

OHCHR Expert Workshop on the Prohibition of Incitement

Vienna, 9-10 February, 2011

Introduction

One of the stated objectives of OHCHR expert seminar for Europe 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.” 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 worthy objectives, the Jacob Blaustein Institute for the Advancement of Human Rights (JBI) submits the following information for participants’ consideration.

JBI has conducted extensive research and convened expert conferences on the subject of permissible restrictions to freedom of expression under article 19(3) of the ICCPR and on the scope of limitations to freedom of expression mandated by article 20(2). These efforts have revealed a significant degree of ambiguity regarding the scope and nature of permissible limitations on freedom of expression, which in turn create significant opportunities for abusive or improper use of such laws in a manner which, by unnecessarily restricting freedom of expression, run afoul of human rights law.

JBI is concerned that absent a clear understanding of the content of international legal standards regarding the proper scope, definition, and conditions on the application of article 20, participants in this Expert Seminar will be unable to achieve one of their core objectives: accurately evaluating the degree to which States have implemented the prohibition against incitement to national, racial, or religious hatred in conformity with international law. Moreover, to the degree that ambiguity regarding the definition and proper application of article 20 persists, there will remain a serious risk that States will adopt and implement provisions that restrict freedom of expression to a greater degree than that required by article 20, in ways that cannot be justified with reference to article 19(3).

In this vein, 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 restrictions on expression that do not adhere to these limitations should be discouraged.

At present, article 20 is characterized by significant ambiguity. Such ambiguity significantly undermines the protection of the right to freedom of expression. Indeed, the Human Rights Committee has indicated that in order for restrictions on freedom of expression to be compatible with article 19(3), they must satisfy three criteria: they must be provided by law, they may only be imposed for one of the grounds articulated in article 19(3) (for respect of the rights or reputations

of others or for the protection of national security, public order, public health, or morals), and they must be “necessary” to achieve one of those grounds.¹ The clear implication is that measures enacted on the basis of article 20(2) are also subject to the restrictions set out in article 19(3); meaning that prohibitions against incitement are permissible only where they are provided by law, imposed for one of the grounds articulated in article 19(3), and “necessary” to achieve one of those grounds.

Ambeyi Ligabo, the former UN special rapporteur on freedom of opinion and expression, 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.”² Ambeyi Ligabo; Miklos Haraszti, 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 emphasized 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.”³ In response to these concerns regarding overbreadth and abuse of restrictions on freedom of expression, Ligabo has articulated a number of limitations on the proper application of article 20(2), stating that measures enacted on this basis “should be clearly and narrowly defined,” “should not justify any type of prior censorship,” “should be the least intrusive means in what concerns limitations to freedom of expression,” and “should be applied by an independent judiciary.”⁴

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 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.
- 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.
- An individual must intend for his or her advocacy to incite discrimination, hostility 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

¹ See, e.g., Human Rights Committee, *Velichkin v. Belarus*, No. 1022/2001.

² 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.

³ 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>.

⁴ 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.

justified with reference to article 20(2), an independent judiciary and respect for due process.

II. Blasphemy provisions and other prohibitions of display 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.

Not only does ambiguity regarding the content of article 20 invite abuse of legislation that restricts freedom of expression; it also opens the door for efforts to inappropriately expand the definition of article 20 to permit, or even require, laws prohibiting blasphemy and other prohibitions of display of disrespect to a religion or other belief system, including prohibitions against “defamation of religions,” under the guise that such laws are analogous to laws prohibiting expression of racial hatred.

However, experts have rejected this view, warning against the dangers of adopting such a ‘pick and mix’ attitude to protections and limitations contained in human rights law.⁵ At JBI’s expert roundtable on “Challenges to the Human Rights Agenda,” in October 2010, Professor Nazila Ghanea warned against the dangers of reckless attempts to transplant norms relating to the area of race to the area of religion, particularly in the context of article 20, and counseled that those seeking to maintain the integrity of the human rights system should avoid trivializing the thresholds required before limitations on rights such as that to freedom of expression can be permissibly imposed; be mindful of the effect of the measures implemented for the purpose of protecting human rights (e.g. to ensure that they are not discriminatory and do not restrict other rights, such as that to freedom of religion or belief); apply such restrictions with reference to context and proportionality; and ensure that such restrictions are applied in good faith and under the oversight of an independent judiciary (see appendix A). Prof. Ghanea justified her approach in part by noting that the *travaux préparatoires* to the ICCPR suggest that the drafters anticipated that the need for measures mandated by article 20 would arise in the context of extreme situations of a seriousness approximating that of resort to violence or war.

UN human rights experts and bodies have confirmed this view. The UN special rapporteur for freedom of religion or belief, Asma Jahangir, has noted that the scope of protection afforded to the right to freedom of religion or belief, “does not include the right to have a religion or belief that is free from criticism or ridicule,” and freedom of religion “does not bestow a right for believers to have their religion itself protected from all adverse comment.”⁶ Moreover, Ms. Jahangir has noted that there is a “danger that efforts to combat defamation [of religions] may be manipulated for purposes contrary to human rights,” and has warned that blasphemy offenses “should not be used to censure all inter-religious and inter-religious criticism.”⁷ Ambeyi Ligabo, the former special rapporteur on the promotion and protection of the right to freedom of opinion and expression, has emphasized that article 20(2) is intended to “protect individuals against direct violations of their

⁵ Prof. Nazila Ghanea, “Compilation of Relevant International Instruments Relating to ‘incitement’ and ‘defamation,’” JBI Expert Roundtable “Challenges to the UN Human Rights Agenda,” New York, NY, October 6, 2010. For access to this article, please contact JBI at jbi@ajc.org.

⁶ Report of the Special Rapporteur on Freedom of Religion or Belief, Asma Jangahir, and the Special Rapporteur on Conemporary 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.

⁷ Ibid.

rights” and “not...to protect belief systems from external or internal criticism,” warning that “a broader interpretation of these limitations...is not in line with existing international instruments and would ultimately jeopardize the full enjoyment of human rights.”⁸ The UN Human Rights Committee has similarly welcomed States parties’ abolishment of blasphemy provisions, in recognition of their inherent incompatibility with freedom of expression.⁹

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, as such prohibitions protect ideas, rather than individuals.

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

It is of 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; such intolerance should not be addressed, however, 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. These include speaking out against intolerance; creating faith-based advisory councils within governments to identify and address potential areas of tension between different racial and religious communities and assist with conflict resolution and mediation; instituting training programs to inform and sensitize governmental authorities about actions, perceptions and biases that may contribute to racial and religious discrimination and intolerance; encouraging representation and meaningful participation of individuals, irrespective of their race or religion, in all sectors of society, especially in government; and provide support for organizations working with youth to promote tolerance, diversity, and non-discrimination.

Conclusion:

- States should be encouraged to take steps other than unnecessarily restricting expression in order to promote tolerance and social harmony.

For more information, please contact JBI at:

The Jacob Blaustein Institute for the Advancement of Human Rights

165 East 56th Street, New York, NY 10022

T: (212) 891-1315; F: (212) 891-1460; E: jbi@ajc.org

www.jbi-humanrights.org

⁸ 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.

⁹ 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.

APPENDIX 1

Challenges to the UN Human Rights Agenda JBI Expert Roundtable October 6, 2010

Abridged Paper presented by Prof. Nazila Ghanea

“Compilation of Relevant International Instruments Relating to ‘incitement’ and ‘defamation’”

The discussion over the past decade in the United Nations regarding, first, defamation of religion/s and, subsequently, incitement largely relies on the transplantation of thresholds and standards across various human rights norms. Whilst it may be informative to cross check protections in one area, say race, against another area, such as religion, relying on this in the creation of new normative standards without further careful deliberation could lead to unforeseen human rights consequences. In particular, such ‘creative borrowing’ needs to be assessed in the light of the protections originally offered within the normative system drawn upon.

Existing instruments offer detailed standards and commentary on the distinctions and protections that need to be remembered in the context of these human rights norms. A quick consideration merely of the core instruments and the relevant General Comments from the main treaty monitoring bodies itself offers much clarity, hence they are outlined below. The purpose of this briefing note is to illustrate this claim through a compilation of the normative standards often drawn upon in the incitement and defamation debate. In particular, it highlights the following:

Nine Points for Consideration

1. Attention to the relevant standards, protections, beneficiaries and limitation grounds in instruments protecting *inter alia* freedom of religion or belief and freedom of expression suggests that a transplantation of prohibitions and limitation grounds can prove problematic.
2. The very contexts in which freedoms can be enjoyed differ too. For example, open and vigorous debate would appear to underlie the very enjoyment of human rights in one area, freedom to adopt a religion or belief of one’s choice (ICCPR, A 18), but require to be restricted in another area, such as the enjoyment of an environment free of the incitement of racial hatred (ICERD, A4).
3. Even the right to hold opinions is not protected in *exactly* the same way across human rights standards. It should be upheld “without interference” in ICCPR, A19 but “without coercion” (ICCPR, A18).
 - The drafters of the ICCPR were clearly particularly vigilant about any interference proving ‘coercive’ in the area of religion or belief. Such coercion may be exercised through criminal sanctions; through denials of civil and political rights; or through (actual or threats of) violations of economic, social and cultural rights.

4. Some ICCPR rights are subject to derogation, others are not.
 - It should be noted that freedom of religion or belief (A18) is not subject to derogation. This is a serious consideration in any effort to prohibit incitement to religious hatred, in order to ensure that any thresholds or prohibitions do not have the effect of infringing freedom of religion or belief – *inter alia* freedom to have, adopt or change religion or belief.
5. State obligations vis-à-vis victims can come to be distorted when absolute rights, derogations and empowerment rights are collapsed across differing instruments.
 - For example, the having or adopting a religion or belief of one's choice is absolute and the right to hold opinions without interference is absolute. It is the manifestation of that religion or belief and the expression of those opinions that *may* be subject to the precise limitation grounds outlined. The threshold for the limitation grounds differ with the limitation grounds regarding incitement being more exacting still.
6. Non-discrimination is a key cross cutting consideration that needs to be ensured in the generation of any new normative understandings regarding incitement or defamation. No new standard should have the effect *in itself* of being discriminatory, or of extinguishing enjoyment of other rights. The 'cutting and pasting' of different protections and limitation grounds across different human rights standards may lead to precisely such results.
 - In elaborating A18 in GC 22, the Human Rights Committee has observed that restrictions themselves "may not be imposed for discriminatory purposes or applied in a discriminatory manner" (para. 8).
 - In the same GC 22 the pertinent point has been made that any limitations "for the purpose of protecting morals must be based on principles not deriving exclusively from a single tradition". This is a standard that should be observed in guiding consultations around incitement and defamation (para. 8).
7. In light of the above, where human rights instruments have considered that limitations are necessary we should:
 - Not trivialise the thresholds required before limitation grounds can be considered legally justifiable.
 - Be mindful of the effect of the measures (e.g. on discrimination).
 - Consider the context, carefully calibrate appropriate and necessary measures that should be taken, ensure oversight by an independent judiciary where legal measures are considered, apply them in good faith, whilst also upholding other rights and obligations as well.
8. We should also be vigilant as to whether any new norms are actually required at the international level or at the national level? Do these norms necessarily have to be enshrined in law? Considering how little jurisprudence has been generated at the international, regional and national level on the question of incitement it seems unlikely that it is timely to rush to generated new norms and prohibitions on this matter at the international level.
9. Overall, a 'pick and mix' attitude to protections and limitations has a skewed and distorting impact. Using this as the basis of arguing for new international norms – especially those that make individuals more rather than less vulnerable to intrusive measures by states – is prone to lead to the infringement of human rights and should be avoided.

Two Further Concerns

Having considered the above, some other concerns also need to be addressed with regards to the ongoing defamation of religions resolutions which were initiated in 1999. These go beyond the above concerns with the confusion arising from the transplantation of thresholds and standards. They cluster around 2 sets of concerns: normative and protection-related.

1. Normative Concerns

- No case has yet been made as to why existing provisions addressing religious and racial intolerance are insufficient to deal with the human rights concerns – against specific victims – that may result from ‘defamation of religions’. Since the UN resolved to focus on the implementation of existing norms back in the 1990s – and resisted the proliferation of norms where there is duplication – it is surprising that this discipline of justifying the need for new standards has not been addressed since 1999. It should be noted that the following existing instruments contain provisions related to the subject matter of this resolution:
 - Intolerance, discrimination and equality – in every HR instrument, including UDHR and the twin covenants, ICERD and the other core human rights instruments,
 - Migrants – International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families,
 - Minorities – 1992 UN Declaration on the Rights of Persons Belonging to National or Ethnic, Religious or Linguistic Minorities, Independent Expert on Minority Issues,
 - Racial intolerance – the International Convention on the Elimination of All Forms of Racial Discrimination
 - Religious intolerance – UDHR Art 18, ICCPR Art 18, 1981 UN Declaration on the Elimination of Intolerance and Discrimination Based on Religion or Belief, Special Rapporteur on freedom of religion or belief, and
 - Genocide prevention – 2005 Committee on the Elimination of Racial Discrimination (CERD) declaration on the prevention of genocide for the consideration of the States parties to the International Convention on the Elimination of All Forms of Racial Discrimination, the Secretary-General and his Special Adviser on the Prevention of Genocide, as well as the Security Council.

It is also suggested that the global approach of the resolution to a whole range of human rights issues is at loggerheads with the reality of specificities of context, historical experience, grass roots alertness regarding the above; particularly in relation to the vulnerability of particular minorities and populations to incitement or even to genocide.

2. Protection-related Concerns

- Since the 1993 Vienna World Conference on Human Rights the international community has also resolved to recognise and uphold the ‘universality, indivisibility and inter-relatedness’ of rights. We should therefore be aware of and highly concerned by the way in which laws protecting religions from ‘defamation’ will severely undercut and jeopardize a number of other human rights. Many NGOs and experts have highlighted that freedom of opinion and expression may be compromised in relation to ‘freedom from defamation of religions’. However, there are many further rights that

have been violated as a result of the application of blasphemy laws, which are/would be similar to ‘defamation of religions’ laws. Examples include:

- Equality and non-discrimination, especially with regards to religion or belief, minority rights,
- freedom of religion or belief, and particularly freedom to change religion or belief (UDHR, Art 18; General Comment 22),
- the presumption of innocence and fair trial guarantees (ICCPR, Art 9 & 14),
- protections for human rights defenders, and even
- the prohibition against torture, inhuman and degrading treatment, and the right to life.

There are also concerns regarding the implementation and practical application of laws prohibiting ‘defamation of religions’, considering the grave record of some national jurisdictions which address somewhat similar offences such as blasphemy. The application of these laws has led to widespread condemnation on grounds of discrimination against minority communities, the fuelling of inter-communal hostilities and even state complicity in arbitrary detentions, torture and killings. Given these examples, there are numerous due process and fair trial-related concerns that arise with regard to the practical application of laws prohibiting ‘defamation of religions’. These include, *inter alia*:

- Who is authorised to accuse another of this violation, and on what basis.
- How the presumption of innocence be maintained.
- Whether there are guarantees to ensure the accused obtains a fair trial and receives an adequate defence.
- Punishments envisaged for the worst violation of ‘defaming religions.’

The obligations of states, including due diligence obligations, continue to encompass the need for the state to:

- promote an environment of pluralism, harmony and respect for human rights,
- promote, protect and fulfil existing human rights standards,
- take hate crimes seriously, especially when targeting a person belonging to a minority,
- be vigilant to genocide prevention indicators, for example those promoted by CERD, and
- go beyond the law and continuously educate the public with regards to promoting a culture of tolerance and respect.

AREAS/ APPLICATION	FREEDOM OF EXPRESSION	HATE SPEECH	RACIAL DISCRIMINATION	FREEDOM OF RELIGION OR BELIEF	MINORITY RIGHTS
Standards	A19 ICCPR, GC 10	A20 ICCPR, GC 11 (read along with A5 ICCPR)	A4 CERD	A18 ICCPR, GC 22, 1981 Declaration	A27 ICCPR, GC 23, 1992 Declaration
Beneficiary/ies	Everyone	State Parties	Everyone	Everyone	Persons belonging to minorities
Rights and Duties	<p>The right to hold opinions is absolute and should not be subject to interference. The right is very broad.</p> <p>Expression may be limited in particular instances as this right relies on “special duties and responsibilities”</p> <p>.</p>	<p>Propaganda for war. Advocacy of national, racial, religious hatred THAT constitutes incitement to discrimination, hostility or violence.</p>	<p>States: “(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 ... and also the provision of any assistance to racist activities, including the financing thereof; (b) Shall declare illegal and prohibit organizations...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.”</p>	<p>A18: “freedom, either individually or in community with others and in public or private, to manifest his religion or belief in worship, observance, practice and teaching.”</p> <p>The right to have, adopt <i>or</i> change religion or belief is absolute and should not be subject to coercion – 18.2).</p>	<p>A27: “Persons belonging to minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language.”</p>

Subject to Derogation	Yes	Yes	No	No	Yes
Triggers and Limitations	<p>A19: “Provided by law AND For respect of the rights or freedoms of others For protection of national security or public order, or public health, or morals.”</p>	<p>A20: “Propaganda for war” OR “advocacy of national, racial, religious hatred THAT constitutes incitement to discrimination, hostility or violence.”</p> <p>As we go from violence to hostility and hostility to discrimination, clearly a higher threshold is required because of the wider scope. Clearly there is the need for a well calibrated response.</p> <p>The context of the obligation and the <i>travaux préparatoires</i> suggests a war-like situation.</p>	None	<p>A18: “Freedom to manifest one’s religion or beliefs may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others.”</p>	None

<p>Application</p>	<p>No mention of 'offensiveness'. No mention of 'incitement'. 'Others' are persons not, for example, religions.</p>	<p>UN Human Rights Committee has outlined that compliance requires: "a clear law or policy with appropriate sanctions" (GC 11).</p>		<p>No mention of 'offence' or 'incitement'; but mention of no coercion.</p> <p>GC22, para. 8 makes it clear that "restrictions may not be imposed for discriminatory purposes or applied in a discriminatory manner" and that limitations based on 'morals' "must be based on principles not deriving exclusively from a single tradition".</p>	<p>See GC23 on positive measures required to ensure enjoyment. GC23, para 6(1): "a State party is under an obligation to ensure that the existence and the exercise of this right are protected against their denial or violation. Positive measures of protection are ... required."</p>
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