Navigating the Boundaries: Freedom of Expression, Hate Speech, and Religious Values in the UN Framework

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International Covenant on Civil and Political Rights (ICCPR)

- Article 19 of the ICCPR protects freedom of expression, it provides that speech may be limited to protect the 'rights or reputations of others' as well as 'national security', 'public order, or 'public health or morals'
- Article 20(2) of the ICCPR stipulates that: "any advocacy of national, racial or religious hatred *that constitutes incitement to discrimination, hostility or violence* shall be prohibited by law."

Types of Speeches Under Articles 19 and 20 of the ICCPR

prohibited speech

- Article 20(2) directly prohibits certain forms of expression. Criminal and civil forms of prohibited speech.

limited speech- protected speech

- under Article 19(3)
- under Article 19(2)
- As noted by the Human Rights Committee, offensive, disrespectful, or pejorative content that does not advocate for war or incite discrimination, hostility, or violence, is, at least in principle, protected

Blasphemy or "defamation of religions"

Inciting terrorist acts and violent extremism

Extremely offensive expression

Defamation

The denial of historical events

Speech against "the state" and public officials

“incitement to hatred” -“hate speech”

- In European criminal statutes following World War II, mostly under the heading of “incitement to hatred.
- The constitutional doctrine of the first half of the 21st century tends to adopt a transposition of the American term “hate speech.”

Hate speech

- There is no universally accepted definition of hate speech.
- States and institutions adopt their own understanding of what hate speech entails without actually defining it.
- On an international level, one of the few documents, albeit non-binding, which has sought to elucidate the meaning of hate speech, is the Council of Europe's Committee of Ministers Recommendation 97 (20) on Hate Speech. It provides that this term is to be "understood as covering all forms of expression which spread, incite, promote or justify racial hatred, xenophobia, anti-Semitism or other forms of hatred based on intolerance, including intolerant expression by aggressive nationalism and ethnocentrism, discrimination and hostility against minorities, migrants and people of immigrant origin." The Recommendation incorporates the justification of hatred as well as its spreading, incitement and promotion, allowing for a broad spectrum of intentions to fall within its definition.

Article 4 of the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD)

- Article 4 of the ICERD requires States to condemn all propaganda and all organizations which are based on ideas or theories of superiority of one race or group of persons of one color or ethnic origin, or which attempt to justify or promote racial hatred and discrimination in any form, with due regard to the freedoms of opinion and expression. This includes an obligation to criminalize all dissemination of ideas based on racial superiority or hatred, incitement to racial discrimination, as well as all acts of violence or incitement to such acts against any race or group of persons of another color or ethnic origin, including the provision of any assistance to racist activities and their financing.

Jurisprudence of the Human Rights Committee (UNHRC) of the ICCPR

- Article 20 (2) secures the right of people as individuals and as members of groups to be free from hatred and discrimination under article 26 by requiring States to prohibit certain conduct and expression by law. (The case of Mohamed Rabbae, A.B.S and N.A v the Netherlands, § 10.4; Committee's general comment No. 34, § 51)
- Only with regard to the specific forms of expression indicated in article 20 that States parties are obliged to have legal prohibitions (The case of Mohamed Rabbae, A.B.S and N.A v the Netherlands, § 10.4; e Committee's general comment No. 34, § 52)
- Article 20 (2) is crafted narrowly in order to ensure that other equally fundamental Covenant rights, including freedom of expression under article 19, are not infringed. (The case of Mohamed Rabbae, A.B.S and N.A v the Netherlands, § 10.4)
- The freedom of expression embraces even expression that may be regarded as deeply offensive (Committee's general comment No. 34, § 11)

Jurisprudence of the Human Rights Committee (UNHRC) of the ICCPR

- Articles 19 and 20 are compatible with and complement each other. A prohibition that is justified on the basis of article 20 must also comply with the strict requirements of article 19 (3). Thus, in every case, measures of prohibition under article 20 (2) must also be "provided by law"; they may only be imposed for one of the grounds set out in subparagraphs (a) and (b) of article 19 (3), and they must conform to the strict tests of necessity and proportionality. (Committee's General Comment No. 3 §§ 22, 48, 50, 52)

- Article 20(2) does not expressly require the imposition of criminal penalties, but instead requires that such advocacy be 'prohibited by law.' Such prohibitions may include civil and administrative as well as criminal penalties." (Mohamed Rabbae, A.B.S and N.A v The Netherlands (14 July 2016) Communication no. 2124/2011, § 10)

Jurisprudence of the Human Rights Committee (UNHRC) of the ICCPR

- This limitation on scope of article 20(2) was intentional. The drafting history indicates that "[f]ears were expressed that an article prohibiting such advocacy might lead to abuse and would be detrimental to freedom of expression." Thus a formulation limiting article 20(2) to "only such advocacy … as 'constitutes incitement'" was adopted.

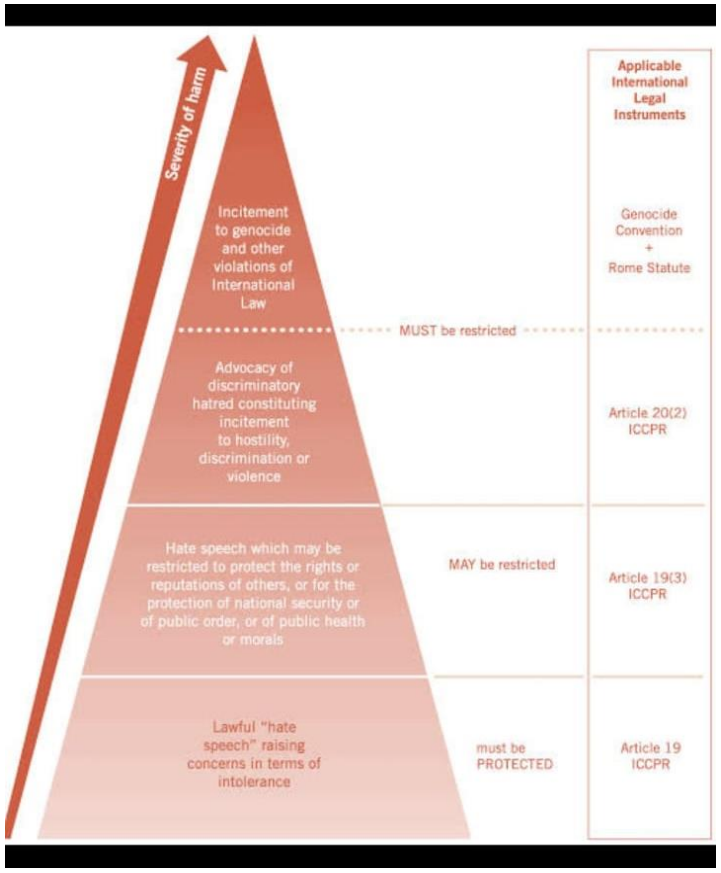
- «No one should be penalized for the dissemination of “hate speech” unless it has been shown that they did so with the intention of inciting discrimination, hostility or violence.» (Joint Statement on Racism and the Media by the UN Special Rapporteur on Freedom of Opinion and Expression, the OSCE Representative on Freedom of the Media and the OAS Special Rapporteur on Freedom of Expression (2001)

- The three-part test (legality, proportionality and necessity) for restrictions also applies to cases involving incitement to hatred, in that such restrictions must be provided by law, be narrowly defined to serve a legitimate interest, and be necessary in a democratic society to protect that interest.

Religious Hate-UN Human Rights Framework

- **Deeply offensive expression**: International freedom of expression standards protect expression that is offensive, disturbing or shocking, and do not permit limitations solely on the basis of "offence" caused to an individual or group.
- **Blasphemy or "defamation of religion"**: International human rights law protects people, and not abstract concepts, such as religions or belief systems. It distinguishes between ideas or beliefs attached to individuals, and does not protect religions or beliefs per se from adverse comment or scrutiny. Prohibitions of displays of lack of respect for a religion or other belief system, including blasphemy laws, are incompatible with the ICCPR, except in the specific circumstances envisaged in article 20 (2) (Committee's General Comment No. 34, § 48)
- **Hate speech:** While all 'hate speech' is a cause for concern, it will not always constitute a criminal offence. States are required to prohibit severe forms of 'hate speech,' including through criminal, civil, and administrative measures.The most severe types of hate speech that may appropriately attract criminal sanction include "incitement to genocide", and particularly severe forms of "advocacy of discriminatory hatred that constitute incitement to violence, hostility or discrimination." In these cases, 'hate speech' may also be the expressive act itself that is criminalised. On the other hand, 'hate speech' may not be an element of a 'hate crime.'

Hate Speech Pyramid



- with regard to domestic sanctions, it is essential to make a careful distinction between (a) forms of expression that should constitute a criminal offence; (b) forms of expression that are not criminally punishable, but may justify a civil suit; and (c) forms of expression that do not give rise to criminal or civil sanctions, but still raise concerns in terms of tolerance, civility and respect for the convictions of others.

Rabat Test/Threshold: a six-part threshold test for expressions considered as criminal offences

- **Rabat Plan of Action on the prohibition of advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence** (UN High Commissioner for Human Rights 2013, A/HRC/22/17/Add.4)
- The Rabat Plan of Action seeks to clarify the standards and thresholds linked to Article 20 ICCPR.
- Rabat Plan of applies a six-part test to assess hate speech, including religious incitement which incorporates:

Rabat Test/Threshold: a six-part threshold test for expressions considered as criminal offence

(1) The social and political context:

- Context is of great importance when assessing whether particular statements are likely to incite discrimination, hostility or violence against the target group, and it may have a direct bearing on both intent and/or causation. Analysis of the context should place the speech act within the social and political context prevalent at the time the speech was made and disseminated.

(2) Status of the speaker:

- The speakers position or status in the society should be considered, specifically the individuals' or organizations' standing in the context of the audience to whom the speech is directed.

Rabat Test/Threshold: a six-part threshold test for expressions considered as criminal offence

(3) Intent to incite the audience against a target group:

Article 20 of the International Covenant on Civil and Political Rights anticipates intent. Negligence and recklessness are not sufficient for an act to be an offence under article 20 of the ICCPR, as this article provides for "advocacy" and "incitement" rather than the mere distribution or circulation of material. In this regard, it requires the activation of a triangular relationship between the object and subject of the speech act as well as the audience.

(4) Content and form of the speech:

- The content of the speech constitutes one of the key foci of the courts' deliberations and is a critical element of incitement. Content analysis may include the degree to which the speech was provocative and direct, as well as the form, style, nature of arguments deployed in the speech or the balance struck between arguments deployed.

Rabat Test/Threshold: a six-part threshold test for expressions considered as criminal offence

(5) Extent of its dissemination:

Extent includes such elements as the reach of the speech act, its public nature, its magnitude and size of its audience. Other elements to consider include whether the speech is public, what means of dissemination are used, for example by a single leaflet or broadcast in the mainstream media or via the Internet, the frequency, the quantity and the extent of the communications, whether the audience had the means to act on the incitement, whether the statement (or work) is circulated in a restricted environment or widely accessible to the general public.

(6) Likelihood of harm, including imminence:

- Incitement, by definition, is an inchoate crime. The action advocated through incitement speech does not have to be committed for said speech to amount to a crime. Nevertheless, some degree of risk of harm must be identified. It means that the courts will have to determine that there was a reasonable probability that the speech would succeed in inciting actual action against the target group, recognizing that such causation should be rather direct.

CONCLUSION

- UN/CCPR Article 20(2) is narrowly construed and establishes a stringent threshold for the types of expression that must be proscribed. On its face, Article 20(2) does not mandate the prohibition of all forms of "advocacy of national, racial, or religious hatred" but only that which also "constitutes incitement to discrimination, hostility, or violence." In other words, mere advocacy of hatred—absent an intent or likelihood of inciting discriminatory action, hostility, or violence—does not meet the threshold for restriction under this provision.
- The right to freedom of expression implies that it should be possible to scrutinize, openly debate and criticize belief systems, opinions and institutions, including religious ones, as long as this does not advocate hatred that incites violence, hostility or discrimination against an individual or group of individuals.

CONCLUSION

- Article 20(2) is significantly more restrictive in scope than Article 4 of the CERD, which imposes an affirmative obligation on States Parties to criminalize, inter alia, the "dissemination of ideas based on racial superiority or hatred" irrespective of whether such dissemination rises to the level of incitement to discrimination, hostility, or violence.

Individual opinion (partly concurring and partly dissenting(of Committee members Yuval Shany and Sir Nigel Rodley annexed to the the case of Mohamed Rabbae, A.B.S and N.A v the Netherlands

- «…according to which article 20(2) of the Covenant does not create an independent human right to be protected by legislation prohibiting hate speech. Instead, the article imposes an obligation on States parties to pass legislation in order to protect national, racial or religious groups against discrimination, hostility and violence – i.e., to prohibit an infringement of certain aspects of Covenant rights, such as articles 6 (right to life), 7 (prohibition of ill-treatment), 9 (right to security of person) and 26 (prohibition of discrimination)."

- «victims of human rights violations should not be able to invoke article 20(2) separately, but only in conjunction with other Covenant rights, such as articles 6, 7, 9 and 26, which the prohibiting legislation was designed to protect»