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PROHIBITION OF INCITEMENT TO NATIONAL, RACIAL AND RELIGIOUS HATRED IN ACCORDANCE WITH INTERNATIONAL HUMAN RIGHTS LAW

Some aspects of the work of the UN Human Rights Committee

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1. Introduction

According to the most recent General Comment on Article 19 of the International Covenant on Civil and Political Rights (ICCPR) by the Human Rights Committee (hereafter the Committee), Articles 19 and 20 are "compatible with and complement each other".[1] This interplay between Article 19 and 20 of the International Convention of the Convention on Civil and Political Rights (ICCPR), the subject of this seminar has direct relevance for African countries. As the Rwanda genocide demonstrated, incitement to hatred and violence, rooted in ethnic attitudes and coupled with media complicity perpetuating such action can have tragic consequences..

The Committee has emphasized the need for a coherent Article 19 and 20 framework, particularly in light of various incidents of political incitement to ethnic hatred and violence in numerous African countries. For example, the current conflict in Cote d'Ivoire has been recognized as both spurred and exacerbated by inflammatory speech and incitement to hatred. Similar concerns came to a head in Kenya following the 2007 election, where politicians were accused of inciting post-election violence[2]. Allegations were also made in Burundi that a private radio station affiliated with the ruling party was promoting hate in its broadcasts[3]. The Human Rights Committee has made a number of observations and recommendations in this regard, some of which are discussed below.

2. General Comments of the Human Rights Committee

In providing greater detail on the substantive obligations of States parties with regard to Article 19, the Committee observes in various paragraphs of the first draft of General Comment 34 on freedom of speech that "freedom of expression and freedom of opinion constitute the foundation stone for every free and democratic society. They form a basis for the full enjoyment of a wide range of other human rights. The scope of the right to seek, receive and impart information and ideas of all kinds embraces even views that may be regarded as deeply offensive, although such expression may be restricted in accordance with the provisions of article 19, paragraph 3 and Article 20. Paragraph 3

[1] HRC: Draft General Comment No. 34, CCPR/C/GC/34/CRP/4 (2011) at para. 52.
[2] See Kenya National Commission on Human Rights (KNCHR) Final report, On the Brink of the Precipice: A human Rights account of Kenya's post -2007 Election Violence, (2008) 3 at Para 7
[3] See media accuse Burundi radio of promoting hate," Agence France-Presse, June 10 2010

expressly states that the exercise of the right to freedom of expression carries with it special duties and responsibilities. For this reason two limitative areas of restrictions on the right are permitted which may relate either to respect of the rights or reputations of others or to the protection of national security or of public order or of public morals". Elaborating further on conditions under which restrictions in paragraph 3 may be imposed, the Committee states that "the restrictions must be provided by law; they may only be imposed for one of the grounds set out in subparagraphs (a) and (b) of paragraph 3 and must be justified as being necessary for the State party for one of those grounds".

Discussing the relationship between articles 19 and 20, the Committee makes the following comments:[4]

"The acts that are addressed in article 20 are of such an extreme nature that they would all be subject to restriction pursuant to article 19, paragraph 3. As such, a limitation that is justified on the basis of article 20 must also comply with article 19, paragraph 3, which lays down requirements for determining whether restrictions on expression are permissible.

What distinguishes the acts addressed in article 20 from other acts that may be subject to restriction under article 19, paragraph 3, is that for the acts addressed in article 20, the Covenant indicates the specific response required from the State: their prohibition by law. It is only to this extent that article 20 may be considered as *lex specialis* with regard to article 19 [para 53]."

The Committee is concerned with the many forms of "hate speech" that, although a matter of concern, do not meet the level of seriousness set out in article 20. It also takes account of the many other forms of discriminatory, derogatory and demeaning discourse. However, it is only with regard to the specific forms of expression indicated in article 20 that States parties are obliged to have legal prohibitions. In every other case, while the State is not precluded in general terms from having such prohibitions, it is necessary to justify the prohibitions and their provisions in strict conformity with article 19 [para 54]. "

Lastly in General Comment 29 (2001), the Committee, in discussing derogations from the provisions of the Covenant, held that, "no declaration of a state of emergency made pursuant to article 4, may be invoked as justification for a State party to engage itself, contrary to article 20, in propaganda for war, or in advocacy of national, racial or religious hatred that would constitute incitement to discrimination, hostility or violence".[5]

3. Concluding observations of Human Rights Committee

As long ago as 1983, the Committee noted in its General Comment 11 that many State reports failed to give sufficient information concerning national legislation and practice that is relevant to Article 20. Consequently, not much has been documented in the Committee's concluding observations on Article 20, nor on the link between incitement under article 20 and freedom of expression under article 19.

[4] ICCPR Draft General Comment No 34, CCPR/C/GC/CRP/5 at para 52

[5] ICCPR general Comment 29, A/56/40 vol 1, (2001) 202 at para 13(e)

The concluding observations on *Egypt* (2002) provide an example of the Human Rights Committee, in its interpretation of article 20, using the restrictions in Article 19 to limit the scope of
freedom of expression, thereby prohibiting the publication of articles that incite ethnic or racial violence. The Committee noted concern about infringements of the right to freedom of religion or belief, particularly, the State party's failure to take action, following the publication of articles inciting violence against Jews in the Egyptian press[6]. The Committee stated that the publication of the articles constituted advocacy of racial and religious hatred and incitement to discrimination, hostility and violence, concluding [that] the State party must take whatever action is necessary to punish such acts by ensuring respect for article 20, paragraph 2.

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In reviewing the periodic reports of both Namibia (2004) and Morocco (2004), the Committee stressed the need for allegations of incitement to be investigated thoroughly and for legislation to give full effect to the requirements of article 19.[7] In both countries, journalists had been fined and harassed in the exercise of their profession. The Committee concluded in its review of Namibia, that the State party should take appropriate steps to prevent threats to harassment of media personnel, with appropriate action taken against those responsible.[8]

Based on previous concluding observations following its examination of periodic reports of Algeria, Sudan and Tunisia, the Committee has elaborated on restrictions on the freedom of expression of journalists in the first draft of General comment 34. It states that "Journalists are frequently subjected to (such) threats, intimidation and attacks because of their activities. So too are persons who engage in the gathering and analysis of information on the human rights situation and who publish human rights related reports". In light of this, the committee recommends that allegations of attacks should be vigorously investigated, perpetrators prosecuted and victims provided with appropriate forms of redress (para 24).

Similarly, the Committee reiterated, in its review of Togo's 2002 periodic report its concern at the state's failure to address issues of incitement, particularly in relation to contradictions between allegations by media personnel of serious violations of Article 19 (and 6 & 7) and the denials by the State Party. It held that the State party should guarantee the fair access of political parties to public and private media and ensure that their members are protected against slander [9].

[6] ICCPR A/58/40 vol.1 (2002) 31
[7] ICCPR, A/60/40 vol.1 (2004) 35
[8] ICCPR, A/59/40 vol 1 (2004) 64
[9] ICCPR, a/59/40 vol.1 (2002) 36

The Committee had the occasion to examine Togo's fourth periodic report in March 2011 and has been more forthcoming in its concerns, recommending that the State should move with urgency to criminalize any advocacy of national, racial or religious hatred constituting incitement to discrimination, hostility or violence, and to act as soon as possible to impose criminal penalties on any person making statements whose effect is the incitement to acts in violation of Article 20.

4. Some summaries of the Case law of the Human Rights Committee relating to African countries

The committee's case law on African countries deals largely with violations of Article 19 than express prohibitions of Article 20.

***Muteba v. Zaire* (124/1982), ICCPR, A/39/40 (24 July 1984)**

Mr. Tshitenge Muteba was arrested on 31 October 1981 by members of the Military Security of Zaire at Ngobila Beach, Zaire, when arriving from Paris via Brazzaville (Congo). Although in the prison register he was charged with attempts against the internal and external security of the State and with the foundation of a secret political party, he was never brought before a judge nor brought to trial. After more than a year and a half of detention he was granted amnesty under a decree of 19 May 1983 and allowed to return to France. The Human Rights Committee found that the facts before it disclosed violations of the Covenant, in particular of article 19, because Mr Muteba suffered persecution for his political opinions.

Jaona v. Madagascar (*132/1982*), ICCPR, A/40/40 (*1 April 1985*)

Following the re-election of President Ratsiraka, in November 1982 Mr.
Jaona challenged the results and called for new elections at a press conference. Shortly afterwards, on 15 December 1982, Mr. Jaona was placed under house arrest in Tananarive and subsequently detained at the military camp of Kelivondrake, 600 km south of Tananarive. He was not informed of the grounds for his arrest and there is no indication that charges were ever brought against him or investigated.
Mr. Jaona was released on 15 August 1983. The Human Rights Committee held that these facts disclosed violations of the Covenant and of article 19, paragraph 2, because Mr Jaona suffered persecution on account of his political opinions.

***Mpandanjila v. Zaire* (138/1983), ICCPR, A/41/40 (26 March 1986)**

In 1980, eight former Zairian parliamentarians and one Zairian businessman were subjected to measures of arrest, banishment or house arrest on account of the publication of an "open letter" to Zairian President Mobutu.
Although they were covered by an amnesty decree of 17 January 1981, they were not released from detention or internal exile until 4 December 1981. They were subsequently brought to trial before the State Security Court on 28 June 1982 on charges of plotting to

overthrow the regime, planning the creation of a political party, and of secret documents concerning the establishment of the said party. The trial was not held in public and the accused were sentenced to 15 years' imprisonment with the exception of the businessman, who was sentenced to 5 years' imprisonment. The authors were released pursuant to an amnesty decree promulgated on 21 May 1983, but they were then subjected to an "administrative banning measure'
The Human Rights Committee found that these facts disclosed violations of the Covenant, with respect to Article 19, because the authors suffered persecution on account of their opinions.

Mpaka-Nsusu v. Zaire **(157/1983), ICCPR, A/41/40 (26 March 1986)**

Mr. Andre Alphonse Mpaka-Nsusu presented his candidacy for the presidency of Zaire in conformity with existing Zairian law. His candidacy, however, was rejected. On 1 July 1979, he was arrested and subsequently detained in the prison of the State Security Police without trial until 31 January 1981. After being released from prison he was banished to his village of origin for an indefinite period. He fled the country on 15 February 1983.
The Human Rights Committee found that these facts disclosed violations of the Covenant, with respect to Article 19, on account of persecution for political opinions.

Bwalya v. Zambia **(314/1988), ICCPR, A/48/40 vol. II (14 July 1993) (CCPR/C/48/D/314/1988)**

At the age of 22, Mr Bwalya ran for a parliamentary seat in the Constituency of Chifubu, Zambia and was prevented from properly preparing his candidacy and from participating in the electoral campaign. Because of the harassment and hardship to which he and his family were being subjected, the author emigrated to Namibia, where other Zambian citizens had settled. At an unspecified later date, Mr. Bwalya returned to Zambia.

On 25 March 1990, he sought the Committee's direct intercession in connection with alleged discrimination, denial of employment and refusal of a passport. In respect of issues under article 19, the Committee considered that the response of the authorities to the attempts of the author to express his opinions freely and to disseminate the political tenets of his party constituted a violation of his rights under article 19.

Kalenga v. Zambia **(326/1988), ICCPR, A/48/40 vol. II (27 July 1993)**

On 11 February 1986, Mr Kalenga was arrested by the police of the city of Masala. The following day, a police detention order was issued against him pursuant to Regulation 33 (6) of the Preservation of Public Security Act. This order was revoked on 27 February 1986 but immediately replaced by a Presidential detention order, issued under Regulation 33 (1) of the said Act.

He was subsequently kept in police detention, on charges of (a) being one of the founding members and having sought to disseminate the views of a political organization, the so-called People's Redemption Organization - an organization considered illegal under Zambia's (then) one-party Constitution -and (b) of preparing subversive activities aimed at overthrowing the regime of (then) President Kenneth Kaunda. He was released on 3 November 1989, following a Presidential order. According to the Committeee, the response of the Zambian authorities to the author's attempts to express his opinions freely and to disseminate the tenets of the People's Redemption Organization constituted a violation of his rights under article 19 of the Covenant.

***Mika Miha v. Equatorial Guinea* (414/1990), ICCPR, A/49/40 vol. II (8 July 1994) (CCPR/C/51/D/414/1990)**

In respect of issues under article 19, the Committee noted that the State party had not refuted the author's claim that he was arrested and detained solely or primarily because of his membership in, and activities for, a political party in opposition to the regime of President Obiang Nguema. In the circumstances of the case, the Committee concluded that the State party had unlawfully interfered with the exercise of the author's rights under article 19, paragraphs 1 and 2.

***Mukong v. Cameroon* (458/1991), ICCPR, A/49/40 vol. II (21 July 1994)**
(CCPR/C/51/D/458/1991) at paras. 9.6 and 9.7.

Mr Mukong claimed a violation of his right to freedom of expression and opinion, as he was persecuted for his advocacy of multi-party democracy and the expression of opinions inimical to the State party's government. The State party replied that restrictions on Mr Mukong's freedom of expression were justified under the terms of article 19, paragraph 3 and were necessary for the safeguard of national security and/or public order. The Committee considered that it was not necessary to safeguard an alleged vulnerable state of national unity by subjecting Mr Mukong to arrest, continued detention and treatment in violation of article 7. In the circumstances of the author's case, the Committee concluded that there has been a violation of article 19 of the Covenant.

***Diasso and Dobou v. Togo* (422/1990, 423/1990 and 424/1990), ICCPR, A/51/40**

In respect of the claim under article 19, the Committee observed that it remained uncontested that the authors were first prosecuted and later not reinstated in their posts, between 1986 and 1991, *inter alia*, for having read and, respectively, disseminated information and material critical of the Togolese Government in power. On the basis ofthe information before it, the Committee concluded that there had been a violation of article 19 of the Covenant.

***Marques v. Angola* (1128/2002), ICCPR, A/60/40 vol. II (29 March 2005)**

On 3 July, 28 August and 13 October 1999, Mr Marques, a journalist and the representative of the Open Society Institute in Angola, wrote several articles critical of Angolan President *dos Santos* in an independent Angolan newspaper, the *Agora*. On 13 October 1999, Mr Marques was summoned before an investigator at the National Criminal Investigation Division (DNIC) and questioned for approximately three hours before being released. On 16 October 1999, he was arrested at gunpoint by 20 armed members of the Rapid Intervention Police and DNIC officers at his home in Luanda, without being informed about the reasons for his arrest. Subsequently, he was formally arrested, though not charged, by the deputy public prosecutor of DNIC.
On 25 November 1999, he was released from prison on bail and informed of the charges against him for the first time. On 31 March 2000, the Provincial Court convicted him of abuse of the press by defamation, finding that his newspaper article of 3 July 1999, contained "offensive words and expressions" against the Angolan President and, albeit not raised by the accusation and therefore not punishable, against the Attorney-General in their official and personal capacities. The Court found that the author had "acted with intention to injure" and based the conviction on the combined effect of articles 43, 44, 45 and 46 of Press Law No. 22/91, aggravated by item 1 of article 34 of the Penal Code (premeditation). The issue before the Committee was whether the author's arrest, detention and conviction, or his travel constraints, unlawfully restricted his right to freedom of expression ,in violation of article 19 of the Covenant. In the circumstances, the Committee concluded that there had been a violation of article 19 *inter alia*.

5. Conclusion

It is clear from this paper, that some African countries have broadened the scope of Article 20 of the ICCPR in a manner that that does not meet the strict test under Article 19(3). It is also evident that African national legal systems lack clearly formulated provisions for the protection of freedom of expression as required by article 19, and for the prohibition against incitement to hatred, as required by article 20. In addition, most of the case law relating to freedom of expression is concerned with political violations and restrictions of freedom of expression rather than expressly prohibiting incitement to national, racial and religious hatred. Therefore, it is evident that national legislation and case law should be drafted in a way that clearly links the prohibition of incitement to national, racial or religious hatred to freedom of expression. This would remove ambiguity in interpreting such legislation and provide a solid framework for enabling the provisions to be implemented most effectively.