary” to achieve one of those grounds. Thus, the threshold for permissible restrictions on freedom of expression justified with reference to ICCPR article 20 is necessarily high.
- Measures enacted on the basis of article 20(2) must be articulated clearly and narrowly to ensure against abusive and overbroad application.
- An individual must *intend* for his or her advocacy to incite discrimination or violence in order to be sanctioned consistently with article 20(2).
- The application of any restrictions enacted pursuant to article 20(2) should only be carried out following an adequate investigation by a competent and impartial body and a fair, impartial, credible trial procedure conducted by an independent judiciary. This implies that States must ensure, as a precondition to enacting restrictions on freedom of expression justified with reference to article 20(2), an independent judiciary and respect for due process.
- Restrictions on expression justified by reference to article 20(2) must not be directed to suppress the expression of critical views, controversial opinions or politically incorrect statements, nor should they restrict proselytizing, discussion, criticism, or expressions of antipathy, dislike, ridicule, insult, or abuse.

II. Blasphemy provisions and other prohibitions of displays of disrespect to a religion or other belief system, including prohibitions against “defamation of religions,” are incompatible with the right to freedom of expression and do not fall within the scope of expression that is properly restricted under article 20.

The requirement that all measures enacted in order to implement ICCPR article 20 satisfy the restrictions outlined in ICCPR article 19(3) has the effect of rendering laws prohibiting blasphemy or disrespect to a religion, including prohibitions against “defamation of religions,” impermissible under human rights law.

This is in part because the aim of such laws is primarily to prevent and punish criticism of religious doctrine and tenets of faith, rather than incitement to discrimination or violence against individuals on the basis of their religion, whereas, as Special Rapporteurs Beilefeldt and La Rue also note in their submission to the Americas workshop, “individuals rather than religions *per se* are the rights-holders.”^{vi}

Blasphemy laws are also incompatible with article 19 because they fail to satisfy the three-part test for prohibitions that limit the right to freedom of expression guaranteed in article 19 of the ICCPR, particularly the third part of that test, which requires that restrictions on freedom of expression be necessary to achieve a legitimate purpose and proportionate to the harm intended to be prevented. Prohibitions against “defamation” and “vilification of religions” fail to satisfy this test because these terms are extremely vague and overbroad and refer to a broad category of conduct that cannot be defined objectively.

The jurisprudence of the Human Rights Committee, articulated in its decisions on communications submitted under the Optional Protocol to the ICCPR and in its recent General Comment on Article 19 of the ICCPR, reflects its negative view of blasphemy laws and related provisions. For example, the Committee has also found that blasphemy laws may not “discriminate in favour of or against one or certain religions or belief systems, or their adherents over another, or religious believers over non-believers” and may not “be used to prevent or punish criticism of religious leaders or commentary on religious doctrine and tenets of faith.”^{vii} The Committee has also welcomed States parties’ abolishment of criminal blasphemy provisions, in recognition of their inherent tension with freedom of expression.^{viii}

UN human rights experts and bodies have confirmed this view, and have explicitly noted that even *prima facie* non-discriminatory blasphemy laws nevertheless impermissibly restrict freedom of expression. Special Rapporteurs Bielefeldt and La Rue note in their submission to the Americas workshop:

The difficulties in providing an objective definition of the term ‘defamation of religions’ at the international level make the whole concept open to abuse through excessive application or loose interpretation. At the national level, domestic blasphemy laws...could result in the de facto censure of all inter-religious and intra-religious criticism...and have often proved to be applied in a discriminatory manner. There are numerous examples of persecution of religious minorities or dissenters, but also of atheists and non-theists, as a result of legislation on religious offences or overzealous application of laws that use a *prima facie* neutral language. Moreover, the right to freedom of religion or belief, as enshrined in relevant international legal standards, does not include the right to have a religion or a belief that is free from criticism or ridicule.^{ix}

Ambeyi Ligabo, the former special rapporteur on the promotion and protection of the right to freedom of opinion and expression, and Asma Jahangir, the former UN special rapporteur on freedom of religion or belief, have similarly stated that prohibitions against defamation of religions or blasphemy are impermissible under human rights law for these reasons.^x Indeed, as Jangahir has noted that such laws are not only inappropriate but also ineffective at combating religious intolerance, stating that “excessive or vague legislation on religious issues...could create tensions and problems instead of solving them.”^{xi}

Conclusions:

- Restrictions on expression justified by reference to article 20(2) must be directed to protecting *individuals* from direct violations of their rights rather than to protecting belief systems, abstract concepts, or institutions as such.
- Prohibitions against blasphemy, religious insult, “defamation of religions,” and “vilification of religions” do *not* fall within the body of laws appropriate for implementing states’ obligations

under article 20. States that have adopted such laws should be encouraged to repeal them, and to avoid applying them until such time as they are repealed. States considering adopting such laws should be discouraged from doing so.

III. States should be encouraged to adopt measures aimed at combating intolerance that promote social harmony and equality rather than criminalize intolerant expression.

There is no question that discrimination based on religion and belief is a serious human rights concern and that racial, religious, and other intolerance should be combated; however, it is impermissible to address such intolerance by implementing expansive, unjustified limitations on freedom of expression. Indeed, there are a number of strategies that states seeking to discourage intolerance and promote social harmony can pursue that do not involve restricting freedom of expression.

In recent months, States have taken very valuable steps to promote respect for racial, ethnic, and religious diversity, including by adopting Human Rights Council Resolution 16/18, entitled “Combating intolerance, negative stereotyping and stigmatization of, and discrimination, incitement to violence, and violence against persons based on religion or belief,” in March 2011. This resolution, adopted without a vote, calls on States to take a number of practical steps “to foster an environment of religious tolerance, peace and respect.” Many of these steps involve developing actions and programs intended to address and combat incitement to national, racial, and religious hatred before it is committed, through measures other than criminal law. They include:

- Encouraging the creation of collaborative networks to build mutual understanding, promote dialogue and inspire collective action
- Creating a government mechanism to identify potential areas of tension between religious communities and assist with conflict prevention and mediation
- Speaking out against intolerance
- Promoting the ability of members of all religious communities to manifest their religion and to contribute openly and on an equal footing
- Encouraging representation and meaningful participation of individuals, irrespective of their religion, in all sectors of society
- Countering religious profiling

This policy-driven approach to combating intolerance in HRC Resolution 16/18 is also consistent with the practice of the majority of states in the Americas region. As noted in the background study for the Americas workshop prepared by Eduardo Bertoni, “in this region it is consciously assumed that the criminal model is not an efficient tool when it comes to addressing the real causes of discrimination... Indeed, in the Americas the law is no longer seen as the principal or the only instrument available in the fight against acts of discrimination.”^{xii} Rather, “in the countries of the Americas there is a marked preference for the non-punitive model that has as its objective the implementation of public policies intended to combat racial discrimination.”^{xiii}

The approach to combating religious intolerance embodied in HRC Resolution 16/18 is also consistent with the approach to combating racial and religious intolerance advocated by Special Rapporteurs Beilefeldt and La Rue in their submission to the Americas workshop, which states:

To tackle the root causes of intolerance, a much broader set of policy measures are necessary, for example in the areas of intercultural dialogue or education for tolerance and diversity. This set of policy measures should also include strengthening freedom of expression. The strategic response to hate speech is more speech: more speech that educates about cultural differences; more speech

that promotes diversity; more speech to empower and give voice to minorities, for example through the support of community media and their representation in mainstream media.^{xiv}

Conclusion:

- States should adopt policies that promote tolerance and social harmony and that do not unnecessarily restrict freedom of expression in doing so.

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ⁱ See, e.g., Human Rights Committee, General Comment No. 34, Article 19: Freedoms of Opinion and Expression, CCPR/C/GC/34, 12 September 2011, para. 50. See also Human Rights Committee, *Velichkin v. Belarus*, No. 1022/2001.

ⁱⁱ Ibid.

ⁱⁱⁱ Joint submission by Mr. Heiner Bielefeldt, Special Rapporteur on freedom of religion or belief, and Mr. Frank La Rue, Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, p. 13, available at http://www2.ohchr.org/english/issues/opinion/articles1920_iccpr/docs/JointSRSubmissionSantiago.pdf. Additionally, Ambeyi Ligabo, the former UN special rapporteur on freedom of opinion and expression, similarly criticized the implementation of laws that restrict freedom of expression where the grounds for such limitations “lack any objective criteria and clear definition, and are therefore open to subjective and arbitrary interpretation by judges implementing them.” Report of the Special Rapporteur on the right to freedom of opinion and expression, Ambeyi Ligabo, Mission to the Islamic Republic of Iran, E/CN.4/2004/62/Add.2., 12 January 2004, para. 95. Ligabo also stated that violations of article 20(2) “should be clearly and narrowly defined,” “should be the least intrusive means in what concerns limitations to freedom of expression,” and “should not justify any type of prior censorship.” Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, Ambeyi Ligabo, A/HRC/7/14, para. 65.

^{iv} Ibid. Note that Ambeyi Ligabo similarly stated that penalties imposed in order to implement article 20(2) “should be applied by an independent judiciary.” Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, Ambeyi Ligabo, A/HRC/7/14, para. 65.

^v Joint Declaration by the UN Special Rapporteur on Freedom of Opinion and Expression, the OSCE Representative on Freedom of the Media, the OAS Special Rapporteur on Freedom of Expression and the ACHPR Special Rapporteur on Freedom of Expression, “International Mechanisms for Promoting Freedom of Expression,” 20 December 2006, <http://www.osce.org/fom/23489>.

^{vi} Joint submission by Mr. Heiner Bielefeldt, Special Rapporteur on freedom of religion or belief, and Mr. Frank La Rue, Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, p. 10.

^{vii} Human Rights Committee, General Comment No. 34, Article 19: Freedoms of Opinion and Expression, CCPR/C/GC/34, 12 September 2011, para. 48.

^{viii} See, e.g., Concluding observations of the Human Rights Committee on the United Kingdom of Great Britain and Northern Ireland, CCPR/C/GBR/CO/6, 30 July 2008, para. 4.

^{ix} Joint submission by Mr. Heiner Bielefeldt, Special Rapporteur on freedom of religion or belief, and Mr. Frank La Rue, Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, p. 12.

^x Ligabo has emphasized that article 20(2) is intended to “protect individuals against direct violations of their rights” and “not...to protect belief systems from external or internal criticism.” UN Commission on Human Rights, Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, Ambeyi Ligabo, A/HRC/7/14, Feb. 28, 2008, paras. 85 and 66. Jahangir has noted that freedom of religion “does not bestow a right for believers to have their religion itself protected from all adverse comment” and that like other overbroad restrictions on freedom of expression, laws intended to combat “defamation of religions” “may be manipulated for purposes contrary to human rights.” Report of the Special Rapporteur on Freedom of Religion or Belief, Asma Jangahir, and the Special Rapporteur on Contemporary Forms of Racism, Racial Discrimination, Xenophobia and Related Intolerance, Doudou Diene, Further to Human Rights Council Decision 1/107 on Incitement to Racial and Religious Hatred and the Promotion of Tolerance, A/HRC/2/3, 20/9/2006, paras. 36-37.

^{xi} A/HRC/10/8/Add. 3, p. 50.

^{xii} Eduardo Bertoni, “A study on the prohibition of incitement to hatred in the Americas,” available at , http://www2.ohchr.org/english/issues/opinion/articles1920_iccpr/docs/SantiagoStudy_en.pdf, p. 12.

^{xiii} Ibid. at p. 11.

^{xiv} Joint submission by Mr. Heiner Bielefeldt, Special Rapporteur on freedom of religion or belief, and Mr. Frank La Rue, Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, p. 14.