LAW AND JUDICIAL PRACTICES

By Chaloka Beyani[1]

In the context of the prohibition of incitement to national, racial or religious hatred, Articles 19 and 20 of the ICCPR correspond to the social phenomenon that national, racial, and religious groups are in need of protection from such incitement. Under Article 19 freedom of expression is subject to restrictions that are necessary and justifed in the public interest, have a legitimate aim, and are proportionate to that aim. Expression that amounts to advocacy for incitement to national, racial, or religious hatred is not the subject of such restrictions because Article 20 makes clear that such advocacy is prohibited.

The prohibition in Article 20 is open ended. But the substance of that prohibition is given further content by Article 4 of CERD, which specifically criminalizes propaganda and incitement to national, racial, or religious hatred. The provisions (Arts. 5, 6, and 7) of the Protocol for the Prevention and the Punishment of the Crime of Genocide, War Crimes and Crimes Against Humanity and all forms of Discrimination, adopted by the International Conference on the Great Lakes 2006, are to the same effect, as are those of the Protocol on Management of Information and Communication (Art. 3(6)) also adopted by the same Conference.

Protection from incitement to national, racial, or religious hatred is connected to that of national, racial, and religious communities or minorities under Article 27 of the ICCPR for the purpose of co-existence, inclusiveness, political and economic instability within States, particularly those States with diverse nationa, racial, or religious groups. It is implicit in the protection of the existence of such communities or minorities that the prohibition of genocide prohibits the destruction of national or ethnic groups.

These remarks show that the provisions of Articles 19 and 20 should be contextualised in a broader framework that seeks to protect national, racial, or religious groups from incitement to hatred as well as their existence. Incitement to hatred for these groups is an important factor that is played to not only discriminate against them, but also to marginalize them politically, socially, and economically. It also has to be said that the destruction or elimination of these groups emanates from the ideology of incitement to hatred.

Judicial practices on incitement to national, racial or religious hatred are key to the prevention of incitement and protection from it. But relevant judicial practices cannot evolve in the absence of pertinent legal standards. Besides that, judicial practices can be as good or as bad as the law on which they are based, and their integrity to deliver justice must be an overriding factor. Some of these laws are of a colonial character and fall short of the international standards of human

[1] Law Department, London School of Economics and UN Special Rapporteur on the human rights of Internally Displaced Persons.

rights. The study prepared by the OHCHR shows diverse approaches to the prohibition of incitement to national, racial or religious hatred, either linked to freedom of expression, or to freedom of religion, or to tribalism, and would appear to fall short of international standards. These standards provide the benchmarks and it is necessary that they are domesticated into national laws. However, the same study indicates that only about 19 African States have done so in relation to Articles 19 and 20 of the ICCPR. Domestication is absolutely vital to achieving the sort of protection sought internationally and as a basis for addressing the problem of incitement to national, racial orvreligious hatred.

More importantly, judicial practices help to determine whether conduct amounts to incitement to national, racial, or religious hatred and elaborate on the constituent elements relative to incitement. They also serve to provide criminal and civil remedies arising from from breaches of the prohibition of incitement to national, racial or religious hatred. CERD has held that Art. 6 remedies are not limited to criminal proceedings- they encompass civil proceedings too.

Incitement to commit an offence is an attempt to persuade another person, by whatever means, to commit an offence. Examples include Articles 25(3)(e) of the ICC Statute 1998 and Article III(c) of the Convention on the Prevention and Punishment of Genocide 1948. As a criminal offense, incitement belongs to the category of crimes of attempt and conspiracy. Incitement must be direct and public whereas incitement in private must lead to the consummation or actual commission of the crime in question. in either case, the incitement must be accompanied by a requisite mental elementand that is beyond the scope of this paper.

Judicial practices in criminal proceedings embrace a wider conception of incitement.
In the case of *Akayesu*, the ICTR defined incitement as comprising:

'speeches, shouting, or threats uttered in a public place or at public gatherings, or through sale or dissemination, offer for sale, or display of written or printed material or printed matter in public places or at public gatherings, or through the public display of placards or posters, or through any other means of audiovisual communication'.

In 1998 the Tribunal convicted Akayesu of incitement to commit genocide on the basis, amongst others, that he urged others to eliminate the Tutsis. This conviction, and the need to prevent the reoccurrence of genocide in the Great Lakes Region, was part of the inspiration behind the formulation of the Protocol on Genocide in the Great Lakes Region. The Protocol establishes a link between discrimination, ideas of superiority, incitement to hatred, and genocide. For example, Article 6(2)(a) condemns discriminatory ideologies and declares that any circulation of ideas based on the superiority of one group over another, any incitement to hatred or discrimination and any act of violence or provocation to such acts directed against any race or any group of people of a given ethnic origin, as well as any help given to such activities, including financing them, is an offence punishable by law.

The Media Trials before the Tribunal involved the activities of Radio Telev Lebre Mille- Collins (RTLM) whose broadcasts whipped up hatred against the Tutsis and told perpetrators where the Tutsis could be found and killed. In a decision that elucidates the relation between freedom of

expression in Article 19 and the prohibition to propaganda and incitement in Article 20 of the ICCPR, the Tribunal took the view that freedom of speech is limited by freedom from discrimination. In its view:

'The nature of radio transmission made RTLM particularly dangerous and harmful, as did the breadth of its reach. Unlike print media, radio is immediately present and active. The power of the human voice . . . adds a quality and dimension beyond words to the message conveyed'.

As in the case of the Protocol Against Genocide, the Media cases inspired the formulation of the Protocol on Management of Information and Communication. For example, Article 3(6) of the Protocol obliges Member States to prohibit and criminally punish acts of inciting propaganda for hatred, hostility or discrimination on grounds of ethnicity, for war, violence, genocide, ethnic cleansing and crimes against humanity, and this in collaboration with regulation and self-regulation authorities.

It is also clear that euphemistic speech may constitute incitement. In the case of *Eliezer Niyitigeka*, a conviction of incitement to commit genocide was secured for telling people 'to go to work' when the context indicated that this was an euphemism for killing Tutsis.

Pictures have also been held by the Arusha Tribunal to incite hatred in the case of *Hussan Ngeze* in which a picture of a Machete in a newspaper with a question, 'what weapons shall we use to conquor the Inyezi once and for all?' Inyezi was a derogatory word for Tutsis. In its decision, the Trial Chamber said that 'the answer was intended to be the Machete' and this was clear both textually and visually.

Judicial practices on the criminalization of the prohibition of incitement are such that, given the nature of criminal proceedings, the threshold for the prohibition is very high. This is less so in civil cases. In *L.K. v The Netherlands* (4/991) CERD, A/48/18, 16th March 1993, an author with a partial disability visited a house which was offered to him on a lease under a scheme of subsidized housing. Twenty people gathered and shouted 'no more foreigners' and said that the house would be set on fire pursuant to a policy that no more than five percent of the street's inhabitants should be foreigners. CERD held that the remarks constituted incitement to racial discrimination and acts of violence against persons of colour, contrary to Article 4.

The practice of CERD is relevant to national judicial practices where national legislation prohibits incitement but does not criminalize it, as in the case of South Africa. It is also relevant to countries like Kenya where the Constitution in the Bill of Rights incorporates Articles 19 and 20 of the ICCPR. But Kenya has gone further on two fronts. First treaties ratified by the State are constitutionally speaking part of the law of the land. Second, it has specific legislation criminalizing hate speech. What is not clear from that legislation, however, is the relation between hate speech and incitement to hatred on national, racial or religious basis.

Remedies against incitement to national, racial, or religious hatred are varied. It is incumbent on the State to investigate any allegations of incitement and to ensure that incitement is not protected by freedom of speech.

In criminal cases, the doctrine of freedom to prosecute should be exercised positively against perpetrators, but the plight of the victims should not be ignored by the mere fact of prosecution. There should be specific relief from suffering as well as counselling and rehabilitation of victims.

In civil proceedings, satisfaction and or compensation may be due to the victims, and such compensation should be accompanied by guarantees of non-repeatition of incitement.

Other remedies may include excluding the perpetrators from asylum, where this is sought following incitement and flight to other States, e.g., *Leo Mugesera v Minister of Citizenship and Immigration*. In that case, the applicant's immigration status was reopened after evidence that he made a speech inciting genocide against Tutsis in 1992, but his deportation was saved by the Canadian Federal Court of Appeal on the basis that the original translation of the speech he gave was flawed.