



Association of Muslim Lawyers



Society of **Black Lawyers**
the pursuit of equality in justice

The Right Honorable Ms. Fatou Bensouda
Prosecutor of the International Criminal Court International Criminal Court Post Office
Box 19519
2500 CM, The Hague The Netherlands

20 September 2015

Dear Madam Prosecutor,

REQUEST FOR THE INITIATION OF AN URGENT INVESTIGATION (PURSUANT TO ARTICLE 15 OF THE ROME STATUTE) INTO THE RACIALLY MOTIVATED HATE CRIMES COMMITTED AGAINST SYRIAN AND MUSLIM REFUGEES BY THE MAGAZINE CHARLIE HEBDO

We write on behalf of the Society of Black Lawyers of England and Wales (“SBL”) and the Association of Muslim Lawyers (“AML”).

The SBL and AML have campaigned vigorously to achieve equality, diversity and social justice for all. The SBL has been at the cutting edge of several national and global campaigns for equality for over 40 years; from the unlawful “Sus” laws of the 1970’s in the UK to the anti-apartheid movement of the 1980’s, and more recently, the campaign against racism and anti-semitism within European football. Likewise, the AML has been at the forefront of advocating human rights for all, including those in Bosnia, Gaza, and the many displaced refugees around the world.

In June this year we began our joint mission to assess the refugee and migrant crisis by visiting Sicily and Lampedusa and met with a range of local and national NGOs and statutory agencies in Italy. In September we also visited Calais.

The SBL and the AML have been following the crises spurred by the disastrous plight of African, Arab and Asian refugees and migrants fleeing persecution and poverty to cross the Mediterranean Sea to Europe. Unfortunately, to our utter outrage and consternation, the predicament of these migrants has been subject to some of the most vile, racist, offensive, and barbaric cartoons by the magazine Charlie Hebdo.

The first cartoon published in mid-September 2015 stated, “The proof that Europe is Christian, “The Christians walk on water, Muslim children drown”. The second caption, with a drawing of the dead body of three year old Syrian boy Aylan Kurdi, who recently

tragically drowned as he and his family desperately attempted to reach Greece by sea, commented, "So close to his goal", alongside a McDonald's "2 for 1 children's menu for the price of one". Our view is that no degree of satire justifies these cartoons.

The cartoons may have an oblique target of European indifference to refugees, but they are made at the callous expense of a drowned child, amongst others, who happened to be a Muslim. His faith did not make him any more deserving of or susceptible to death. Those fleeing their homes and trying to find refuge in Europe, including those who have sadly lost their lives along the way, are Muslim, Christian and members of several other faiths. The singling out of Muslims by Charlie Hebdo was gratuitous in our view, and designed to segregate people according to Syrian nationality and according to religion. The subtext is one consistent with the rationale of Charlie Hebdo, that has in past editions been happy to use the "N" word, to depict a French Cabinet Minister as a monkey.

The appalling terrorist murder of Charlie Hebdo journalists and staff in 2014 does not place that publication above the law and give it an entitlement to ridicule and abuse people of any nationality or religion in the name of supposed satirical humour and free speech.

The key question is not whether publication of such article amounts to freedom of speech, and whether it is simply distasteful rather than unlawful, but whether it offends a particular religious and/or national group in terms that are likely to amount to persecution.

Having carefully analysed the reprehensible cartoon comments published by Charlie Hebdo, as an organization of Muslim Lawyers, members of the AML are deeply offended by the images and text used in the cartoons, and it is our joint and firm belief that in publishing these cartoons the editors of Charlie Hebdo are in breach of a litany of other international conventions, by publishing material with the sole aim of inciting racial hatred and persecution and vilifying migrants, in particular Muslim migrants. We believe that the cartoons are in addition aimed at ridiculing not only the plight of the Muslims (as portrayed in the cartoon), but people of other faiths as well, to minimise any empathy towards refugees or migrants. In this vein, the SBL and the AML strongly urge the Office of the Prosecutor to immediately invoke its powers under Article 15 of the Rome Statute and initiate an urgent investigation into this matter, on the "basis of information on crimes within the jurisdiction of the Court" as per Article 15(1).

It is our view that Charlie Hebdo's deplorable and inexcusable description of Muslim refugees as being left to drown whilst Christian ones are saved is a clear incitement to religious hatred. At a time when attacks against refugees and against Muslims are at an unprecedented level and increasing across Europe, these comments are extremely dangerous and inflammatory.

We note the purported limitation on the jurisdiction of the ICC, however it would be unfortunate if the ICC had a habit to seek to investigate hate speech in Africa but ignore or tolerate hate speech that occurred within Europe. There is no evidence that the French authorities have shown any indication of prosecuting or investigating Charlie Hebdo for such incitement.

The consequences of such cartoons are the creation of an atmosphere of hatred and

xenophobia which influences the minds of ordinary people and can rapidly descend into a violent uprising.

Referring to the inciting comments that led to the genocide in Rwanda may be seen as extreme, however, the jurisprudence of the International Criminal Tribunal for Rwanda (“ICTR”) has demonstrated in the seminal cases of the *Prosecutor v Rutaganda*² and *Prosecutor v Musema*³, that “incitement to commit an offence, under Article 6(1) of the Statute of the ICTR involves instigating another directly and publicly to commit an offence”. The ICTR has also addressed and defined the elements of the crime of direct and public incitement to genocide in a litany of decisions. In the *Prosecutor v Akayesu*⁴ the ICTR went as far as emphasising the inchoate nature of the crime of genocide by declaring thus;

*“Genocide clearly falls within the category of crimes so serious that direct and public incitement to commit such a crime must be punished as such, even where such incitement failed to produce the result expected by the perpetrator”*⁵.

The Appeals Chamber for the ICTR in the *Prosecutor v. Nahimana, Barayagwiza, & Ngeze*⁶ also referred to as the Media Case trial,⁷ on careful consideration, upheld the convictions and substantial sentence of three media leaders for crimes of speech committed through radio broadcasts and Newspaper publications in the run up to the 1994 genocide in Rwanda. In fact, the Newspaper in question, namely the Kangura, was found to have published ethnic hatred and threats that “had the effect of poison”⁸ and led to the spread of fear mongering and hate propaganda⁹ which paved the way for the resultant genocide in Rwanda.

The magazine Charlie Hebdo, having taken the provocative and irresponsible step to publish the racist and xenophobic cartoons and statements in question ought to be the subject of a prosecution. The magazine’s Editors should be warned to desist from using the platform it has to disseminate hate speech and incite hatred against migrants and refugees, as both domestic and international law prohibits such actions.

The intention of those responsible is an important consideration. It is our view that both the cartoonists concerned, the Editors and owners of Charlie Hebdo would have known all too well the historical significance of those images. The aggravating evidential features that we rely upon are as follows:

1. There was no apology from the magazine nor is there likely to be, to those who are insulted, and humiliated by these abusive comments;
2. The publication outlet has not taken any disciplinary action against the journalists or Editors concerned;
3. The cartoons and comments of incitement were made as a direct reference to the death of Aylan Kurdi, as well his 5 year old brother and his mother. This is against the background of some 2,500 men, women and children having died in

- the Mediterranean or being subjected to violence, intimidation and threats to their life in Libya and fleeing war and persecution in Syria;
4. Many of the migrants were undoubtedly fleeing persecution and oppression in either the Middle East or sub-Saharan Africa and would qualify for international protection under the 1951 Geneva Convention;
 5. The comments are the latest example in a long line of racist and xenophobic abuse targeted at migrants by Charlie Hebdo in the last ten years;
 6. The Charlie Hebdo magazine and its online presence have a market of some 200,000 sales;
 7. By comparison, the expert opinion of the United Nations High Commissioner for Human Rights, Zeid Ra'ad Al Hussein, was that the Katie Hopkins column recalled Europe's darkest days of fascist hate speech and should be subject to prosecution. This is similar to the expressions of Charlie Hebdo which are the subject of this letter.

In light of the above, the SBL and the AML respectfully request that the Office of the Prosecutor investigate whether the journalists/editors/owners of Charlie Hebdo are individually or collectively liable for committing violations under the Rome Statute and other applicable laws as per Article 21 (1) (b).

We have taken the liberty to enumerate below some of the international conventions that we believe can be relied upon to expose the violations committed by the editors and cartoonists at Charlie Hebdo:

International Conventions

- I. Universal Declaration of Human Rights (UDHR) 1948. Article 7 of the UDHR states that: "All are equal before the law and are entitled without any discrimination to equal protection of the law. All are entitled to equal protection against any discrimination in violation of this Declaration and against any incitement to such discrimination.
- II. The European Convention of Human Rights ("ECHR") 1950. Article 10 (2) (Freedom of Expression) states that: "The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary". Article 14 of the Convention states that: "The enjoyment of the rights and freedoms set forth in this Convention shall

be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or status.” This was also replicated in part in: Article 1 of Protocol 12 to the Convention for the Protection of Human Rights and Fundamental Freedoms of the ECHR which states thus: 1. “The enjoyment of any right set forth by law shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.” 2. “No one shall be discriminated against by any public authority on any ground such as those mentioned in paragraph 1”.

III. United Nations International Covenant on Civil and Political Rights 1966 (“ICCPR”). Article 20(2) of ICCPR states that:

“Any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law”.

IV. International Convention on the Elimination of All Forms of Racial Discrimination 1965.

Article 4 of the states that:

“States Parties condemn all propaganda and all organizations which are based on ideas or theories of superiority of one race or group of persons of one colour or ethnic origin, or which attempt to justify or promote racial hatred and discrimination in any form, and undertake to adopt immediate and positive measures designed to eradicate all incitement to, or acts of, such discrimination and, to this end, with due regard to the principles embodied in the Universal Declaration of Human Rights and the rights expressly set forth in article 5 of this Convention, inter alia:

(a) Shall declare an offence punishable by law 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 colour or ethnic origin, and also the provision of any assistance to racist activities, including the financing thereof;

(b) Shall declare illegal and prohibit organizations, and also organized and all other propaganda activities, which promote and incite racial discrimination, and shall recognize participation in such organizations or activities as an offence punishable by law;

(c) Shall not permit public authorities or public institutions, national or local, to promote or incite racial discrimination”.

We also recommend that the following principles of international law recommended to member states on hate speech should be considered alongside the international legal conventions set out above.

Principle I:

Recommendation No. R (97) 20 Of The Committee Of Ministers To Member States On

"Hate Speech".

Principle 2:

“The governments of the member states should establish or maintain a sound legal framework consisting of civil, criminal and administrative law provisions on hate speech which enable administrative and judicial authorities to reconcile in each case respect for freedom of expression with respect for human dignity and the protection of the reputation or the rights of others.

To this end, governments of member states should examine ways and means to:

- stimulate and co-ordinate research on the effectiveness of existing legislation and legal practice;
- review the existing legal framework in order to ensure that it applies in an adequate manner to the various new media and communications services and networks;
- develop a co-ordinated prosecution policy based on national guidelines respecting the principles set out in this recommendation;
- add community service orders to the range of possible penal sanctions;
- enhance the possibilities to combat hate speech through civil law, for example by allowing interested non-governmental organisations to bring civil law actions, providing for compensation for victims of hate speech and providing for the possibility of court orders allowing victims a right of reply or ordering retraction;
- provide the public and media professionals with information on legal provisions which apply to hate speech”.

Principle 3:

“The governments of the member states should ensure that in the legal framework referred to in Principle 2, interferences with freedom of expression are narrowly circumscribed and applied in a lawful and non- arbitrary manner on the basis of objective criteria. Moreover, in accordance with the fundamental requirement of the rule of law, any limitation of, or interference with, freedom of expression must be subject to independent judicial control. This requirement is particularly important in cases where freedom of expression must be reconciled with respect for human dignity and the protection of the reputation or the rights of others”.

Principle 4:

“National law and practice should allow the courts to bear in mind that specific instances of hate speech may be so insulting to individuals or groups as not to enjoy the level of protection afforded by Article 10 of the European Convention on Human Rights to other forms of expression. This is the case where hate speech is aimed at the destruction of the rights and freedoms laid down in the Convention or at their limitation to a greater extent than provided therein”.

Principle 5:

“National law and practice should allow the competent prosecution authorities to give special attention, as far as their discretion permits, to cases involving hate speech. In this regard, these authorities should, in particular, give careful consideration to the suspect’s right to freedom of expression given that the imposition of criminal sanctions generally constitutes a serious interference with that freedom. The competent courts should, when imposing criminal sanctions on persons convicted of hate speech offences, ensure strict respect for the principle of proportionality”.

Principle 6:

“National law and practice in the area of hate speech should take due account of the role of the media in communicating information and ideas which expose, analyse and explain specific instances of hate speech and the underlying phenomenon in general as well as the right of the public to receive such information and ideas. To this end, national law and practice should distinguish clearly between the responsibility of the author of expressions of hate speech, on the one hand, and any responsibility of the media and media professionals contributing to their dissemination as part of their mission to communicate information and ideas on matters of public interest on the other hand”.

Principle 7:

“In furtherance of Principle 6, national law and practice should take account of the fact that:

- reporting on racism, xenophobia, anti-Semitism or other forms of intolerance is fully protected by Article 10, paragraph 1, of the European Convention on Human Rights and may only be interfered with under the conditions set out in paragraph 2 of that provision;
- the standards applied by national authorities for assessing the necessity of restricting freedom of expression must be in conformity with the principles embodied in Article 10, as established in the case law of the Convention’s organs, having regard, inter alia, to the manner, content, context and purpose of the reporting;
- respect for journalistic freedoms also implies that it is not for the courts or the public authorities to impose their views on the media as to the types of reporting techniques to be adopted by journalists.

The Committee of Ministers’ Declaration on freedom of political debate in the media, adopted in February 2004, holds that defamation or insult by the media should not lead to prosecution, “unless the seriousness of the violation of the rights or reputation of others makes it a strictly necessary and proportionate penalty, especially where other fundamental rights have been seriously violated through defamatory or insulting statements in the media, such as hate speech”.

It is worthy to note that the Committee of Ministers, in Recommendation No. 8 in **R (1997) 20**, provided the following working definition for hate speech disseminated through the media. They declared thus:

“The term ‘hate speech’ shall 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: intolerance expressed by aggressive nationalism and ethnocentrism, discrimination and hostility against minorities, migrants and people of immigrant origin.”¹⁰

The European Court of Human Rights also referred to “all forms of expression which spread, incite, promote or justify hatred based on intolerance (including religious intolerance)” in its *Gunduz v. Turkey* judgment of 4 December 2003, paragraph 40 as offending the provisions of Article 10 of the ECHR. It is worth noting that the ECHR have strongly indicated that:

“no difference in treatment which is based exclusively or to a decisive extent on a person’s ethnic origin is capable of being objectively justified in a contemporary democratic society built on the principles of pluralism and respect for different cultures.”

Crimes Against Humanity

The Rome Statute equally posits that “crimes against humanity” means any of the acts mentioned in Article 7 if committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack. Article 7 (h) states that:

“Persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender as defined in paragraph 3 or other grounds that are universally recognised as impermissible under international law in connection with any act referred to in this paragraph or any crime within the jurisdiction of the Court.”

In light of the above, we most humbly wish to reiterate that the initiation of an investigation by the ICC will send a strong and clear message to those involved in either committing or aiding and abetting the aforementioned crimes, to be held liable for their actions and we hope that sanctions will follow.

It is our view that these measures will help to end the continuing breaches of international law as well as the reckless impunity that underpins the media frenzy surrounding situations such as the refugees’ and migrants’ crisis, which often results in the incitement of racial hatred and subsequent loss of life.

Yours sincerely,

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