

# **Study of the prohibition of incitement to national, racial or religious hatred in Africa**

(Author: Doudou Diène)

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## **Methodology**

The present report was prepared at the request of the Office of the United Nations High Commissioner for Human Rights (OHCHR) following the terms of reference adopted in July 2010: accordingly, the report analyses significant trends in national legislation, jurisprudence and policies relating to the prohibition of incitement to hatred, that have been established in Africa.

The manner in which the freedom of expression and the prohibition of incitement to national, racial or religious hatred are articulated reveals the permanent tension between three key considerations of the modern world: the relationship between human rights and politics; the dialectics of national unity and cultural diversity; and the dialogue or clash of civilizations. These challenges bring with them not only legal problems but also sweeping cultural and political categorizations that the study must take into account methodologically. Ultimately, it is essential to try and clarify the actual manner in which a fundamental freedom is implemented and the conditions and modalities of its restrictions and limitations which are legal, political and cultural in nature. Hence the importance of two complementary approaches to the structure of the study: a legal approach informed by sociological and political analysis. This dual approach justifies the sources and partners that have been used: actual legal data that have been gathered from government institutions, reports and studies by civil society organizations – at the national, regional and international level – , national, ethnic and religious minorities and the media and their representatives. The complexity of the African continent at the national level (weak civil society, dearth of legal and judicial documentation and so forth) is compensated for by giving special attention to the work of the international tribunals dealing with recent conflicts in Africa. Another key consideration has also supported the study: the need to shed light on human rights in Africa in their full cultural and historical depth in order to combat the prevailing image of a continent without history or traditions of freedom and respect for the individual, particularly in the domaine of human rights and even among the African elite. The study also took account of the cultural, religious and ethnic diversity of the continent, including the differences between sub-Saharan Africa and North Africa.

## **Summary**

Where the prohibition of incitement to hatred on national, racial or religious grounds is concerned, African countries are characterized by three main trends: the central role played by the ethnic and racial factor in nation-building and national or related conflicts, of which the genocide in Rwanda constitutes an extreme example; the primacy accorded to the political treatment of freedom of expression over the legal and formal observance of the prohibition of national, racial or religious hatred; and the prominence of tribalism and the religious dimension. These trends are further complicated by the weakly organised civil society active in the defence of human rights. Consequently, in relation to the prohibition of incitement to national, racial or religious hatred one finds the following: legal systems differ widely; there are a relative number of national court cases; priority is given to the promotion of traditional mechanisms and practices to combat incitement to hatred in national policies which are conducive to the creation and fostering of national unity. Accordingly, incitement to national, racial or religious hatred represents a serious danger for African societies: hence the central role that it plays in current political

conflicts. The amalgamation of race and ethnicity, of culture and religion in these societies which are so deeply multi-ethnic, particularly in their national policies, demonstrates that priority attention should be given to drawing up legislation in accordance with the provisions of the International Covenant on Civil and Political Rights and to the implementation of coordinated policies at the national and regional levels which would reflect a clear political determination to prevent the manipulation of ethnic tension for political ends and which focus on the elimination of potential ethnic and tribal hostility, with a view to building a sound legal and cultural basis for people to live together in multicultural African societies. It is this issue that constitutes the main obstacle to the strengthening of democracy on the continent of Africa.

### Summary table of African country data by category

#### Diverse approaches to the prohibition of incitement to national, racial or religious hatred

Category A	Category B	Category C	Category D
Prohibition of incitement to national, racial or religious hatred exclusively linked to freedom of expression	Prohibition of incitement to national, racial or religious hatred broadly associated with freedom of religion or new legal categories not covered by the ICCPR	Centrality of tribalism in the prohibition of incitement to national, racial or religious hatred	Legislation linking the prohibition of incitement to national, racial or religious hatred exclusively with the freedom of religion, or which formulates new categories of limitation and restriction
<b>Total: 19</b>	<b>Total: 17</b>	<b>Total: 9</b>	<b>Total: 7</b>
Benin; Burundi; Central African Republic; Egypt; Eritrea; Ethiopia; Gabon; Ghana; Lesotho; Madagascar; Mali; Morocco; Niger; Nigeria; Rwanda; South Africa; Sudan; Uganda; United Republic of Tanzania	Botswana; Burkina Faso; Cameroon; Chad; Côte d'Ivoire; Democratic Republic of the Congo; Gambia; Guinea; Kenya; Liberia; Libyan Arab Jamahiriya; Malawi; Mauritania; Mauritius; Mozambique; Sierra Leone; Zimbabwe	Angola; Cameroon; Côte d'Ivoire; Equatorial Guinea; Guinea; Guinea Bissau; Lesotho; Namibia; Togo	Algeria; Angola; Djibouti; Egypt; Libyan Arab Jamahiriya; Sierra Leone; Tunisia

### General introduction: Historical heritage and cultural context

#### *Cultural characteristics*

The continent of Africa is shaped by historical legacies and cultural characteristics which exert a significant influence on attitudes to the prohibition of

incitement to national, racial or religious hatred. Most African cultures are underpinned by a strong dynamic of identity, creating a tension between the ontological recognition of the uniqueness of the individual on the one hand, and the social and cultural weight of the community, the group and the ethnicity on the other.

### *Historical and colonial legacy of ethnic and religious divisions*

Generally speaking, the colonial powers exploited this original identity dynamic through policies and legal and administrative practices leading to the enclosure of conflicting identities and cultural isolationism, in particular the artificial creation of borders breaking up ethnic groups, emphasizing the ethnic affiliation of communities by identifying their cultural diversity and focusing on conflicting ethnic differences, and through the selective economic, political and administrative favouring of different communities.

### *Political exploitation of ethnic and religious factors by post-independence nationalist political forces*

Ethnic and religious factors have served as dominant tools and policies both in the purposeful creation of post-independence nation states, and also in the obtaining and preservation of political power in a great number of African countries.

### *Deep historical roots of human rights in Africa*

The concept of human rights is enshrined in the continent of Africa not only in its cosmological constructions and interactive cultural practices, but equally in written treaties and other documents from as far back in history, such as the recently discovered Manden Charter, dated 1222 (567 years prior to the Declaration of Human Rights and of the Citizen), which articulates a vision of humankind reflected in its opening phrase: “Every human life is a life”.<sup>1</sup>

The issue of incitement to national, racial or religious hatred in Africa must therefore be seen in a historical and cultural context defined on the one hand by an identity dynamic that is sensitive to ethnic, national and religious conflicts, and on the other hand by a humanist human rights culture which encourages the respect the prohibition of any incitement to national, racial or religious hatred. This dynamic helps shape national legal systems, case law and policies relating to the prohibition of incitement to national, racial or religious hatred.

## **I. Legislation: Diverse approaches to the prohibition of incitement to national, racial or religious hatred**

Analysis of national legal systems, constitutional texts and other forms of legislation reveals a great diversity in the way the prohibition of the incentive to national, racial or religious hatred is handled in African countries, which is characterized, in the main, by the following broad trends:

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1 <http://www.africultures.com/php/index.php?nav=article&no=1621>.

(a) Prohibition of incitement to national, racial or religious hatred exclusively linked to freedom of expression;

(b) Prohibition of the incentive to national, racial and religious hatred broadly associated with freedom of religion, or new legal categories not covered by the International Covenant on Civil and Political Rights;

(c) The centrality of tribalism in the prohibition of incitement to national, racial and religious hatred;

(d) Legislation linking the prohibition of incitement to national, racial or religious hatred exclusively with freedom of religion, or which formulates new categories of limitation and restriction.

#### **A. Prohibition of incitement to national, racial or religious hatred exclusively linked to freedom of expression**

Only a relatively small number of African countries (around 19) have followed articles 19 and 20 of the International Covenant on Civil and Political Rights, by introducing into their constitutions, national legislation, or codes of ethics for the press, provisions that, on the one hand, formally protect the right to freedom of expression as a fundamental freedom and, on the other, deal with prohibition of incitement to national, racial or religious hatred as a limitation or restriction of freedom of expression.

In most legal systems, this prohibition is formulated in a way that is wide-ranging and open to interpretation. A very small number of countries, of which **South Africa** is one, make incitement to hatred dependent on the criterion of intent. The following examples are illustrative of this:

With regard to the linkage between incitement to religious hatred and incitement to racial hatred, it should be noted that article 176 of the **Egyptian** criminal code, as amended in 2006 by act No. 147, stipulates imprisonment for any person who incites discrimination against a group of persons on the grounds of their race, origin, language or beliefs, in cases where such incitement threaten public stability. Prior to its 2006 amendment by act No. 147, article 176 stated that any person engaging in incitement to hatred would be subject to imprisonment in cases where such incitement threatened public stability. The amendment reflects the legislator's intention to punish incitement to national, racial or religious hatred.

Section 16 of the Constitution of South Africa is more directly linked to articles 19 and 20 of the Covenant in that it makes a specific connection between the prohibition of incitement to hatred and the concept of freedom of expression: "1. Everyone has the right to freedom of expression, which includes; (a) freedom of the press and other media; (b) freedom to receive or impart information or ideas; (c) freedom of artistic creativity; and (d) academic freedom and freedom of scientific research. 2. The right in subsection (1) does not extend to (a) propaganda for war; (b) incitement of imminent violence; or (c) advocacy of hatred that is based on race, ethnicity, gender or religion, and that constitutes incitement to cause harm".

South African national legislation, no doubt reflecting the experience of apartheid, encodes, unlike the majority of African legislatures, the significant criterion of “clear intent” in its definition of incitement to hatred. Thus Act No. 4 of 2000 on the promotion of equality and the prevention of unjust discrimination contains the following clause: “No person may publish, propagate, advocate or communicate words [...] that could reasonably be construed to demonstrate a clear intention to (a) be hurtful; (b) be harmful or to incite harm; (c) promote or propagate hatred.”

The legislation of **Rwanda** reflects two issues specific to that country: the genocide of 1994 and the incorporation of traditional values into the current legal system and set of legal procedures to prevent incitement to hatred on racial or ethnic grounds, to confront the consequences of the genocide and to promote a national, multicultural unity.

Thus, the preamble to the Constitution emphasizes:

In the wake of the genocide that was organised and supervised by unworthy leaders and other perpetrators and that decimated more than a million sons and daughters of Rwanda;

Resolved to fight the ideology of genocide and all its manifestations and to eradicate ethnic, regional and any other form of divisions;

[...]

Emphasizing the necessity to strengthen and promote national unity and reconciliation which were seriously shaken by the genocide and its consequences;

[...]

Considering that it is necessary to draw from our centuries-old history the positive values which characterized our ancestors that must be the basis for the existence and flourishing of our Nation;

Article 38 of the Constitution of **Nigeria** states that:

1. Every person shall be entitled to freedom of thought, conscience and religion, including freedom to change his religion or belief, and freedom (either alone or in community with others, and in public or in private) to manifest and propagate his religion or belief in worship, teaching, practice and observance.
2. No person attending any place of education shall be required to receive religious instruction or to take part in or attend any religious ceremony or observance if such instruction ceremony or observance relates to a religion other than his own, or religion not approved by his parent or guardian.
3. No religious community or denomination shall be prevented from providing religious instruction for pupils of that community or denomination

in any place of education maintained wholly by that community or denomination.

The Constitution of Nigeria also stipulates in article 39: “Every person shall be entitled to freedom of expression, including freedom to hold opinions and to receive and impart ideas and information without interference.”

#### **United Republic of Tanzania:**

Article 28 of the Constitution of the United Republic of Tanzania prohibits all forms of injustice, intimidation, sedition, oppression and nepotism.

Articles 43 and 63 of the Criminal Code 16 R.E. 2002 expressly prohibits any propaganda which promotes war, either directly or indirectly, and sets out penalties for related offences. It also criminalizes activities which foment hatred or cause incitement to violence or to disobedience of legitimate authority.

In its article 55, paragraph 1, the Criminal Code criminalizes incitement to violence and to national or religious hatred which constitutes incitement to discrimination, hostility or violence.

Article 9 (g) of the Constitution of the United Republic of Tanzania stipulates that the State authorities must gear their policies and activities towards ensuring that the Government and all public institutions offer equal opportunities to all citizens, men and women alike, without distinction as to their colour, race, tribe, religion or station in life. Article 9 (h) stipulates further that all forms of injustice, intimidation, discrimination, corruption, oppression or favouritism are to be eradicated.

Article 63 (a) of the Criminal Code affirms that incitations to violence is a criminal offence (chapter 16). Pursuant to article 63 (b), incitation to national or religious hatred which constitutes incitation to discrimination, hostility or violence are incitations to violence and are therefore deemed to be criminal offences.

The Constitution of **Ghana**, in its article 17 (and 21), indicates that:

Article 17:

1. All persons shall be equal before the law.
2. A person shall not be discriminated against on grounds of gender, race, colour, ethnic origin, religion, creed or social or economic status.
3. For the purposes of this article, “discriminate” means to give different treatment to different persons attributable only or mainly to their respective descriptions by race, place of origin, political opinions, colour, gender, occupation, religion or creed, whereby persons of one description are subjected to disabilities or restrictions to which persons of another description are not made subject or are granted privileges or advantages which are not granted to persons of another description.



4. Nothing in this article shall prevent Parliament from enacting laws that are reasonably necessary to provide -

(a) For the implementation of policies and programmes aimed at redressing social, economic or educational imbalance in the Ghanaian society;

(b) For matters relating to adoption, marriage, divorce, burial, devolution of property on death or other matters of personal law;

(c) For the imposition of restrictions on the acquisition of land by persons who are not citizens of Ghana or on the political and economic activities of such persons and for other matters relating to such persons; or

(d) For making different provision for different communities having regard to their special circumstances not being provision which is inconsistent with the spirit of this Constitution.

5. Nothing shall be taken to be inconsistent with this article which is allowed to be done under any provision of this Chapter.

Article 21:

1. All persons shall have the right to -

(a) Freedom of speech and expression, which shall include freedom of the press and other media;

(b) Freedom of thought, conscience and belief, which shall include academic freedom;

(c) Freedom to practise any religion and to manifest such practice;

(d) Freedom of assembly including freedom to take part in processions and demonstrations;

(e) Freedom of association, which shall include freedom to form or join trade unions or other associations, national or international, for the protection of their interest;

(f) Information, subject to such qualifications and laws as are necessary in a democratic society;

(g) Freedom of movement which means the right to move freely in Ghana, the right to leave and to enter Ghana and immunity from expulsion from Ghana.

2. A restriction on a person's freedom of movement by his lawful detention shall not be held to be inconsistent with or in contravention of this article.

3. All citizens shall have the right and freedom to form or join political parties and to participate in political activities subject to such qualifications and laws as are necessary in a free and democratic society and are consistent with this Constitution.

4. Nothing in, or done under the authority of, a law shall be held to be inconsistent with, or in contravention of, this article to the extent that the law in question makes provision-

(a) For the imposition of restrictions by order of a court, that are required in the interest of defence, public safety or public order, on the movement or residence within Ghana of any person; or

(b) For the imposition of restrictions, by order of a court, on the movement or residence within Ghana of any person either as a result of his having been found guilty of a criminal offence under the laws of Ghana or for the purposes of ensuring that he appears before a court at a later date for trial for a criminal offence or for proceedings relating to his extradition or lawful removal from Ghana; or

(c) For the imposition of restrictions that are reasonably required in the interest of defence, public safety, public health or the running of essential services, on the movement or residence within Ghana of any person or persons generally, or any class of persons; or

(d) For the imposition of restrictions on the freedom of entry into Ghana, or of movement in Ghana, if a person who is not a citizen of Ghana; or

(e) That is reasonably required for the purpose of safeguarding the people of Ghana against the teaching or encourages disrespect for the nationhood of Ghana, the national symbols and emblems, or incites hatred against other members of the community except so far as that provision or , as the case may be, the thing done under the authority of that law is shown not to be reasonably justifiable in terms of the spirit of this Constitution.

The Ghanaian Press Act No. 18/2002 of 11 May 2002 stipulates, in its article 11, that press freedom comprises the prerogatives to publish opinions and to gather, receive and disseminate information or opinions through the media. Censorship of the press is prohibited. Freedom of the press is subject to the restrictions expressly defined by the law and by the international conventions on human rights to which Ghana is a party.

The national legislation of **Uganda** states, in article 29, paragraph 1, of the Constitution: "Every person shall have the right to freedom of speech and expression, which shall include freedom of the press and other media," and specifies in its Criminal Code: "Section 26 prohibits the use of any language which is defamatory, or which constitutes incitement to public disorder, hatred or violence. Violators of this section also are liable to punishment of payment of 1.6 million or maximum of two years or both."

Section 76 B, paragraph 1, of the Criminal Code Act stipulates that “any person who incites any person to do an act of violence against any person by reason of his race, place of his origin, political opinion, colour, creed, sex or office, commits an offence and shall be liable on conviction to imprisonment for a term not exceeding fourteen years”.

Uganda also has anti-sectarian legislation designed to counter incitations and discriminatory acts based on race, colour, tribe, ethnic group or any other category. Thus, article 51, paragraph 1, of the relevant act provides that any person who, without legitimate excuse, prints, publishes or at any meeting utters a statement indicating or implying the need or desirability to perform any act calculated to cause death or physical injury to a person or class or community of persons, or to perform any operations likely to cause destruction or damage to property, is deemed to be committing an offence and is liable to imprisonment for three years.

In its article 83, the act provides that any person who incites another person to commit an act of violence against a person on the grounds of that person’s race, origin, political opinions, colour, creed, sex or office is deemed to be committing an offence and is liable on conviction to a maximum term of imprisonment of fourteen years.

The national legislation of **Morocco** illustrates the dominance of the religious factor in the interpretation and implementation of articles 19 and 20 of the International Covenant on Civil and Political Rights, opening the way to conditions and possibilities for the limitation of freedom of expression, which are not in strict accordance with these articles.

Article 6 of the Constitution states that Islam is the State religion and that the State guarantees freedom of worship for all.

Article 9 guarantees to all citizens: freedom of opinion, freedom of expression in all its forms and freedom of assembly; and also freedom of association and freedom to join any trade union or political organization of their choice. No limitation, except by law, may be put to the exercise of such freedoms.

In addition, articles 38–40 of the Press Code provide as follows:

**Article 38**

Those shall be held punishable as complicit in an act defined as a crime or misdemeanour who, through words, shouts or threats made in public places or at public meetings, or through written or printed materials sold, distributed, put on sale or displayed in public places or at meetings, or through placards and posters placed on public view, or through audiovisual and electronic means of communication, shall directly incite a person or persons to commit the said act if the incitement is followed by the perpetration of the act. This provision shall apply even when the incitement results only in an attempted offence.

**Article 39**

Those who, through one of the channels listed in the preceding article, shall directly incite to theft, murder, arson and pillage, or to destruction by explosives, or to crimes or misdemeanours threatening the external security of the State, will be punished, in cases where the incitement is not followed by an effect, with between

one and three years in prison and a fine of between 5,000 and 100,000 dirhams. Those who, through the same channels, directly incite a person or persons to commit a crime threatening the internal security of the State, shall be punished with the same sentence as those who, through one of the channels listed in article 38, have advocated crimes of murder, pillage, arson, theft, or destruction with explosive substances.

#### **Article 39 bis**

Whoever shall, using any of the channels listed in article 38, incite racial discrimination, hatred or violence against any person or persons on the grounds of their race, origin, colour, ethnic or religious grouping, or is complicit in war crimes or crimes against humanity, will be subject to a sentence of between one month and one year's imprisonment and a fine of between 3,000 and 30,000 dirhams or to one of those two penalties.

#### **Article 40**

Any incitement, through any of the channels listed in article 38, which aims to provoke military personnel on land, air or sea, or agents of the Police Force, to neglect their duties or refuse to carry out the commands of their superiors regarding the exercise of laws and regulations, will be subject to a sentence of between two and five years imprisonment and a fine of between 5,000 and 100,000 dirhams.”

### **B. Prohibition of incitement to national, racial or religious hatred broadly associated with freedom of religion or new legal categories not covered by the International Covenant on Civil and Political Rights**

The prohibition of incitement to national, racial and religious hatred is formally connected, in many African legal systems, with freedom of religion or categories and concepts which do not feature in the International Covenant on Civil and Political Rights and which, in the final analysis, leave room for a political interpretation of the prohibition of incitement, and for new limitations and restrictions on freedom of expression.

The national legislation of **Chad** demonstrates the lack of a formal link between freedom of expression and the prohibition of incitement to national, racial and religious hatred. Article 27 of the Constitution of Chad guarantees freedom of expression, while article 47 of Act No 029 of 12 August 1994 on press regulations deals more formally with incitement to racial and ethnic hatred and complicity in violence in the following terms: “Defamation by the same means of a group of persons not defined under article 45 (\*) of the present Act, but which belong to a specific ethnic group, region or religion, will be punishable by a term of imprisonment of between one and three years and a fine of between 100,000 and 500,000 CFA francs, if the purpose of the defamation was to arouse hatred or foment violence against those persons.”

#### **Burkina Faso**

##### **Constitution of 2 June 1991:**

Article 1, paragraph 3: “Discrimination of any kind, including that based on race, ethnic origin, region, colour, sex, language, religion, caste, political opinions, wealth and birth are prohibited.”

Article 7: “Freedom of belief, [...] conscience, religious and philosophical opinion, freedom of worship, freedom of assembly, freedom of customary practices, freedom of demonstration and procession, are all guaranteed by the present Constitution, subject to respect for law, public policy, moral probity and the human person.”

Article 8: “Freedom of opinion, the press and the right to information are guaranteed. Each person has the right to express and disseminate his opinions in accordance with the laws and regulations in force.

Article 13: Political parties and groupings may be created freely; [...] Such parties and groupings however, may not be formed on tribal, regional, denominational or racist grounds.”

#### **Status of Refugees Act No 042-2008/AN of 23 October 2008**

Article 2: The present Act applies to all asylum seekers and refugees, without discrimination of any kind, including on the grounds of gender, religion, race and nationality.

Article 10: All refugees officially residing in Burkina Faso have the same rights and must conform to the same obligations without being subjected to any kind of discrimination linked to race, ethnicity, religion or country of origin.

Article 11: All refugees officially residing in Burkina Faso are entitled to the same treatment as the local population.

#### **Criminal Code Act 43-96 ADP of 13 November 1996**

Article 132: Any act of discrimination or any manifestation counter to freedom of conscience and freedom of worship which is likely to set people against one another shall be punishable by terms of imprisonment of between one and five years and a ban on entering the country for a period of five years. Any form of distinction, exclusion, restriction or preference based on race, colour, ancestry or national and ethnic origin will be considered an act of racial discrimination if it has the aim or intention of destroying or compromising the recognition, enjoyment or exercise of conditions of equality, human rights and fundamental freedoms in the political, economic, social and cultural arenas, or in any other area of public life.

#### **Information Code Act No 56-93 ADP of 30 December 1993**

Article 18: All specialized publications and publications purveying general information must not carry any illustrations, text, information or insertions which could violate the privacy of any citizen or run counter to public morality, public decency and the ethics of society, or advocate racism or tribalism...

Article 112, paragraph 2: Defamation by such means of any group of persons not defined in articles 104 and 105 of the present Act, but based on their membership of a particular race, region or religion, will be punishable by terms of imprisonment of between one month and one year and a fine of between 100,000 and 1,000,000 francs, if it aims to foment hatred among citizens or inhabitants.

### **Education (General Policy) Act No 013-2007 of 30 July 2007**

Article 3: All persons living in Burkina Faso have the right to education without any discrimination, including that based on sex, social origin, race, religion, political opinion, nationality or health status...

## **Burundi**

### **Information Code Act 56-93 of 30 December 1993**

Article 45: A press offence consists of an expression of opinion or the attribution of an act constituting abuse of the freedom of expression committed by the press.

Article 50: Notwithstanding the relevant provisions of the Criminal Code, these offences are punishable by terms of penal servitude of between six months and five years and a fine of between F Bu 100,000 and F Bu 300,000 for the Publications Director, the Editor-in-Chief, the Assistant Editor or the journalist responsible for publishing: press releases, appeals or announcements advocating the offence, or conducive to the commission of blackmail, fraud, or racial or ethnic hatred; statements fomenting civil disobedience or disseminating propaganda for the enemies of the nation of Burundi in times of war.

## **Malawi**

### **Constitution**

Freedom of conscience (Article 33): Every person has the right to freedom of conscience, religion, belief and thought, and to academic freedom.

Freedom of opinion (Article 34): Every person shall have the right to freedom of opinion, including the right to hold opinions without interference to hold, receive and impart opinions.

Freedom of expression (Article 35): Every person shall have the right to freedom of expression.

Freedom of the press (Article 36): The press shall have the right to report and publish freely, within Malawi and abroad, and to be accorded the fullest possible facilities for access to public information.

**Article 34 of the Press Code** guarantees to every individual the right to freedom of opinion, including the right to hold, receive and disseminate opinions without interference. Inasmuch as this expression can be channelled through many different forms, the Constitution further guarantees freedom of expression by according to every individual freedom of assembly, of demonstration, and freedom to use the language of their choice and to participate in the cultural life of their choice.

## **Mauritius**

### **Constitution**

#### Article 12: Freedom of expression

1. Except with his own consent, no person shall be hindered in the enjoyment of his freedom of expression, that is to say, freedom to hold opinions and to receive and impart ideas and information without interference, and freedom from interference with his correspondence.

2. Nothing contained in or done under the authority of any law shall be held to be inconsistent with or in contravention of this section to the extent that the law in question makes provision:

(a) In the interests of defence, public safety, public order, public morality or public health;

(b) For the purpose of protecting the reputations, rights and freedoms of other persons or the private lives of persons concerned in legal proceedings, preventing the disclosure of information received in confidence, maintaining the authority and independence of the courts, or regulating the technical administration or the technical operation of telephony, telegraphy, posts, wireless broadcasting, television, public exhibitions or public entertainments; or

(c) For the imposition of restrictions upon public officers, except so far as that provision or, as the case may be, the thing done under its authority is shown not to be reasonably justifiable in a democratic society.

### **C. The centrality of tribalism in the prohibition of incitement to national, racial and religious hatred**

A number of African countries, nine in all, give prominence in their national legal systems to tribalism. This prevailing trend reflects the primacy of the concept of tribe over that of race in African societies generally, and shows how article 20 of the International Covenant on Civil and Political Rights is reflected in their cultures. In essence, these legal systems reflect the conflicting forces between the traditional cultural reality of the tribe as group identity and the present-day political and ideological exploitation of tribalism. The following examples illustrate this dynamic.

In its article 4, paragraph 4, the 1996 Constitution of **Guinea-Bissau** emphasizes that: "It shall be prohibited to create [political] parties that are regional or

local in nature, which encourage racism or tribalism, or which support violent means in pursuing their goals.” Article 55, paragraph 3, states: “Armed associations are not allowed, nor organizations that promote racism or tribalism”. This formulation is typical of African national legislation on the subject of tribalism.

Article 13 of the Constitution of **Equatorial Guinea** affirms the principle of freedom of expression, while article 15 specifies that “Any act of prejudice or discrimination carried out on tribal, sexual, religious, social or political grounds, or from the motivation of corruption or others of a similar nature, is punishable by law.”

Article 10 of the Press Ethics Code of **Benin** emphasizes: “Journalists must refuse to publish any incitement to tribal, racial and religious hatred. They must make a stand against all forms of discrimination. Advocacy of crime is prohibited.”

Article 25 of the Constitution of **Togo** states that “every individual has the right to freedom of thought, conscience, religion, worship, opinion and expression. The exercise of those rights and freedoms must take into account respect for the freedoms of others, for public policy and for the standards set by laws and regulations. Religious beliefs may be freely practised and organized within the confines of the law.”

Article 48 of the same Constitution stipulates that all citizens have the duty to ensure respect for the rights and freedoms of other citizens and to safeguard security and public policy. They must encourage tolerance and dialogue in their relations with others. It is their duty to safeguard the national interest, social order, peace and national solidarity. Any act or incident of a racist, regionalist or xenophobic nature will be punishable by law.

Chapter III of the Togolese Press and Communications Code, which covers criminal clauses, sets out three categories of sentence: fines, suspended sentences and custodial sentences. Articles 85, 86 and 87 stipulate terms of imprisonment for offences involving incitement to tribal hatred, seeking to persuade the forces of law and order to turn aside from their duty to the nation, and encouraging the wilful destruction of goods and institutions referred to in article 85. The custodial sentences for such offences range from three months to two years.

Article 86 states that “A punishment of between three months’ and one year’s imprisonment and a fine of between 100,000 and 1,000,000 CFA francs will be imposed on any individual who, through any of the mechanisms listed in article 85 of this Code, encourages interracial or inter-ethnic hatred or encourages anyone to break the laws of the country. If the offence is repeated, the maximum sentence can be doubled.

In this context, the historical and political legacy of a number of African countries, which bears the prints of the struggle against colonialism, including the armed struggle, played a significant role in the formulation of national legislations that emphasized respect for the fundamental freedoms, balances and limitations set out in the International Covenant on Civil and Political Rights. The importance of the racial factor in the anti-colonial struggle, especially the legalization of racial



discrimination, as in South Africa, generated a stricter, more legalistic approach to incitement of racial, national and religious hatred.

The Constitution of **Lesotho** specifies, in the section on fundamental human rights and freedoms, that:

1. Whereas every person in Lesotho is entitled, whatever his race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status to fundamental human rights and freedoms, that is to say, to each and all of the following:

[...]

(i) Freedom of conscience;

(j) Freedom of expression;

14. Freedom of expression

1. Every person shall be entitled to, and (except with his own consent) shall not be hindered in his enjoyment of, freedom of expression, including freedom to hold opinions without interference, freedom to receive ideas and information without interference, freedom to communicate ideas and information without interference (whether the communication be to the public generally or to any person or class of persons) and freedom from interference with his correspondence.

The preamble to the Constitution of **Cameroon** declares that the human person, without distinction as to race, religion, sex or belief, possesses inalienable and sacred rights and affirms the nation's attachment to the fundamental freedoms enshrined in the Universal Declaration of Human Rights, the Charter of the United Nations, the African Charter on Human and People's Rights, and all duly ratified international conventions relating thereto, in particular, to the following principles:

No person shall be harassed on grounds of his origin, religious, philosophical or political opinions or beliefs, subject to respect for public policy;

The State shall be secular. The neutrality and independence of the State in respect of all religions shall be guaranteed;

Freedom of religion and worship shall be guaranteed;

The freedom of communication, of expression, of the press, of assembly, of association, and of trade unionism, as well as the right to strike shall be guaranteed under the conditions fixed by law.

Article 10 of the Constitution of **Namibia**, on equality and freedom from discrimination, affirms the following:

1. All persons shall be equal before the law.

2. No persons may be discriminated against on the grounds of sex, race, colour, ethnic origin, religion, creed or social or economic status.

Article 21 of the Constitution also states that “All persons shall have the right to: freedom of speech and expression, which shall include freedom of the press and other media;

**D. Legislation linking the prohibition of incitement to national, racial and religious hatred exclusively with freedom of religion, or which formulates new categories of limitation and restriction**

The legislation of a number of African countries, set out in more than seven constitutions, expressly identifies freedom of religion, to a greater degree than freedom of expression, in the context of the prohibition of incitement to national, racial and religious hatred. The predominance of the religious factor is reflected in the emphasis accorded in national legislations to the concepts of religious defamation and blasphemy in place of prohibition of incitement to racial hatred.

In the same vein, freedom of the press is subject to limitations or restrictions which do not appear in articles 19 and 20 of the International Covenant on Civil and Political Rights, including: compliance with the dominant religious values, fanaticism, treason, terrorism and extremism...

Thus, article 98 (f) of the Constitution of **Egypt**, affirms that “Any person who exploits religion in order to promote or advocate extremist ideologies by word of mouth, in writing or in any other manner with a view to stirring up sedition, disparaging or belittling any divinely-revealed religion or its adherents, or prejudicing national unity or social harmony shall be liable to a penalty of imprisonment for a period of not less than six months and not more than five years or a fine of not less than LE 500 and not more than LE 1,000.”

**Algeria** stipulates in its Constitution that all citizens are equal before the law and should not be subjected to discrimination on the grounds of birth, race, sex, opinion or any other personal or social condition or circumstance (article 29). Freedom of expression, freedom of association and freedom of assembly are guaranteed to all citizens (article 41). Article 26 of the Information Code of 1990 prohibits the publication of any material deemed to be hostile to Islamic and national values or to human rights or which seeks to justify racism, fanaticism or treason.

The new categories of restriction and limitation relate to acts “contrary to Islamic values”, “fanaticism”, “and treason”.

Article 52 bis of the Criminal Code of **Tunisia**, with reference to Act No 93-112 of 22 November 1993, categorizes as terrorist acts, “acts of incitement to hatred or to racial or religious fanaticism regardless of the methods used.” Article 44 of the Press Code, amended by Constitutional Act No 93-85 of 2 August 1993, amending the Press Code, penalizes “any individual who directly foments hatred between members of a race or religion or a people, or who propagates opinions based on racial segregation or religious extremism, or who provokes the commission of an offence against the President of the Republic or against a religion whose practice is permitted, or who incites the population to break the laws of the country”. Article 53 of the same Code also sets out that “defamation of a group of persons who belong, by origin, to a

particular race or religion, will be punished by a term of imprisonment of between one month and one year, and a fine of between 120 and 1,200 dinars, when such defamation has the aim of fomenting hatred among citizens or inhabitants”.

Incitement to hatred is thus defined as an act of terrorism, or an offence against the President of the Republic.

The legislation in **Angola** is hybrid in nature as, on the one hand, it refers to tribalism and, on the other, it mentions, in the context of the legacy of the country’s civil war, such new concepts as “military and paramilitary organizations”, “secret societies” and “fascist ideology”. Article 32 of the Constitution of Angola also proclaims the freedom of expression and lists several categories of prohibition, including racist, fascist and tribalist ideologies and military and paramilitary organizations, in the pursuit of political goals.

The national legislation of the **Libyan Arab Jamahiriya** illustrates several legal ambiguities which de jure and de facto legitimize failure to uphold the freedom of expression, including through:

- A legal framework known as the Great Green Book, which is not a constitutional text in the strictest sense and which mingles references to fundamental freedoms listed in the International Covenant on Civil and Political Rights with extra-legal concepts associated with a broad definition of society;
- The emphasis accorded to the tribal dimension in the references to “inter-community conflicts” or “acts of revenge”;
- The contradiction between the repression of movements deemed as “Islamist” and the prohibition of “the promotion of non-Islamic practices.”

General observation

Certain specific elements of these national legislations highlight the worrying trend in these countries to reinterpret article 20 of the International Covenant on Civil and Political Rights, in particular the very concept of incitement to religious hatred, in the light of the emergence of new concepts that have a religious connotation, such as blasphemy, defamation of religion etc. These concepts, which are not included in the International Covenant on Civil and Political Rights, are currently being incorporated into some national legal systems.

## **E. Regional legislation**

The African Charter on Human and Peoples’ Rights does not include any provision referring specifically to the prohibition of incitement to national, racial or religious hatred. The only provision in any way related to this concept is found in article 28, which stipulates that: “Every individual shall have the duty to respect and consider his fellow beings without discrimination, and to maintain relations aimed at promoting, safeguarding and reinforcing mutual respect and tolerance.”

Case law in the African Commission on Human and Peoples' Rights does not include any specific case dealing with the prohibition of incitement to national, racial or religious hatred.

## **II. Jurisprudence**

### **A. National jurisprudence**

Two significant facts stand out in the study of African national case law dealing with the prohibition of incitement to national, racial and religious hatred. The very limited number of cases specifically concerning national, racial or tribal hatred are characterized by the following specific features: the central importance of traditional methods in resolving conflicts of a tribal nature; the limited number of modern judicial remedies that could be applied in dealing with such conflicts; the lack of public awareness of such remedies; and the weakness of national policies to prevent instances of incitement to national, racial and ethnic hatred.

The significant number of court cases dealing with freedom of religion is indicative of the importance accorded by national authorities to the issue of religion in African societies. This dual tendency in national case law reflects the dominance of the blend of ethnic, cultural and religious factors in recent African conflicts. Modern, post-independence identity models are often based on reducing ethnic identity to religious affiliation. The fragile nature of the separation of powers, including the independence of the judiciary from the executive, is instrumental in reinforcing this tendency.

Economic constraints, in particular the lack of or weakness of mechanisms and infrastructures underpinning legal systems (archiving and computerizing of sentences, the skills of technical staff) also go some way towards explaining the relatively small number of such cases in African jurisprudence.

The majority of cases involving freedom of expression and freedom of the press focus much more on political violations and restrictions of those freedoms than on the prohibition of incitement to national, racial and religious hatred. The authorities often justify these violations and restrictions by linking them to the defence and protection of national unity or what is considered as the national religious identity. This poses the risk of article 20 of the International Covenant on Civil and Political Rights being interpreted in a selective manner, to give prominence – depending on specific political considerations – to ethnic, national or religious factors.

#### **1. Weakness of national jurisprudence specifically related to incitement to national, racial and religious hatred**

The jurisprudence of **Rwanda** is noteworthy for its innovative nature, especially in its recourse to traditional methods of conflict resolution.

On 18 June 2002 the Government of Rwanda set up a new judicial system, known as *gacaca* courts, assigned the responsibility of trying more than 100,000 genocide suspects languishing in the country's overcrowded prisons. The concept of *gacaca* was based on the traditional practice of holding hearings to resolve local

conflicts. The new *gacaca* courts, however, added the formal trappings of the modern legal court system to this traditional practice. These new *gacaca* courts are judicial bodies established by law; their judges are empowered to pass sentences of up to life imprisonment. Eight years after the genocide, around 112,000 detainees were being held in the country's overcrowded prisons. Of these, some 103,000 are still awaiting trial on charges of involvement in genocide. The majority of them have not been tried in court. In many cases, the accusations levelled against these detainees have only been checked in a cursory way, or not at all, in the pretrial investigation. The majority of these detainees have not been tried in court, and they have very little chance of having their cases heard in the near future in any of the country's courts, which are overwhelmed with cases, dealing with an average of 1,500 genocide cases per year. By establishing more than 10,000 *gacaca* courts, the Government of Rwanda hopes to clear the current backlog over a period of between three and five years.

One of the most interesting aspects of the *gacaca* process lies in its unearthing of numerous forms of resistance to the genocide. Incidents where Hutus attempted to save their Tutsi neighbours, not always successfully, have come to light in the *gacaca* courts. The central principle of the *gacaca* courts is the need for the accused to admit their involvement in the massacres.

## **2. Prevalence of jurisprudence dealing with violations of freedom of expression in general, or of freedom of religion**

### **Egypt**

1. In April 2009 the Cairo Administrative Court revoked the licence of *Ibdaa*, a minor literary magazine, for having published a poem by Helmy Salem entitled "Shurfat Laila Mourad" ("On Laila Murad's balcony"). The Court found that the poem constituted "a flagrant offence against the Divine Being in a manner that suggested the most extreme degradation" because it depicted God in images of persons, objects and animals. Salem was accused of blasphemy and, following the trial, was stripped of the award for achievement in the arts which had been bestowed upon him by the Ministry of Culture.<sup>2</sup>

2. On 22 February 2007, Abdul Kareem Nabeel Suliman (alias Kareem Amer), a 22-year-old law student from Alexandria, was sentenced to four years in prison: three years for insulting religion and one year for defaming President Mubarak. Concerned by what he perceived as religious extremism at his university, Kareem had expressed secular views promoting equality between the sexes and raising questions about Islam on his blog and on the websites "Modern discussion and Copts United". Kareem was first arrested in 2005 and held for 12 days. In November 2006 he was again arrested after having been expelled from Al-Azhar University, whose authorities had informed the public prosecutors of his writings. He was held in solitary confinement while awaiting trial because he refused to recant. In March 2007 the Court of Appeal upheld

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<sup>2</sup> Source: Amal Amireh, "Egypt's Sheikh Yousef al Badri and the Poet Helmi Salem," Arabisto, 5 April 2008, [www.arabisto.com/article/Blogs/Amal\\_Amireh/Egypt's\\_Sheikh\\_Yousef\\_al\\_Badri\\_and\\_the\\_Poet\\_Helmi\\_Salem/1013](http://www.arabisto.com/article/Blogs/Amal_Amireh/Egypt's_Sheikh_Yousef_al_Badri_and_the_Poet_Helmi_Salem/1013).

Kareem's conviction and approved a civil action taken by Egyptian lawyers to impose a fine on Kareem for "insulting Islam".<sup>3</sup>

### **Morocco**

A judgement was handed down on 12 January 2007 by the Ouarzazate Court of First Instance, as part of a lawsuit brought against a journalist for incitement to discrimination. The article that he had published was held to be biased against African people. The editor, who was questioned by the prosecutor, confirmed that a mistake had been made in the wording of the title of the published article. The newspaper gave up three pages to a letter of apology. The edition containing the article was withdrawn from news stands and bookshops.

### **Mauritania**

On 19 August 2009 Mr. Hanevy Ould Dehah was sentenced to six months' imprisonment for "publications offensive to Islam and public decency" by the magistrates' court in Nouakchott, a sentence that was upheld on appeal on 24 November. Mr. Hanevy was to have been released on 24 December 2009, but the public prosecutor's department, which had demanded a sentence of five years' imprisonment and a fine of five million ouguiyas (12,500 euros) requested the Supreme Court to defer his release until it had reached a decision on its appeal.

On 14 January 2010, however, the Court overturned the decision of the Court of Appeal and referred the case and the parties to a different court of appeal for a retrial. This referral ruling on the part of the Supreme Court was made with one single objective in mind: a clear attempt to cover up the arbitrary detention and obtain a longer sentence – probably one of five years. That decision, however, does not include a committal order and makes no provision for the obtaining of such an order.

### **Sudan**

A case dealing specifically with the issue of blasphemy is analysed in detail in a report jointly presented by the Special Rapporteur on contemporary forms of racism and the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression (document A/HRC/10/8/Add.1).

According to a communication sent on 5 December 2007 jointly with the Special Rapporteur on the promotion and protection of the right to freedom of opinion and freedom of expression:

The Special Rapporteurs brought to the attention of the Government information they had regarding Ms. Gillian Gibbons, a 54 years old English teacher from Liverpool, living in Sudan. On 25 November 2007, Ms. Gibbons was reportedly arrested at her home in Khartoum, where she teaches at a British

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3 Source: Rob Crilly, "The Blasphemous Teddy Bear," Time, November 26, 2007, [www.time.com/time/world/article/0,8599,1687755,00.html](http://www.time.com/time/world/article/0,8599,1687755,00.html).

International School. A court in Khartoum on 29 November 2007 found her guilty of “insulting the faith of Muslims” and sentenced her to 15 days in prison to be followed by deportation. Prosecutors had called for her conviction on charges of inciting religious hatred, which carries a punishment of up to 40 lashes, six months in prison and a fine. Allegedly, in September 2007, Ms. Gibbons had asked her pupils to vote a name for a teddy bear as part of the class’s study of animals and they named it “Muhammad”. Subsequently an office assistant complained to the Ministry of Education and Ms. Gibbons was accused of blasphemy for allowing her pupils to name a teddy bear with the Prophet’s name.

On 30 November 2007, thousands of protesters demonstrated in Khartoum, claiming that the 15-day prison sentence was too lenient. Since protesters have reportedly called for the execution of Ms. Gibbons, serious concern is expressed at her safety. Further reports indicate that Ms. Gibbons has been given a presidential pardon on 3 December 2007.”

## **Algeria**

Case law in Algeria reflects a more tolerant and progressive and less repressive attitude to the issue of blasphemy, depending on the different jurisdictions in the country.

In February 2008, three Christians – Youssed Ourahmane, Rachid Seghir and Hamid Ramdani – who were charged, under Ordinance 06-03, with “blaspheming the name of the prophet Muhammad and Islam,” were fined and sentenced to three years in prison. The men were accused by Shamouna Al-Aid, who had converted to Christianity and then reconverted back to Islam. On 29 October 2008 a Court in Ain al-Turck acquitted all the accused.

## **Nigeria**

In October 2007 Sani Kabylye, a 55 year old Christian man, was sentenced to three years in prison by a sharia court, without right of appeal, after three men had accused him of blaspheming Islam and the prophet Muhammad. On the grounds of lack of evidence, Kabylye was set free on 16 February 2009, having served 300 days of his sentence. His lawyer drew attention to several inconsistencies in the original trial, including the fact that a non-Muslim was being tried in an Islamic court without authorization.

## **B. Jurisprudence of the Arusha Tribunal**

The **Rwanda** genocide is the most disturbing illustration in recent times of the use of the media in incitement to racial hatred. The consideration, definition, analysis and scope of the prohibition of such incitement (as stipulated in article 20 of the International Covenant on Civil and Political Rights) by the International Criminal Tribunal for Rwanda constitutes the most exhaustive body of case law on the subject to date. This case law is likely to serve as the benchmark not only for other African countries, but for international bodies as well. As such, it merits careful analysis in this study. Set out in greater detail in the annex, it can be summed up in two case

studies: that of Ferdinand Nahimana in relation to the role of Radio des Mille Collines, and that of the pop-singer Simon Bikindi.<sup>4</sup>

Both charges were based on three songs in 1987 and 1993. The Chamber found that international definitions of the terms “expression” and “speech” were broad enough to include artistic expression such as songs. It found that songs extolling Hutu solidarity and defining Tutsis as enslavers and enemies of the Hutu, were composed with the intention of fomenting ethnic hatred of Tutsis and encouraging acts of violence against them. It also found, however, that there was no evidence to suggest that songs produced before 1994 played a role in the events of 1994. Nevertheless, Bikindi was ultimately found guilty of direct and public incitement to commit genocide, on the basis of two exhortations that he had made in June 1994.

In essence, the case law hinges on the following considerations:

The need to strike a delicate balance between freedom of expression, which is a fundamental human right, and the limitations imposed by the need to protect the rights of others. In this regard there are two conceptions at odds with each other: the absolute primacy of freedom of expression, and the centrality of the prohibition of incitement to hatred in the context of protecting freedom of expression. The second of the two conceptions seems closer to the spirit of the Pact on Civil and Political Rights and the International Convention on the Elimination of All Forms of Racism, both of which require the prohibition of incitement to racial hatred.

It is accordingly vital to take the cultural and temporal context into consideration when assessing the degree of incitation and deciding whether the criterion of intentionality has been met in establishing incitation.

### **III. National policies**

The predominant factors in African national policies hinge on the following priorities: the construction of national unity, the struggle against tribalism and the defence of national identity.

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4 The indictment of Ferdinand Nahimana before the Trial Chamber focused on the following: conspiracy to commit genocide (Article 6.1 of the ICTR Statute), genocide (Article 6.1 of the Statute), and direct and public incitement to commit genocide (Article 6.1 and 6.3 of the Statute), conspiracy to commit genocide (Article 6.1 of the Statute), crimes against humanity (persecution) (Article 6.1 and 6.3 of the Statute), crimes against humanity (extermination) (Article 6.1 of the Statute), crimes against humanity (murder) (Article 6.1 of the Statute). On 3 December 2003, the Trial Chamber found Nahimana guilty of: conspiracy to commit genocide (Article 6.1 of the Statute); genocide (Article 6.1 of the Statute); direct and public incitement to commit genocide (Article 6.1 and 6.3 of the Statute); crimes against humanity (persecution) (Article 6.1 and 6.3 of the Statute); crimes against humanity (extermination) (Article 6.1 of the Statute). He was found not guilty of (a) complicity in genocide, (b) murder.

On 28 November 2007, the Appeals Chamber quashed all the convictions handed down by the Trial Chamber against Nahimana as the author (Article 6.1 of the Statute of the ICTR) for the following crimes: agreement conspiracy to commit genocide, b) genocide, c) direct and public incitement to commit genocide, d) persecution, e) Extermination. She confirmed, pursuant to Article 6.3 of the Statute of the ICTR, the "convictions against him" only because of the emissions of radio RTLM after 6 April 1994 'to: a) the crime of incitement direct and public incitement to commit genocide, b) the crime of persecution as a crime against humanity. According to the ruling of the Appeals Chamber, these two crimes were committed by the journalists of Radio RTLM during the period 6 April to July 1994. Bikindi was indicted in December 2008 for, among other offences, incitement to commit genocide and persecution as a crime against humanity.



In most African countries national policies are restricted by the prevalence of programmes specifically aimed at encouraging inter-cultural or inter-community dialogue, tolerance and togetherness. Nevertheless, in general these policies are dominated by factors of a political or community nature. Some national policies, such as those in Central Africa and the Great Lakes region, reflect the search for balance between respect for the commitments made under international instruments on human rights, and the need to take into account and show respect for traditional cultural practices and values.

There is a role to be played by traditional and spiritual leaders in the mechanisms of conflict prevention and resolution. While remaining specific to the individual needs of each country, the institutions set up for this purpose, often very active, are attentive to the need to defend the universal values of human rights protection. These institutions are now confronted by the modern realities of society and have to deal with new forms of conflict associated with the existence of the modern State.

Intellectual resources are being mobilized in the campaign to prevent and resolve conflicts of identity, to educate the population and to search for peace, human rights and democracy. Two particular examples of national policy are significant in this regard: that of Rwanda, which accords great importance to the use of traditional practices and values in dealing with the consequences of genocide, and that of Gambia, which illustrates the effectiveness of this method, in a culturally indirect manner.

In **Rwanda**, *gacaca* is a Kinyarwanda word meaning “grassy area” and, by extension, can refer to a gathering of neighbours (sitting on the grass, the *gacaca*) while they settle disputes between inhabitants of the neighbourhood. While the institution is not codified in any legal or regulatory system, it is now an integral part of the process of settling disputes at local level. In fact it is acknowledged and employed by the people themselves and by the local authorities. It is therefore convened and chaired by the local council member (the rural councillor elected by his area and representing it in the rural district council). Rwanda has set up a number of institutions and mechanisms to foster dialogue, consultation and reconciliation, including two innovative institutions at national level to give meaning and substance to the objectives of dialogue and reconciliation.

The *National Council of Dialogue* established by Article 168 of the Constitution:

There is hereby established a “National Council of Dialogue”. It shall bring together the President of the Republic and five representatives of each district, municipality and town council designated by their peers. It shall be chaired by the President of the Republic and be attended by members of the Cabinet and Parliament, the prefects of provinces and the Mayor of the city of Kigali and such others as may be determined by the President of the Republic.

The Council shall meet at least once a year. It shall debate, among others, on issues relating to the state of the nation, the state of local governments and national unity.

Resolutions of the Council are submitted to the concerned State institutions to enable them to improve their services to the population.

*The National Commission on Unity and Reconciliation*

In accordance with Article 178 of the Constitution, the National Unity and Reconciliation Commission is an independent national institution. Its responsibilities include particularly the following:

1. Preparing and coordinating the national programme for the promotion of national unity and reconciliation;
2. Putting in place and developing ways and means to restore and consolidate unity and reconciliation among Rwandans;
3. Educating and mobilizing the population on matters relating to national unity and reconciliation;
4. Carrying out research, organizing debates, disseminating ideas and making publications relating to peace, national unity and reconciliation;
5. Making proposals on measures that can eradicate divisions among Rwandans and to reinforce national unity and reconciliation;
6. Denouncing and fighting against acts, writings and utterances which are intended to promote any kind of discrimination, intolerance or xenophobia;
7. Making an annual report and such other reports as may be necessary on the situation of national unity and reconciliation.

The National Unity and Reconciliation Commission shall submit each year its programme and activity report to the President of the Republic and the Senate and provide a copy thereof to such other State organs as may be determined by law.

An organic law shall determine the organization and functioning of the Commission.

Article 17 of the Constitution of the **Gambia** stipulates that: “2. Any person in the Gambia, whatever his race, colour, sex, language, religion, politics or opinion, national or social origin, financial status, birth or any other status, is entitled to the human rights and fundamental individual freedoms set out in this chapter, albeit subject to respect for the rights of others and safeguarding the public interest.” Article 25 states that: “Each person has the right to: 1. freedom of speech and expression, which includes freedom of the press and other media.”

There are no relevant policies in place to organize the correlation between incitement to hatred on the one hand and freedom of expression on the other. The cultural and traditional relationships between the tribes of the Gambia are used in conflict prevention and resolution. In the Gambia, racial hatred is very unusual, or suppressed.

The importance of the role played by the media in the promotion of the culture of peace and development in conflict and post-conflict zones must not be understated, especially in Liberia and Sierra Leone. Professional media organizations stress the significance of the policies set out below.

There are some national policies which are directly targeted at the role of the media, by, for example, incorporating the culture of peace and inter-cultural dialogue into the syllabuses of training courses for journalists and other media professionals. Such policies are also geared towards the development of communication at local levels such as community radio stations and other media. It is rare to find national policy that is directly targeted at the prohibition of incitement to national, racial and religious hatred. Worrying trends are discernable in the following areas of national programmes and development plans.

#### **A. Primary importance of building and defending national unity**

The dominance of this theme in the majority of African States reflects the importance accorded by Governments of the region to the building of post-independence national unity. In this regard, national policies focus on two urgent priorities: the internal approach of the tribal and ethnic question with a view to fostering a sense of belonging and solidarity among communities driven apart by the colonial Powers, and the defence of a national territory that is characterized by the formation of artificial borders dividing communities between different countries.

Overall this dual external/and internal dynamic underpins three contradictory policies for national unity construction: the first reconciling respect for tribal, cultural or ethnic identity with the promotion of multi-cultural national unity; the second, the political dominance of one community or ethnic group over others; and the third, denying the deep-rooted historical and cultural significance of the ethnic component of African societies. These three different national policy approaches, whose random implementation depends on the political context, translate into the vulnerability of all African societies to the threat of incitement to national, racial and religious hatred.

#### **B. Discriminatory treatment of the issue of national minorities**

National policies reflect the highly precarious nature of the situation in which national minorities find themselves. The instability of their situation stems from three ominous trends which may be observed in certain countries: the predominance of the issue of national unity over respect for the rights of national minorities; the inadequacy of legal and constitutional mechanisms for the protection of national minorities and the political and electoral exploitation of the issue of national minorities. Consequently, the issue of ethnic minorities constitutes the ideal seedbed for incitement to national, racial and religious hatred in Africa.

#### **C. Growing importance of the factor religion**

A significant number of national policies (electoral platforms, written and spoken programmes etc.) give clear and significant priority to the religious dimension in the construction of national unity and identity. While freedom of religion may be guaranteed by law, national policies tend to emphasize or favour one or another religion as a symbol of national identity. The amalgamation of national and religious identity tends to dominate national policies, and in particular electoral platforms. This tendency is likely to exacerbate the enclosure of religious identities, leading to interdenominational antagonism, as can already be seen in the growing number of

internal conflicts. It is against this highly sensitive background that incitement to religious hatred is developing in several African countries.

Article 20 of the International Covenant on Civil and Political Rights, in particular the concept of incitement to religious hatred, is therefore being subjected to a new interpretation, in political discourse, through the emergence of concepts that have a religious connotation, such as blasphemy, defamation of religion etc. These concepts, which are not included in the International Covenant on Civil and Political Rights, are in the process of being incorporated into several national legislations.

In several countries national policies deal more directly with restrictions on freedom of religion than with the prohibition of incitement to national, racial and religious hatred. The following example is taken from reports and studies conducted by human rights organizations.

## **Angola**

During her visit to Angola in 2007, Ms. Asma Jahangir, United Nations Special Rapporteur on freedom of religion and belief, noted that:<sup>5</sup>

“In Cabinda, where expressions of dissent by civil society have been quelled by the authorities, a conflict within the Catholic church continues. This conflict has resulted in acts of violence, intimidation, harassment and arrests by the security forces of individuals disputing the appointment of the Bishop of Cabinda, who is perceived as being connected to the MPLA Government. Violence and threats of violence against the leadership of the Catholic Church in Cabinda are also reported.

“Some other issues of concern also studied during the Special Rapporteur’s visit include media reports and statements by Government officials stigmatizing Muslims, the treatment of children accused of witchcraft, the closure of mosques and other places of worship, administrative requirements for Radio Ecclésia and concerns about the situation of persons in any form of detention. In the present report, the Special Rapporteur studies these problems and concludes with a series of recommendations.”

**Constitution:** The right to freedom of religion and belief is enshrined in the 1992 Constitution of Angola.

Article 8, paragraph 2, provides that religions should be shown respect and that the State must protect churches, places and objects of worship, provided they respect the laws of the State. Article 18 states that all citizens are equal before the law, enjoy the same rights and are subject to the same duties, regardless of their religion. All acts threatening to jeopardize social harmony or create discrimination or privileges based on any of these factors will be subject to severe penalties under law.

Article 45 stipulates the inviolability of freedom of conscience and belief.

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5 A/HRC/7/10/Add.4.

**Acts: Act No 04/02** on freedom of religion, conscience and worship, repealing Executive Decree 46/91. The Act defines the term “worship” and clarifies the concept of secularism and equality of treatment which entails a clear separation between Church and State. All religious institutions should be treated equally (article 3). The Act also provides that freedom of conscience incorporates the rights to profess a religion, to profess no religion and to be able convert from one religion to another (article 4). The Act recognizes the principle of non-discrimination on religious grounds with regard to employment (article 5).

#### **IV. Conclusions and observations**

The legal formulation and observance of the prohibition of incitement to national, racial and religious hatred is based on various pertinent international mechanisms, such as:

- **Universal Declaration on Human Rights (article 19);**
- **International Covenant on Civil and Political Rights (articles 19 and 20);**
- **International Convention on the Elimination of All Forms of Racial Discrimination (article 4);**
- **UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions (2005);**
- **Declaration of Principles on Freedom of Expression in Africa of the African Commission on Human and Peoples’ Rights;**
- **African Charter on Human and Peoples’ Rights (articles 9 and 28);**
- **Camden Principles on Freedom of Expression and Equality (principles 9 and 12).**

It is also important to call to mind certain principles which could guide the implementation of the international prohibition of incitement to national, racial and religious hatred. For example, the legal and ethical complementarity of all fundamental human rights as formulated in international human rights instruments is of key importance. Furthermore, all human rights are universal, indivisible and interdependent, and the principle of non-discrimination, as incorporated in all the main human rights instruments, occupies a central position.

The right to freedom of expression is the one fundamental right that is both necessary and indispensable to the observance, protection and implementation of all other fundamental rights. While freedom of expression is not an absolute, its limitations and restrictions must be in accordance with the parameters strictly defined by law in the conditions set out in article 19, paragraph 3, of the International Covenant on Civil and Political Rights, including the following three criteria of legitimacy for any restriction on freedom of expression: it must be provided by law; it must pursue a legitimate goal and it must be “necessary in a democratic society”. Limiting freedom of expression in order to give effect to the prohibition of incitement to national, racial and religious hatred is, within the meaning of article 20 of the International

**Covenant, an obligation and not an option. Consequently, it should be explicitly stated in constitutional and legislative texts.**

**This study shows that the majority of African national legal systems (constitutions and ordinary laws) do not contain a clearly formulated provision for the protection of freedom of expression as required by article 19 of the International Covenant and stemming from the obligation of States to prohibit incitement to hatred, as required by article 20 of the ICCPR.**

**International human rights law, in particular article 20 of the International Covenant on Civil and Political Rights, stipulates that statements aimed at creating an eminent threat of discrimination, hostility or violence against individuals belonging to a specific targeted group, fall within the notion of incitement. What is essential in this context is to observe the one limitation on non-incitement, and not to add any other undefined limitations which are not reflected in the ICCPR, such as those pertaining to “terrorism”, “extremism” or “fanaticism”, or those “contrary to Islamic values”. The study shows that there are indeed such new categories of restriction and limitation in process of being incorporated into several legal systems in Africa. Article 20 of the International Covenant on Civil and Political Rights, notably the very concept of incitement to religious hatred, thus runs the risk of being re-interpreted.**

**The very limited number of cases in national case law which expressly deal with national, racial and tribal hatred, reflects the predominant use of traditional mechanisms for the resolution of tribal conflicts, the limited availability of modern legal remedies and the lack of information thereon accessible to ordinary people. Most of the case law dealing with freedom of expression and freedom of the press is concerned with violations and political restrictions of those freedoms and to a much lesser extent with prohibiting incitement to national, racial and religious hatred. These violations and restrictions are indeed often justified by the political authorities as necessary for the defence and protection of national unity or of what is stated to be the country’s national religion. Article 20 of the International Covenant on Civil and Political Rights thus risks being interpreted in a selective manner which privileges – depending on varying political criteria – a certain ethnic, national or religious dimension.**

**African national case law could be more closely modelled on the provisions of international human rights law and deal more directly with the notion of incitement to national, racial or religious hatred. Incitement to religious hatred should be defined in terms compatible with international human rights law and should not include defamation of religions. Archiving and systematic publishing of judgements in cases relating to freedom of expression and the prohibition of incitement to national, racial and religious hatred can help promote respect for these laws.**

**The case law of the Arusha Tribunal should serve as a model for all African countries, both for the manner in which it highlighted the gravity of the factor of incitement to national and racial hatred in the Rwandan genocide and**

**for the importance that it accorded to the criteria and conditions for categorizing an act as hatred and to the cultural context of the countries concerned.**

**The dominant characteristics of African national policies hinge on priority considerations such as the building of national unity, the fight against tribalism and the defence of national identity. The haphazard implementation of such policies is often subject to their particular political context and reveals the highly vulnerable situation that ethnic minorities are in. There is a risk, therefore, that criminalising incitement to hatred is harmfully used against ethnic, religious or cultural minorities, as well as marginal groups and those holding critical political opinions. The amalgamation of national identity and religious identity takes up a predominant position in national policies, notably with regard to electoral platforms. This trend is likely to exacerbate the enclosure of religious identities and, in consequence, also inter-religious antagonism, as exemplified by a growing number of internal conflicts.**

**Insufficient account is taken of two major factors specific to the African continent: the political and electoral exploitation of the tensions in African societies linked to identity, and the centrality of the aspect of national, racial and religious hatred in recent African conflicts, especially its most extreme manifestation, such as in the Rwanda genocide of 1994 or the post-electoral inter-ethnic conflict in Kenya in 2008.**