BRILL
NIJHOFF

JOURNAL OF LAW, RELIGION AND STATE
7 (2019) 89-103

JLRS
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The International Covenant on Civil and Political Rights and the "Right to be Protected against Incitement"

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Abstract

Article 20(2) of the UN's International Covenant on Civil and Political Rights (ICCPR) is an odd human rights clause. It provides that "[a]ny advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law." Accordingly, this provision does not appear to codify a fundamental right but rather a sui generis state obligation. The present article aims at providing a legal taxonomy of this international incitement clause, ultimately also answering the question as to whether, despite its unique formulation as speech prohibition, it contains a justiciable right to protection from incitement.

Keywords

incitement – religion – Article 20(2) ICCPR – religious hatred – freedom of expression

1 The Unique Nature of the Incitement Clause[1]

Article 20(2) of the UN's International Covenant on Civil and Political Rights (ICCPR)[2] is an odd specimen. It provides that "[a]ny advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law."[3] Ostensibly, this provision does not appear to codify a fundamental right but rather a sui generis state obligation. Moreover, this norm may also be easily construed as a special limit on fundamental rights listed in the same covenant, notably on the right to freedom of expression, but also, for instance, on the right to freedom of association. This characteristic might be considered, in the words of Manfred Nowak, an "alien element in the system of the Covenant."[4]

A doctrinal legal question is whether Article 20(2) ICCPR, uniquely formulated as it is, asserts a *right* as a corollary to the expressly stated obligation, i.e., the prohibition of incitement. And if so, what are the implications of such a right in terms of state obligations and in terms of legal standing for alleged incitement victims? Yet before we reach a conclusion as to Article 20(2) ICCPR's status as an individual entitlement (Section 4), let us first consider the more obvious meanings of this clause, which, after all, reads literally as a "prohibition" (see Section 2, below) and as a potential ground for limitation, i.e. as "right of others" (see Section 3, below).

1 The question (see chiefly Section 4) as to whether the incitement clause enshrined in Art. 20(2) of the ICCPR encapsulates merely a prohibition or also an individual *right* (to be protected against incitement) formed the subject of a paper the author presented at the International Conference on "Regulating Religion: Normativity and Change at the Intersection of Law and Religion," Faculty of Law, National University of Singapore, 14–15 December 2015, Singapore. This article is an updated and expanded version of a paper entitled "The Prohibition of Advocacy of Religious Hatred that Constitutes Incitement to Discrimination, Hostility or Violence: A Taxonomy," in W. Cole Durham Jr., Donlu Thayer (eds.), *Religion, Pluralism, and Reconciling Difference* (Routledge, 2018), Ch. 6.

2 International Covenant on Civil and Political Rights, G.A. Res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171, entered into force 23 March 1976, Art. 20(2). For a detailed analysis, see Jeroen Temperman, *Religious Hatred and International Law* (Cambridge University Press, 2016).

3 ICCPR, Art. 20, para. 2.

4 Manfred Nowak, *U.N. Covenant on Civil and Political Rights: CCPR Commentary* (2nd rev edn, N.P. Engel Publ. 2005), 468.

2 Prohibition or Right?

The straightforward text of the incitement clause suggests that it is intended as a prohibition – nothing more, nothing less. Specifically, Article 20(2) is formulated as an *international injunction to prohibit* incitement. State parties to the ICCPR "shall" – i.e. compulsorily[5] – prohibit by law any advocacy of national, racial, or religious hatred that constitutes incitement to discrimination, hostility, or violence.

From the manner in which the incitement provision was crafted and especially from its position in the covenant overall, we can distill that the prohibition is more than just a grounds for restricting speech. This becomes strikingly clear when one compares Article 20(2) with the way incitement is addressed, for instance, by the UN Migrant Workers Rights Convention.[6] According to Article 13 of this convention, one of the grounds for legitimate restriction of speech is to prevent the advocacy of religious (and other) hatred. Significantly, the drafters of the ICCPR could have merged the incitement prohibition with the limitations on freedom of expression contained in Article 19 of the ICCPR, but decided to reserve *a separate provision* for the purposes of tackling incitement: Article 20. As a result, an autonomous incitement provision is part of the section of the ICCPR (Part III) that substantively lists the fundamental civil and political rights individuals are entitled to. By contrast, the general abuse of rights doctrine (holding that no one may use his or her rights with a view towards destroying the freedoms of others) is included in a miscellaneous part (Art. 5 of Part II of the ICCPR) on state obligations. Do these peculiarities elevate Article 20(2) ICCPR to the level of a fundamental right and, if so, what may be the potential ramifications of this status?

Regarding possible factors disqualifying construal of Article 20 as a right, it is important to note that although as a prohibition it requires national implementation laws, suggesting that it cannot be self-executing, we know from the area of fundamental socio-economic and cultural rights that even standards that are not self-executing can nevertheless be considered human rights.[7]

5 See Jeroen Temperman, *Religious Hatred and International Law* (Cambridge: Cambridge University Press, 2016), Chapter 4 for an extensive discussion on the mandatory nature of Art. 20 ICCPR.

6 International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, adopted by General Assembly Resolution 45/158 of 18 December 1990.

7 E.g. UN Committee on Economic, Social and Cultural Rights, *General Comment No. 3: The Nature of States Parties' Obligations* (UN Doc. E/1991/23), para. 5.

3 The Incitement Clause as a "Right of Others"

To date, only a handful of cases have been decided in which Article 20(2) plays a direct or indirect role. The meager output notwithstanding, these cases do show an interesting development as to the taxonomy of this provision. In this section it will be argued that the UN Human Rights Committee has gradually developed a "right to be free from incitement."

The early case of *J. R. T. and the W. G. Party v. Canada* is inconclusive on the question of whether Article 20(2) contains a right, due to the fact that the complaint was brought by a convicted inciter who spread hateful messages via telephone, rather than by alleged hate speech victims.[8] Consequently, there was no need for the committee to consider inferring any right from the incitement provision in that case. Rather, it sought to invoke the provision to expand its legal basis for restricting extremely hateful speech.[9]

The first traces of a "right to be free from incitement" can be found in *Faurisson v. France*, even though this case was also brought by a person convicted of incitement.[10] The case revolved around Robert Faurisson, a British-French literature professor, who was convicted in France under the *Gayssot Act*,[11] a law that makes it a criminal offense to deny historical crimes against humanity. He had publicly questioned the existence of gas chambers for extermination purposes at Auschwitz and in other Nazi concentration camps in various writings and statements. The Human Rights Committee argued that the restrictions on Faurisson's free speech were permitted and necessary for the sake of ensuring "respect of the rights or reputations of others" (Art. 19, para. 3(a) ICCPR). Crucially, the committee reiterated that this ground for restriction may relate to individuals but also to a "community as a whole."[12] The committee concluded that "[s]ince the statements made by the author, read in their full context, were of a nature as to raise or strengthen anti-semitic [sic] feelings, the restriction

8 *J.R.T. and the W.G. Party v. Canada*, Communication No. 104/1981, Decision of 6 April 1983.

9 *J.R.T. and the W.G. Party v. Canada*, para. 8(b): "The opinions which Mr. T. seeks to disseminate through the telephone system clearly constitute the advocacy of racial or religious hatred which Canada has an obligation under article 20 (2) of the Covenant to prohibit."

10 *Robert Faurisson v. France*, Communication No. 550/1993, Decision of 8 November 1996.

11 Law No. 90–615 of 13 July 1990.

12 *Faurisson v. France*, para. 9.6. Something accepted as early as in (the now replaced) General Comment No. 10 of 1983: "Para. 3 expressly stresses that the exercise of the right to freedom of expression carries with it special duties and responsibilities and for this reason certain restrictions on the right are permitted which may relate either to the interests of other persons or to those of the community as a whole." Human Rights Committee, General Comment 10, Art. 19 (19th session, 1983), para. 4.

served [sic] the respect of the Jewish community *to live free from fear of an atmosphere of anti-semitism* [sic]."[13]

Thus, under the Covenant, it seems that there is a community right to live free from fear of discrimination. Remarkably, the committee did not, at this stage, directly refer to Article 20(2) to augment the existence and significance of such a right. Indeed, the plenary committee altogether omitted referring to this provision in its reasoning, to the dismay of some of the individual committee members.[14]

From the appended individual (concurring) opinions to this case, it transpires that a number of Committee members – yet apparently short of a majority – would have liked to apply Article 20(2) directly and unequivocally to the merits of this case. These individual opinions are much more clear and specific than the majority decision as to which rights of others are at stake.[15] Emphasizing both Article 7 of the Universal Declaration of Human Rights ("protection against any incitement to discrimination") and Article 20(2) of the ICCPR, members Elizabeth Evatt and David Kretzmer, for instance, argued that "[e]very individual has the right to be free not only from discrimination on grounds of race, religion and national origin, but also from incitement to such discrimination."[16] This "right to be free from racial, national or religious incitement"[17] features a number of times in their opinions. It is also referred to as the "right of a person to be free from incitement to discrimination on grounds of race, religion or national origins";[18] a "right to be free from incitement to anti-semitism" (sic);[19] and "the right to be free from incitement to racism or anti-semitism" (sic).[20]

Accordingly, in *Faurisson*, the right to freedom from religious (and other) incitement received legal recognition saw the light of day for the first time, albeit in the individual opinions of committee members rather than in the actual decision. Given the specifics of this case, the main function of this freedom is as a "right of others" which can be applied, in turn, as grounds to

13 *Faurisson v. France*, para. 9.6 (emphasis added).

14 Following the individual opinion by Elizabeth Evatt and David Kretzmer (co-signed by Eckart Klein) and the Individual opinion by Rajsoomer Lallah, the Committee should have expressly engaged with France's obligations under Art. 20(2) ICCPR.

15 Ibid.

16 Individual opinion by Elizabeth Evatt and David Kretzmer, co-signed by Eckart Klein, para. 4. Cecilia Medina Quiroga in her opinion expresses her support for this opinion.

17 Ibid., para. 7.

18 Ibid., para. 4.

19 Ibid., para. 9.

20 Ibid., para. 10.

legitimately restrict the freedom of expression of the inciter. Whether or not this freedom from incitement may be independently invoked by alleged hate speech victims remained unresolved; indeed, that would have been beyond the legal questions raised by the specific facts of the *Faurisson* case. Nonetheless, the majority opinion for the first time supported a community right to live free from fear of an atmosphere of discrimination (in this case anti-semitism), while individual members moreover fleshed out a right to be free from racial, national or religious incitement.

In *Malcolm Ross v. Canada* – a case revolving around an anti-Semitic school teacher – the committee further developed the notion of a right against incitement.[21] It stated that "as held in *Faurisson v. France*, restrictions may be permitted on statements which are of a nature as to raise or strengthen anti-semitic [sic] feeling, in order to uphold the Jewish communities' right to be protected from religious hatred. Such restrictions also derive support from the principles reflected in article 20(2) of the Covenant."[22] Though it cited *Faurisson* as a reference, the committee's argument actually took two new and important strides beyond the *Faurisson* decision. First, the accepted ground for restricting the freedom of expression is referred to as a "right" to be protected from religious hatred rather than an "interest," clarifying to a greater extent than previously the particular "rights of others" at stake in this type of case.[23] Second, the committee explicitly refers to Article 20(2) of the Covenant to substantiate the existence of this right. This makes the *Ross* case the first Human Rights Committee case where the majority of committee members (i.e. as expressed in their adopted views) recognized a *right to be protected from religious hatred*, distilling this notion expressly from Article 20(2) of the ICCPR. Somewhat confusing, however, is the fact that in the same paragraph of this case, the committee refers to a similar but ostensibly non-identical category of "rights and reputations of others" when it concluded that "the restrictions imposed on him were for the purpose of protecting the "rights or reputations" of persons of Jewish faith, including the *right to have an education in the public school system free from bias, prejudice and intolerance*."[24] Such a right is not to be found in the covenant,[25] though perhaps this notion could be considered a derivative of

21 *Malcolm Ross v. Canada*, Communication No. 736/1997, views of 18 October 2000, para. 2.1 and para. 4.2.

22 Ibid., para. 11.5.

23 As was still the case in *Faurisson*, para. 9.6.

24 *Malcolm Ross v. Canada*, para. 11.5 (emphasis added).

25 The ICCPR does not deal with education other than in the context of so-called parental rights as formulated by Art. 18(4).

the more general norms in the category of equality before the law (Art. 26) and protection against hatred (Art. 20) when taken in conjunction. In any event, the formulation appears to have been copied from the domestic proceedings and should be considered a Canadian legal notion.[26] The committee would have done well to gear its formulation more towards the language of Article 20(2) of the covenant and to adhere to its newly adopted general "right to be protected from religious hatred."

Throughout the *Ross* decision, the committee shifts between the conceptualization of Article 20(2) as a group right and as an individual right. When it speaks of the right of Jewish communities, clearly it alludes to a collective right. Then again, in the second reference to this right, mention is made of "persons of Jewish faith" as rights holders, more or less individualizing the same notion. At this juncture, the committee appears to adopt the language of minority rights as codified by Article 27 ("persons belonging to such minorities shall not be denied the right…"). Though the general rationale of those rights is to protect minorities, it is, strictly speaking, "persons," i.e. individuals, belonging to such minorities that are the beneficiaries of these rights.

In sum, the plenary committee – for the first time – unambiguously recognized the right to be protected from religious hatred, inferring this fundamental right directly from the principles laid down in Article 20(2). This right's main function in the *Ross* case was again as a recognized "right of others" (the Jewish community in Canada, or individuals belonging to the Jewish minority), which in turn meant that the extreme speech in question could legitimately be limited. Now that a right to be protected from religious hatred was finally recognized by the committee as a whole, the intriguing question of whether alleged hate speech *victims* are in a position to invoke such a right before the committee could finally be considered.

4 The Incitement Clause as a Right Invoked by Incitement Victims

The *Maria Vassilari et al. v. Greece* case does not deal with religious hatred per se, but rather with racist incitement against the Roma minority, yet it is

26 This notion is based on the principle of equal access to public service and on equality before the law as codified by Art. 5 of the Canadian Human Rights Act, R.S.C., 1985, c. H-6 and Art. 15 of the Canadian Charter of Rights and Freedoms, which is part of the Constitution Act, 1982 (80), 1982, c. 11 (U.K.), Schedule B. A "right to be educated in a school system that is free from bias, prejudice and intolerance" is distilled from those norms in paras. 80, 83, 85 of *Ross v. New Brunswick School District No. 15*, [1996] 1 S.C.R. 825.

certainly unique and important for our purposes as it is one of the first cases to be brought by an alleged *victim* of hate speech, and as such, one of the very few instances in which Article 20(2) was invoked by the applicant as the norm on which the human rights complaint was based.[27] Hitherto, Article 20(2) typically had been invoked by the responding state to persuade the committee to deny standing to a convicted inciter (or, more generally, to underscore that the state was not only permitted but actually obliged under international law to limit the speech act in question).

In the *Vassilari* case, the complainant was not a convicted inciter claiming that his or her freedom of expression was illegitimately restricted, but rather, alleged incitement victims who claimed that the state *did not act sufficiently to restrict the inciter's free speech*. This scenario raises the crucial question as to whether a state breaches international human rights law *by not sufficiently combating incitement*, including by not limiting a person's speech act, for instance, by applying ex post facto (criminal) penalties.

The Human Rights Committee did not reach such a conclusion in this particular case. In fact, it altogether dodged the question as to whether Article 20(2) can be invoked by an applicant. The precise formulation used to establish the inadmissibility of the Article 20-based complaint reflects this clearly: "*Without determining whether article 20 may be invoked under the Optional Protocol*, the Committee considers that the authors have insufficiently substantiated the facts for the purposes of admissibility. Thus, this part of the communication is inadmissible under Article 2 of the Optional Protocol."[28]

The case revolved around a particular letter to the editor published in a newspaper and signed by a number of local residents calling for "militant action" against a group of Roma people living near a Greek town. Since the particulars surely minimally substantiated a *prima facie* case, one wonders whether the reluctance on the part of the committee members to decide the question of "*whether article 20 may be invoked under the Optional Protocol*" is what clouded their overall judgement regarding admissibility. The content of the allegedly inciting letter and the socially vulnerable position of the letter's targeted minority seemed at least to warrant a discussion of the merits of the case. However, such a discussion would necessarily entail a consideration (and possibly, resolution) of the question as to the precise nature of Article 20(2) – something the Committee seemed determined to avoid. Evidence of the committee's reluctance can be seen directly from its decision, which literally states

27 *Maria Vassilari et al. v. Greece*, Communication No. 1570/2007, views adopted on 19 March 2009.

28 Ibid., para. 6.5 (emphasis added).

that it wished, for the time being, to refrain from resolving or even broaching that very question.

One committee member, Mr. Abdelfattah Amor, joined by two others (Mr. Ahmad Amin Fathalla and Mr. Bouzid Lazhari),[29] similarly criticized the committee's non-committal approach. In relation to the nature of Article 20(2), and in particular the question of whether it can be invoked by individuals, he argues: "The Committee has not ventured an opinion on the applicability of article 20, paragraph 2, to individual cases. While it may, of course, decide to do so in the future, the reasons for evading the question are puzzling … By declining to give an opinion on this aspect of the communication, the Committee allows uncertainty to persist on the scope of article 20, paragraph 2, particularly as, given the points raised, discussion was needed at the very least with regard to the question of admissibility."[30]

Moreover, Greece had not objected to the admissibility of the communication neither on the grounds of the applicability of Article 20(2), nor on any other grounds. Amor elaborates on this point, contending that "[t]he Committee's settled jurisprudence holds that, when the State party raises no objection to admissibility, the Committee declares the communication admissible unless the allegations are manifestly groundless or not serious or do not meet the other requirements set out in the Protocol."[31] He further points out that the Greek courts did, indeed, rule on the merits without raising questions of admissibility.[32] Turning to the particulars of the case at hand and the threshold question as to whether the facts presented by the applicants satisfied the admissibility criteria, he goes on to argue rather convincingly that:

> To say that, in the case in point, the authors have insufficiently substantiated the facts for the purposes of admissibility relies on an assessment that cannot be confirmed or justified by the contents of the file. While the facts may be discussed on the merits, they are sufficiently serious not to present an obstacle to admissibility under article 2 of the Optional Protocol. The case in point concerns a letter signed by 1,200 non-Roma individuals, entitled "Objection against the Gypsies: Residents gathered signatures for their removal." The letter accuses the Roma, as a group, of physical assault, battery and arson. The signatories demand that the Roma

29 See individual opinion of committee members Mr. Ahmad Amin Fathalla and Mr. Bouzid Lazhari, indicating they associate themselves with the views of Mr Amor.

30 Individual opinion of committee member Mr. Abdelfattah Amor (dissenting), para. (1).

31 Ibid., para. (2).

32 Ibid. para. (3).

> be "evicted" – "removed" according to the State party – from their settlement and threatened to take "militant action" … The authors took their case to the Committee, claiming to be the victims of a violation by the State party of article 20, paragraph 2, read in conjunction with article 2, paragraph 1, of the Covenant, because the [Greek] court "failed to appreciate the racist nature of the impugned letter and to effectively implement the Anti-Racism Law 927/1979 aimed at prohibiting dissemination of racist speech." This allegedly "discloses a violation of the State party's obligation to ensure prohibition of the advocacy of racial hatred that constitutes incitement to discrimination, hatred or violence." *Was it advocacy of racial hatred or just words? Was a racist offence committed or not? Was there the intention to offend, and who must prove this? These are questions that should be discussed, analysed and assessed on the merits.* To say, subsequently, that the facts have been insufficiently substantiated for the purposes of admissibility is indefensible both legally and factually. Sometimes there are reasons which the legal mind knows nothing of![33]

In sum, it is clear that the Committee – deliberately or not – missed out on a perfect opportunity to elucidate with certainty the precise nature of the rights enshrined in Article 20(2). It could and arguably should have seized upon this case to definitively pronounce the legal nature of Article 20(2), in particular, the question of whether it contains an *invocable* fundamental right or not.

To bolster its position, the Human Rights Committee could have leveraged the workings of its fellow human rights monitoring bodies. The European Court of Human Rights would be of only limited utility here, since the European Convention on Human Rights does not enshrine an incitement prohibition (merely a general "abuse of rights" clause in Art. 17), but in contrast, the work of the UN Committee on the Elimination of Racial Discrimination (CERD) is quite pertinent. The latter long has accepted that alleged victims of racist incitement can not only bring cases to the committee alleging non-compliance with the anti-incitement standards of the ICERD (Art. 4), but can actually win such cases.[34] This committee (CERD) has distilled an "invocable" right to be protected against racist incitement quite in the face of the literal text of the ICERD:

33 Ibid., para. (4) (emphasis added).

34 See, e.g., *L. K.* v. *The Netherlands*, Communication No. 4/1991, U.N. Doc. A/48/18 at 131 (1993); *The Jewish Community of Oslo et al.* v. *Norway*, Communication No. 30/2003, U.N. Doc. CERD/C/67/D/30/2003 (2005).

> Neither the generic hateful propaganda prohibition (Article 4) nor the list of substantive rights in relation of which racial discrimination must be banned by state parties (Article 5) expressly contains such a right. CERD has substantiated this position by reference to Article 6 of ICERD 'by which States parties pledge to assure to all individuals within their jurisdiction effective protection and a right of recourse against any acts of racial discrimination which violate their "human rights" under the Convention. In the Committee's opinion, this wording confirms that the Convention's "rights" are not confined to article 5.[35]

There is no reason why the Human Rights Committee could not adopt a comparable approach to admissibility of alleged incitement cases brought by hate speech victims.[36]

In 2009, accordingly, there was no majority in the UN Human Rights Committee to infer from the ICCPR a right to be protected against incitement; although three of the participating 15 committee members dissented and essentially deemed Article 20(2) applicable to and invocable by incitement victims. In 2011, by implication, there was still no majority, let alone a consensus, as General Comment No. 34 is altogether silent on the question of the invocability of Article 20(2).[37] Likewise, the 2012 *Rabat Plan of Action* on the conceptualization and implementation of Article 20(2) was silent on the question as to whether this provision can be invoked by incitement victims.[38]

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35 *The Jewish Community of Oslo et al.* v. *Norway*, para. 10.

36 For more on ICERD and protection against racist hate speech, see Jeroen Temperman, *Religious Hatred and International Law* (Cambridge University Press, 2016), Ch. 6 ("Comparative International Perspectives: CERD and the European Court of Human Rights on the Right to be Free from Incitement").

37 Human Rights Committee, *General Comment 34: Art. 19: Freedoms of Opinion and Expression* (CCPR/C/GC/34, adopted at its 102nd session, Geneva, 11–29 July 2011).

38 *Rabat Plan of Action on the Prohibition of Advocacy of National, Racial or Religious Hatred that Constitutes Incitement to Discrimination, Hostility or Violence*, Conclusions and recommendations emanating from the four regional expert workshops organised by OHCHR, in 2011, and adopted by experts in Rabat, Morocco on 5 October 2012. In four regional workshops – Europe (Vienna, 9 and 10 February 2011), Africa (Nairobi, 6 and 7 April 2011), Asia and the Pacific (Bangkok, 6 and 7 July 2011), and the Americas (Santiago de Chile, 12 and 13 October 2011) – some 50 experts and more than 200 observers and other stakeholders have reflected on the question of incitement in the meaning of Art. 20(2) ICCPR. This has led to a wealth of comparative information on virtually all ICCPR states parties, but also to background studies, legal and other expert papers, ultimately culminating in the Rabat Plan of Action. The Plan has been welcomed by leading human rights and freedom of expression NGOs, notably the free speech NGO that is called Article 19.

5 Concluding Remarks: The Incitement Clause as Normal Human Rights Provision After All

In 2016, a definitive answer finally issued forth from the Human Rights Committee regarding the question as to whether Article 20(2) of the ICCPR can be invoked by alleged incitement victims: Yes, it can. Whereas in *Vassilari* the committee still saw ways to evade this question, in *Rabbae, A.B.S. and N.A. v. The Netherlands*,[39] the committee settled this matter once and for all.[40]

A bit of background is necessary to fully grasp the nature and significance of the committee's views on this case, which was preceded by and in some way flows from the domestic (Netherlands) case of Dutch rightist politician Geert Wilders. The Wilders case revolved around the question as to whether Wilders had incited to discrimination against Muslims, amongst other charges. Particularly, Wilders' statements about Muslims in various media and his anti-Quran film *Fitna* were the subject of domestic criminal proceedings against him. Ultimately, on 23 June 2011, Wilders was fully acquitted of the charges of inciting hatred and inciting discrimination against Muslims.[41]

Subsequently, a group of alleged victims brought a case against the Netherlands requesting that the UN Human Rights Committee determine a violation of Article 20(2).[42] It is logical that these stakeholders brought the case to Geneva: After all, the ICCPR contains a clause forcing state parties to ban extreme speech, while the European Convention on Human Rights, for instance, does not. Consequently, alleged hate speech victims taking this route have a basis to obtain standing. That said, in earlier cases, the Human Rights Committee had been reluctant to accept that Article 20(2) provides extreme speech victims with legal standing for submitting a complaint. Two lawyers from the Dutch firm Böhler Advocaten tried their luck, and, acting for the three applicants, lodged the case against the Netherlands with the UN Human Rights Committee.[43] The applicants were Dutch citizens of Moroccan descent who all claimed to have

39 *Rabbae, A.B.S. and N.A. v. The Netherlands*, Communication No. 2124/2011, Views adopted on 14 July 2016.

40 This section draws on Jeroen Temperman, "A Right to be Free from Religious Hatred?: The Wilders Case in the Netherlands and Beyond," in: Peter Molnar (ed.), *Turning Points in Free Speech and Censorship Around the Globe* (Budapest: Central European University Press, 2014), 509–530.

41 Ibid., 511–513.

42 Ibid., 526–530.

43 The complaint, CCPR Communication of 15 November 2011, is available at <http://www.bohler.eu/nl/nieuws-overzicht/klacht-tegen-vrijspraak-wilders-ingediend/>. See p. 5 of the 2011 communication.

personally experienced negative impact triggered by Mr Wilders' statements, ranging from general feelings of anxiety, to increasingly feeling threatened and marginalized, to very concrete incidents of hatred and discrimination.[44] In addition to other claims,[45] the applicants' principal claim was a breach of Article 20(2) of the ICCPR, taken in conjunction with the equality principle of Article 26 and minority rights codified by Article 27.[46] In sum, the applicants claimed that the Netherlands failed to (appropriately) apply its anti-incitement legislation, i.e. the Dutch legislation giving effect to the covenant's standards on incitement.

The lawyers acting for the alleged victims submitted that while Article 20 is formulated "in terms of obligations of the state rather than in [terms of the] rights of individuals, this does not imply that these are matters to be left to the internal jurisdiction of state parties and as such [are] immune from review under the individual communication procedure. If such were the case, the protection regime established by the Covenant would be weakened significantly."[47] The communication posited that "[a]s a consequence of the acquittal, the complainants are not only victims of the hate speech of Wilders but also victims of a violation of Article 20 [of the] ICCPR by the State of the Netherlands."[48]

The majority of committee members could not detect a breach of Article 20(2) ICCPR.[49] While the three applicants thus ultimately lost their case, the significance of the Human Rights Committee's decision lies in the fact that it entertained the complaint in the first place and hence dealt with the allegations *on their merits*.

The responding state, The Netherlands, sought to fully capitalize on the reluctance the Committee had displayed vis-à-vis previous Article 20 applications, notably in the reservations on the part of the Committee dominating its decision in the *Vassilari* case. Article 20(2) is, The Netherlands argued,

> … cast not in the form of a human right, but as an obligation on States to put in place legislation prohibiting the conduct described. Other articles

44 Ibid., 5.

45 Other complaints invoke Art. 2 and Art. 14 of the ICCPR. Ibid., 2–5.

46 Ibid., 2–5.

47 Ibid., p. 2.

48 Ibid., p. 2.

49 It should be noted that some members disagreed with this finding. Most outspokenly: Mr. Fabián Salvioli. See Individual opinion (dissenting) of Committee member Mr. Fabián Salvioli.

> use terms such as "all persons," "everyone," etc. Reading article 20 in terms of a justiciable human right would, in essence, result in a human right to specific legislation, and no such right is recognised. Paragraph 2 has been duly implemented in the Netherlands through legislation which prohibits any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence. The Committee's case law also suggests that article 20(2) cannot be invoked under the Optional Protocol 5.[50]

The Committee, for the first time, expressly ruled that Article 20(2) contains individual and *invocable* fundamental rights, i.e. a right to be protected from incitement. In the words of the Human Rights Committee:

> The Committee notes the State party's argument that article 20 of the Covenant is not cast in terms of a justiciable right. However, the Committee considers that in stating that "any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law," article 20(2) provides protection for people as individuals and as members of groups against this type of discrimination. The article is designed to give specific recognition to the prohibition on discrimination set forth in article 26 of the Covenant, by identifying a limitation that States parties must impose on other enforceable Covenant rights, including the principle of freedom of expression under article 19 of the Covenant. The Committee considers that article 20(2) accordingly does not merely impose a formal obligation on States parties to adopt legislation prohibiting such conduct. Such a law would be ineffective without procedures for complaints and appropriate sanctions. The invocation of article 20(2) by individuals who have been wronged accordingly follows the logic of protection that underlies the entire Covenant.[51]

This decision, in one fell swoop, rendered Article 20(2) of the ICCPR not quite as odd as a literal reading suggests. It does not contain merely a prohibition, but also a right. That right, moreover, is justiciable. The UN Human Rights Committee has thus removed the risk of fragmentation of international human rights standards: This interpretation of Article 20(2) ICCPR as a justiciable

50 *Rabbae, A.B.S. and N.A. v. The Netherlands*, para. 4.3.

51 *Rabbae, A.B.S. and N.A. v. The Netherlands*, para. 9.7.

right, with concomitant legal standing before the Committee, brings this Committee's jurisprudence in line with previous jurisprudence to the same effect by the UN Committee on the Elimination of Racial Discrimination.[52]

Now that alleged incitement victims know that they have standing before the Human Rights Committee under Article 20(2) ICCPR, future case law under the same heading will provide the exact scope of the right to be free from incitement and the criteria that need to be met to prove that this novel right has been breached by a state's inaction in the face of extreme speech.

52 See *L.K. v. The Netherlands*; see also *The Jewish Community of Oslo et al. v. Norway*.