

Introduction

The main objective of the workshop is to examine the links between article 19 and article 20 of the International Convention on Civil and Political Rights i.e. the relationship between freedom of expression and incitement to hatred. In other words protecting freedom of expression while ensuring that it is not used to propagate incitement to ethnic, racial or religious hatred; on the flip side ensuring that prohibitions against incitement to ethnic, racial, religious or other hatred is not used to curtail freedom of expression. These provisions are reflective of the reality that there is a great possibility for citizens to misuse freedom of speech to the detriment of other citizens. The origins of free speech may be traced to the English bill of rights of 1688 which protected members of parliament from liability for anything said in parliament – i.e the original concept of parliamentary immunity this principle is still applicable in parliamentary democracies. It can therefore be safely asserted that freedom of opinion and expression is the cornerstone of democratic societies. These opinions can be expressed in various forms i.e. verbally, artistically and or physically.

In this regard we will examine the legal framework, (international, regional, constitutional and legislative) that address these issues and the standards used to ensure a proper balance we will also examine other institutional frameworks such as policy and mechanisms for redress including judicial interventions. The background information has dealt with various regional mechanisms and other country specific situations; I will deal with the Kenyan Situation in light of international and regional conventions and decisions.

Legal framework

Kenya has ratified the ICCPR, the CERD, CEDAW as well as the African Charter on Human and Peoples Rights in addition to this the new constitution of 2010 makes very specific provisions on the freedom of speech and prohibitions therein, as well as having various statutes that deal with crimes related to incitement as well as hate speech. The background papers have elaborated on the provisions of these international and regional instruments and I will

therefore move on to the constitutional and legislative provision under Kenyan Law.

Constitution of Kenya 2010

Article 33 of the constitution Provides

Every person has the right to freedom of expression , which includes

- a) Freedom to seek, receive or impart information or ideas
- b) Freedom of artistic creativity; and
- c) Academic freedom and of scientific research.

(2) the right to freedom of expression does not extend to

- a) propaganda for war;
- b) incitement to violence
- c) hate speech; or
- d) advocacy for hatred that –
 - i) constitutes ethnic incitement, vilification of others or incitement to cause harm; or
 - ii) is based on any ground of discrimination specified or contemplated under Article 27 (4) (race, sex, pregnancy, marital status, ethnic or social origin, colour, age, disability, religion, conscience, belief, culture, dress, language or birth)

3) In the exercise of the right to freedom of expression, every person shall respect the rights and reputation of others.

From the above provisions it is clear that the Kenyan constitution has embraced the latest international and regional principles and notions of the protection of freedom of speech, by capturing both protected and prohibited speech.

The National Cohesion and Integration Commission Act

Section 13 (1) of the National Cohesion and Integration Commission provides as follows with regards to hate speech

A person

- a) Uses threatening, abusive or insulting words or behaviour, or displays any written material
- b) Publishes or distributes written material;
- c) Presents or directs the performance the public performance of a play
- d) Distributes, shows or plays a recording of visual images; or
- e) Provides, produces or directs a programme

Which is threatening abusive or insulting or involves the use of threatening words or behaviour commits and offence if such person intends to thereby to stir up ethnic hatred; or having regard to all the circumstances ethnic hatred is likely to be stirred up.

(2) Any person who commits an offence under this section shall be liable to a fine not exceeding one million shillings or to imprisonment for a term not exceeding three years or both.

(3) in this section ethnic hatred means hatred against a group of person defined by reference to colour race nationality (including citizenship) or ethnic or national origins

The Penal Code

The Penal Code Section 96 “Any person who, without lawful excuse, the burden of proof whereof shall lie upon him, utters, prints or publishes any words, or does any act or thing indicating or implying that it is or might be desirable to do, or omit to do , any act the doing or omission of which is calculated

- (a) To bring death or physical injury to any person or to any class, community or body of persons; or
- (b) To lead to the damage or destruction of any property; or

(c) To prevent or defeat by violence or by other unlawful means the execution or enforcement of any written law or to lead to defiance or disobedience of any such law, or any lawful authority is guilty of an offence and is liable to imprisonment for a term not exceeding five years

Section 138

Any person who with the deliberate intention of wounding the religious feelings of any other person writes any word or any person who, with the like intention of wounding the religious feelings of any other person, writes any word or any person who with like intention, utters any word or make any sound in the hearing of any other person or makes any gesture or places any object in the sign of any other person is guilty of a misdemeanour and is liable to imprisonment for one year.

It must be noted that the statutes in question have not been reviewed to comply with the constitution; but clearly we can see from the constitution that limitation of freedom of expression has to be in very specific circumstances and not in a vague manner. Indeed American case law demonstrates that courts will consider restrictions on freedom of speech if they are formulated in a vague language or where they are not considered the least restrictive means of achieving a compelling state interest or where certain views are restricted but those opposing that view are not restricted. This position is indicative of the fact that freedom of expression as has been noted by John Stuart Mill *On Liberty* (1859) matters a lot to most people, this freedom allows us to express our beliefs, values as well as the right to be informed by the beliefs and views of others. It also enables us to discover and to respect truths which in turn empower us to make better decisions for various aspects of our lives.

The factors taken into account for restrictions at both international constitutional and legislative level, demonstrate that they must be based on the element of harm to others, so whether it is on the basis of national security, or on incitement or hate speech, there is an element of harm that would occur to other citizens in the wrongful exercise of the freedom.

International law and practice since the Nuremberg Trials has been very specific on the prohibition or limitation of freedom of speech where it clearly is used to promote propaganda to war and incitement for genocide. Indeed Article of CERD requires state parties to condemn all propaganda based on ideas or theories of superiority of race, colour, or ethnic origin. Article 4(a) provides for prohibition and punishment for dissemination.

In light of the above a limitation of the Kenyan statutes is that they are prohibitive yes, but they also fail to provide grounds of defence, which is important in an area such as this where for example the freedom of creativity and legitimate thought could easily be labelled as hate speech. Additionally and recent experience in Africa shows that most incitement is very closely linked to political contests and emerging and fragile democracies must be more cautious to balance the rights of citizens to criticize those who govern them without fear of reprisals at the same time the political class must be gauged and monitored against using their elevated positions to exploit age old prejudices to stigmatize and marginalise vulnerable groups, including ethnic groupings.

Judicial and other mechanisms for implementation

The leading precedent incitement to genocide and related offences is *the Nazi Conspiracy and Aggression; Opinion and Judgement (October 1 1946) a trial by the International Military Tribunal (IMT) (Nuremberg)*

In this case Julius Streicher and Hans Fritzsche were charged with crimes against humanity by virtue of anti-Semitic advocacy as well as common plan or conspiracy to wage aggressive war, Hans was also charged with war crimes.

The charges against Julius were based on his role as the publisher of the virulently anti Semetic weekly newspaper Der Sturmer, where he advocated for the extermination of jews. He was convicted of persecution on political and racial grounds constituting a crime against humanity based upon his incitement to murder and extermination of of Jews in Nazi occupied

territory. Hans on the other hand was acquitted with the Tribunal noting that while he 'sometimes made strong statement of a propagandist nature in his broadcasts; the Tribunal was 'not prepared to hold that they were intended to incite German people to commit atrocities on conquered peoples, and he cannot be held to have been a participant in the crimes charged. Clearly the court was setting not persuaded that actions that were unfavourable but did not call for action or leading to violence or hatred could be criminalised.

On the hand the Tribunal observed that noted that Streicher had "25 years of speaking, writing and preaching hatred of the Jews, with what was then an unambiguous intention to incite Germans to exterminate Jews; however un pleasant these acts were the crux or the basis of his guilt was that he "continued to write and publish his propaganda of death" at a time when he knew "of the extermination of Jews in the occupied territory. The Tribunal held that his "incitement to murder and extermination at the time when Jews in the East were being killed under the most horrible conditions clearly constitutes persecution on political and racial ground in connection with war crimes as defined by the Nuremberg Charge. It would therefore appear that this decision lays the fundamental principle that criminalisation of speech; expressions and opinion must be linked directly to an undesirable outcome such as violence or discrimination and or unfair treatment on the part of the targeted audience.

A more recent case it that of the *Jewish Community of Oslo and others v Norway UN Doc CERD/C/67/30/2003* illustrates the manner in which a national jurisdiction as well as the CERD Committee have interpreted the convention. It is an illustration of the tension between freedom of speech and incitement/hate speech in practical terms.

The facts were that: The "bootboys" held a march in Oslo, commemorating Rudolf Hess, a former Nazi leader from Germany. The leader was prosecuted under the Norwegian Law for "threatening, insulting, or subjecting to hatred, persecution or contempt of any person or group of

persons because of their creed, race, colour or national or ethnic origin. The conviction was overturned by the Supreme Court which held that

“Penalizing approval of Nazism would involve prohibiting Nazi organizations , which it considered would be incompatible with the right to freedom of speech...the statements in the speech were simply Nazi rhetoric, and did nothing more than express support for National Socialist ideology. It did not amount to approval of the persecution and mass extermination of the Jews during the Second World War. It was held that there was nothing that particularly linked Rudolph Hess to the extermination of the Jews; noted that many Nazis denied that the Holocaust had taken place, and that it was not known what Mr Sjolie’s (accused) views on this particular matter were. The majority held that the speech contained derogatory and offensive remarks, but that no actual threats were made, no any instructions to carry out any particular actions” (communication para 2.7)

The authors of the communication to the committee had alleged that the march prompted the establishment of a branch of the group in a nearby town and a number of violent attacks against blacks.

The Committee considered these statements to contain ideas based on racial superiority or hatred; the deference to Hitler and his principles and “footsteps” must, in the Committee’s view be taken as incitement at least to racial discrimination, if not to violence and thus considered Articles 4 and 6 of CERD had been infringed. (para 10.4)

It would appear from this decision that the international mechanisms are more likely to make a liberal interpretation to ensure prohibition of what may be classified as harmful speech whereas, the national jurisdiction appears to have appear to be more restrictive in this regard and therefore more liberal towards criminalizing unsavoury speech. It is noteworthy that the USA made a reservation to Article 4 to preserve the right of all citizens of the United States to speak freely regardless of content. Clearly this tension will always be at play; countries such as Rwanda that experienced the genocide have adopted more stringent laws and policies towards curbing genocide and other racial or ethnically motivated acts. Whereas, a

country like Kenya was prompted into action by the Post 2007 election violence; and yet again there is discernable lack of efforts on the part of the criminal justice system and the political leadership to bring to book those who commit such offences. Indeed as I mention at the conclusion of this presentation, the Kenyan Case before the ICC is a demonstration of lack of seriousness to dealing with crimes against humanity that resulted from incitement by the political elite against certain ethnic communities. Indeed the state and to a large extent the elite in Kenya continue to treat the ICC as a political contest rather than a judicial process.

In the ICTR case of the Prosecutor v Nahimana (ICTR 99 – 52-T Judgement, Trial Chamber, December 2003) the three accused persons were convicted of genocide, direct and public incitement to commit genocide and persecution as a crime against humanity based upon the defendant's responsibility for incendiary radio broadcasts and newspaper articles. It is noteworthy that while convicting on incitement to genocide, the ICTR relied heavily on other human rights instruments whereas the ICTR statute on crimes related to genocide are derived directly from the Genocide Convention of 1948. It therefore used the parameters of the other conventions with regard to hate speech which is not provided under the Genocide Convention with regard to direct and public incitement to commit genocide. This position imports notions that excluded from the specific convention and contributes to a lack of clarity; this lack of clarity is further evidenced by the court on the one hand clearly following the ICCPR and CERD definitions when it states that "not all the writings published in Kanguar and highlighted by the Prosecution constitute direct incitement. "A cockroach cannot give birth to a butterfly", for example is an article brimming with ethnic hatred but did not call on readers to take action against the Tutsi population (344 1037).

But in the same judgment with regard to persecution went on to establish that hate speech can form the basis of a conviction without a call for violent action.

"Unlike the crime of incitement, which is defined in terms of intent, the crime of persecution is defined also in terms of impact. It is not a

provocation to cause harm. It is itself the harm. Accordingly, there need not be a call to action in communications that constitute persecution. For the same reason, there need be no link between persecution and acts of violence. The Chamber notes that Julius Streicher was convicted by the International Military Tribunal at Nuremberg of persecution as a crime against humanity for anti-Semitic writings that significantly predated the extermination of Jews in the 1940s. Yet they were understood to be like a poison that infected the minds of the German people and conditioned them to follow the lead of the National Socialists in the persecuting the Jewish people. In Rwanda, the virulent writings of Kangura and the incendiary broadcasts of RTLM functioned in the same way; condition the Hutu population and creating a climate of harm as evidenced in part by the extermination and genocide that followed. (Nahimana at 1072).

The comparison with Nuremberg is striking since the IMT was very clear that Streicher's previous writing showed his history and consistency with anti-Semitic stance; however his real crime was to propagate the same and to call for extermination during a period when the circumstances were more conducive for others to act with the real possibility of harm and indeed did so to the detriment of the Jewish population.

These cases illustrate the complexity that surrounds implementation of legislation and provisions of hate speech in specific cases. Indeed they are also illustrative of the fact that the philosophies and ideologies that form the basis of racial and ethnic hatred and violence are often not created in a day; but are consolidated over a period of time. And yet their very existence activities that lead to negative action would not meet the standards required in a criminal case. Hence the need to obvious need to address these issues through a multipronged manner including through education and other practices that affirm the importance and significance of all citizens in particular the most vulnerable. Such actions should be aimed at restoring the importance of diversity and co-existence of citizens as core principle of nationhood.

Turning back to the Kenyan situation, it noteworthy that in spite of the prevalence of hate speech and other incitements as well as unsavoury language that is mostly associated with the political class and whose proliferation increases during national presidential and parliamentary elections there have been no concluded cases.

The turning point for electoral violence in Kenya was the Post Election Violence of 2008; prior to this there had been attempts to examine other post electoral violence such as through the Akiwumi Commission after the 1997 elections; after 2002; the KNCHR monitored electoral and voting processes such as the by elections and the 2005 referendum in addition to the election campaigns leading to the 2007 elections. The reports indicated and highlighted the use of hate speech and other unsavoury language; and named various politicians. No actions were taken.

In its report “on the brink of the precipice, a human rights account of the Kenya post 2007 election violence (KNCHR Report); the commission identifies ethnicity as a tool that was used by the political elite in their campaigns; see page 25, para 70).....Since the 2005 referendum and particularly by election time the imagery and idioms being used by politicians in campaigns did not merely ridicule their opponents, but aimed at the entire ethnic groups. For example, Kikuyus who circumcise their male children, profiled Raila Odinga and the Luo Community who do not circumcise as unfit for leadership; and the ODM aligned communities such as the Luo and Kalenjin projected the Kikuyu as assuming always the right to lead the country as well as being arrogant, grabbers and corrupt.

From the foregoing, it is evident that Kenya’s post election violence had a historical preface that fed into the more immediate events and issues. Underlying causes gave the political manipulation of grievances, scapegoating of communities and appeals to ethnic chauvinism a resonance with the populace in an election year. The ideological infrastructure was already in place and only needed a refurbishment to fit the conditions of 2007. (para 70, KNCHR Report)

The Waki Commission report made the same findings on the use of hate speech by the political elite as well as by media houses in particular vernacular ones. It is therefore not surprising that one of the legislation that became a priority of the National Accord in 2008 was the one establishing the National Cohesion and Integration Commission Act whose mandates revolves largely around ethnic and race relations and promotion of cohesion. It makes specific provisions on hate speech as noted above.

Section 25 (2) (h)

Provides that the Commission -

“shall investigate complaints of ethnic or racial discrimination and make recommendations to the Attorney General, the Human Rights Commission or any other relevant authority on remedial measures to be taken where such complaints are valid”

Under Section 26 (2) (b)

“Shall publish names of persons or institutions whose words or conduct may undermine or have undermined or contributed towards undermining good ethnic relations or who are involved in ethnic discrimination or the propagation of hate speech”.

It is noteworthy that the NCIC has made very spirited efforts to fight hate speech in Kenya and have summoned a number of politicians as well as made recommendations for the prosecution of some. However, it has become clear that fighting hate speech is not an easy task when those involved are the political elite who do not appear too bothered with being named and shamed as it were and where chances of successful prosecution are truly minimal.

In this regard some of the issues that need to be addressed is that in compliance with the constitution the statutes including the penal code and NCIC Act must be relooked at. Based on its work on hate speech surrounding the electoral process, KNCHR developed a hate speech legislation which has not been adopted either by government or by any private members. The concern that led to the development of this bill was based on the

understanding that any limitation to freedom of speech must be specific, must address content, must address intent, impact, context and outcome of the prohibited speech. Without such clarity and especially with a serious offence such as hate speech whose perpetrators are often the powerful, there is a danger of reinforcing its prevalence if all manner of speech is branded as hate speech. Since the political class are the most affected, it is also important to differentiate what would constitute fair criticism and justified comments. This kind of balance would benefit greatly from clear provisions in the law on what constitutes hate speech; indeed looking at some of the decisions discussed above it may well be that some of the utterances that have been labelled as hate speech may not really meet the judicial threshold.

In conclusion let me revisit the Kenyan case at ICC which has attracted so much frenzy and political activity to the extent that politicians have again relapsed into the very mode that led to the 2007 violence. There is a sombre yet celebratory mood. It is indeed curious that the Kenyan case has become a political rallying and alignment point; one would not be mistaken to think that there is some soap opera with high drama as opposed to a possible indictment for crimes in the country. The gravity of the offences alleged to have been committed has paled in contrast to the political and social activities including prayers for the suspects!

The challenges is that the bodies that have more capacity and indeed constitutional mandate to investigate (the police) and prosecute (the office of the Attorney General) criminal activities are not taking action and it is left to the NCIC that is ill equipped to conduct proper investigations and that also has no capacity and mandate to prosecute to continue warning politicians. The politicians on the other hand using their high profile positions are issuing threats to the NCIC. It is notable that a majority of the clients of NCIC are Cabinet Ministers, this only goes to illustrate that the fight against hate speech is not just a legal or moral obligation; it requires political leadership; including by political parties as well as the presidency where the cabinet is involved. If political parties and the President and Prime Minister cannot discipline members and Cabinet Ministers and

instead watch helpless as they crisscross the country uttering unpalatable speeches against each other and rallying their supporters to their narrow ethnic agenda then the culture of impunity cannot be uprooted. Indeed their silence must be taken as tacit approval of behaviour that is outlawed. With regard to other mechanisms, there is also need to for the Electoral Body to have more capacity to monitor the conduct of individual politicians outside of the campaign period with a view to disqualifying those who engage in activities that polarise and incite citizens against each other.