

**OHCHR expert workshops
on the prohibition of incitement to national, racial or religious hatred**

**Expert workshop on Africa
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I. Introduction

The topic of the 2011 expert workshops on the prohibition of incitement to national, racial or religious hatred is highly relevant for our three mandates as Special Rapporteurs, i.e. on racism, racial discrimination, xenophobia and related intolerance, freedom of religion or belief and freedom of opinion and expression. We welcome the organization by the Office of the High Commissioner for Human Rights of these expert workshops and the possibility for us to contribute to these important discussions.

The expert workshops touch upon the rights and freedoms enshrined in the following provisions of international human rights instruments:

- Article 18 of the Universal Declaration of Human Rights (UDHR) and of the International Covenant on Civil and Political Rights (ICCPR) on freedom of thought, conscience and religion;
- Article 19 of the UDHR and of the ICCPR on freedom of opinion and expression, respectively;
- Article 20 of the ICCPR on the prohibition of any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence; and
- Article 4 of the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD) on the eradication of incitement to racial discrimination as well as acts of violence or incitement to such acts.

In the present written submission, we first explore some legislative and judicial practices in the workshop's region, Africa, and policies conducive to effectively prohibit and prevent advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence (chapter II). We then provide some concluding remarks concerning the protection of individuals against incitement to national, racial or religious hatred (chapter III).

II. Legislative and judicial practices as well as policies in Africa

At the outset, we would like to refer to some examples and pertinent recommendations from our mandates' country fact-finding visits in Africa and our communications sent to States to help review legislative and judicial practices and policies.

1. Legislative practices

In his Human Rights Council report on **Mauritania**¹, the then Special Rapporteur on racism noted that Mauritanian law, including article 1 of the Constitution, prohibits incitement to acts of racial or ethnic discrimination and contains a series of provisions that criminalize the dissemination of ideas based on racial superiority or hatred, incitement to racial discrimination and violence or provocation against another race or a group of a different colour or ethnic origin. Article 3 of Order No. 91-023 of 25 July 1991 on freedom of the press prohibits ethnic or regional hatred and prejudice and any acts considered crimes or offences. In addition, article 4 of Order No. 091-024 of 25 July 1991 on political parties states that “political parties shall ensure that their statutes, programmes, public statements and political activities are free from incitement to intolerance and violence or propaganda intended to undermine territorial integrity or national unity”. Special Rapporteur Doudou Diène recommended the insertion of specific provisions on racial and ethnic discrimination in the Criminal Code.² Notwithstanding the existence of provisions proclaiming the principles of equality in various items of legislation, including the Constitution, he recommended the adoption of comprehensive legislation against all forms of discrimination, incorporating a definition of discrimination that is applicable in all areas of social life and that contains all the elements of article 1 of the International Convention on the Elimination of All Forms of Racial Discrimination.

In his Human Rights Council report on **Côte d’Ivoire**,³ the then Special Rapporteur on freedom of opinion and expression urged the Government to draft specific bills and laws regarding hatred and hateful propaganda in the framework of the exercise of freedom of opinion and expression, in light of the provisions contained in articles 10 and 13 of the Constitution. Special Rapporteur Ligabo also endorsed the concerns and the recommendations of the Committee on the Elimination of Racial Discrimination (see CERD/C/62/CO/1, para. 16: “Noting with concern that some of the national media have used propaganda to incite war and encourage hatred and xenophobia, the Committee recommends that the State party continue its efforts to take the necessary measures to put an end to this practice”).

During his visit to Côte d’Ivoire in 2004, the then Special Rapporteur on racism found that withdrawal into a core identity had given rise to a tendency to conflate ethnicity and religion, which he characterized as a particularly dangerous shift.⁴ Thus it emerges from reports received by Special Rapporteur Diène that northerners, foreigners and those who opposed the President were being termed Muslims. Some of the media have fanned the hatred of certain sections of the population for Muslim communities, who have apparently been accused of wishing to “incinerate Côte d’Ivoire”. Special Rapporteur Diène received reports of a proliferation of Islamophobic acts such as damage to places of worship, the destruction of Muslims’ property, and violence, torture and summary executions of members of the Muslim faith. In his annual report to the Human Rights Council in 2010, the current Special Rapporteur on racism stressed the importance remaining vigilant vis-à-vis incitement to violence or hatred; Special Rapporteur Githu Muigai also quoted from Security Council resolution 1727 (2006) on the situation in Côte d’Ivoire, which refers specifically to the issue of public incitement to hatred and violence.⁵

¹ A/HRC/11/36/Add.2, para. 20.

² Ibid., para. 80.

³ E/CN.4/2005/64/Add.2, paras. 67 and 69.

⁴ E/CN.4/2005/18/Add.3, para. 53.

⁵ See A/HRC/14/43, paras. 42-43 and Security Council res. 1727 (2006), para. 12: “Underlines that it is fully prepared to impose targeted measures against persons to be designated by the Committee who are determined to

2. Judicial practices

We have received a number of reports regarding expressions of incitement to national, racial or religious hatred. Some of the incidents were allegedly not followed up by the local authorities despite that concrete information had been filed by the alleged victims with the police.

In the Human Rights Council report on **Nigeria**⁶, the then Special Rapporteur on freedom of religion or belief urged the Government to strengthen early warning mechanisms with respect to religious tensions and communal violence. Over the last few years, a number of violent riots and other attacks have occurred in several locations in Nigeria and caused the deaths of several thousand people. Special Rapporteur Asma Jahangir noted that according to the majority of the reports submitted to her, the authorities in most cases did not initiate the mechanisms designed to prosecute the offenders and compensate the victims. Despite efforts to secure information, the Special Rapporteur has not received figures or other factual information on prosecutions initiated after the riots and remedies provided to the victims. On numerous occasions, the Special Rapporteur unsuccessfully tried to obtain from government officials copies of reports of commissions of inquiry that had been established by the Government to investigate the causes and circumstances of some of the riots.⁷ The Special Rapporteur reminded the Government to abide by its basic obligation to ensure the protection and security of religious groups which may be targeted and which should be entitled to practise their religions freely and without any obstacles, including those created by non-State actors. The then Special Rapporteur recommended that the Government reassess the efficiency of its mechanisms in order to be able to intervene in a timely and proper manner when such violence occurs.

In a communication sent to the Government of **Egypt** on 30 November 2010,⁸ the present Special Rapporteur on freedom of religion or belief referred to attacks on Coptic Christians in the village of Elnawahed after a rumour that a 19-year-old Coptic Christian had raped a 17-year-old Muslim girl. In the wake of that rumour, Muslim villagers, allegedly instigated by the village mayor, arranged an attack on the houses of the Coptic Christians and subsequently set twenty-two of their houses on fire. The Special Rapporteur reiterated that the General Assembly, in its resolution 64/164, urges States “to take all necessary and appropriate action, in conformity with international standards of human rights, to combat hatred, discrimination, intolerance and acts of violence, intimidation and coercion motivated by intolerance based on religion or belief, as well as incitement to hostility and violence, with particular regard to members of religious minorities in all parts of the world”. In its reply letter of 20 December 2010,⁹ the Government of Egypt referred to the announcement by the Governor of Qina that compensation would be paid to families that had sustained damages as a result of these incidents. The Government also indicated that the investigation by the Office of the Public Prosecutor remained ongoing, pending receipt of the technical reports that it had requested and the arrest and summoning of the suspects indicated in the investigations, who are fugitives.

On 30 April 2009, the Special Rapporteur on freedom of expression sent an urgent appeal to the Government of **Uganda**¹⁰ regarding the physical attacks against Mr. David Kato and Mr. Julian “Pepe” Onziema, both members of Sexual Minorities Uganda (SMUG) and the media

be, among other things [...] (e) inciting publicly hatred and violence [...]”. See also Security Council res. 1933 (2010), paras. 10 and 16; res. 1946 (2010), paras. 6-7; res. 1962 (2010), para. 12; and res. 1967 (2011), para. 10.

⁶ E/CN.4/2006/5/Add.2, para. 113.

⁷ *Ibid.*, para. 87.

⁸ See A/HRC/16/53/Add.1, paras. 107-110 and 119-120.

⁹ *Ibid.*, paras. 111-118.

¹⁰ A/HRC/14/23/Add.1, paras. 2483-2489.

campaign against human rights defenders who work with lesbian, gay, bisexual, transgender and intersex (LGBTI) human rights organizations. On 19 April 2009, the newspaper Sunday Pepper published an article, self-described as a “killer dossier”, listing the names of several human rights defenders and other LGBTI people. The article contained pictures, names, physical descriptions, details about their profession and residence, and negative stereotyping and accusations of “spreading the gay and lesbian vice in schools”. As it had announced, the Sunday Pepper published a follow up report on 26 April 2009, containing new names of LGBTI people and pictures of SMUG members. According to reports received, the Ugandan authorities are allegedly contributing to the climate of hostility against LGBTI defenders through repeated defamatory statements both to the media and Parliament. On 2 April 2009, the Government owned newspaper New Vision reported comments made by the Minister of Ethics and Integrity, who stated that defenders working on sexual orientation and gender identity, being self-confessed LGBTI people, should be investigated and punished. LGBTI defenders have reportedly been the subject of an increased level of harassment and threats in recent weeks including death threats. The urgent appeal of 30 April 2009, mentioned fears that such a smear campaign will further incite hatred and violence against human rights defenders and members of the LGBTI community. The Special Rapporteur expressed concern that the physical attacks on Mr. David Kato and the media harassment of other members of the LGBTI community might be related to their peaceful activities in defence of LGBTI rights. Subsequently, Mr. Kato and two other litigants took the local newspaper “Rolling Stone” to court, successfully securing an injunction against the newspaper to prevent it publishing similar stories in future. On 26 January 2011, Mr. David Kato was beaten to death at his home outside of Kampala. In a press statement of 1 February 2011,¹¹ the United Nations High Commissioner for Human Rights emphasized that in the months leading up to his death, Mr. Kato had been a target of a hate-campaign mounted by a local newspaper, which printed his name, photograph and address alongside those of dozens of others the paper claimed were gay or lesbian, and called for them to be hanged. The High Commissioner referred to remarks of the United Nations Secretary-General, delivered on 10 December 2010, at an event on ending violence and criminal sanctions based on sexual orientation and gender identity: “Violence will end only when we confront prejudice. Stigma and discrimination will end only when we agree to speak out. That requires all of us to do our part. To speak out at home, at work, in our schools and communities. To stand in solidarity.”¹²

In a joint press statement of 4 January 2008,¹³ fourteen Special Procedures mandate holders expressed their deep concern at the events that had occurred in **Kenya** following contested election results. They strongly condemned the extreme violence that took place in the town of Eldoret on 1 January 2008, when dozens of civilians, including women and children, were killed after a mob set fire to a church where they had taken sanctuary. In this regard, the Special Procedures mandate holders were profoundly alarmed by the reports of incitement to racial hatred and the growing friction between the different ethnic groups in Kenya. In the light of historical precedents in the region, they strongly appealed to the Kenyan authorities, as well as political, ethnic and religious leaders, to put an end to what may become the dynamics of inter-ethnic killings, while also calling upon the international community, including the United Nations Security Council, to fulfil its responsibilities in this regard. Furthermore, the Special Procedures mandate holders were deeply concerned by allegations regarding the limitations imposed on the right to freedom of expression, in particular a specific ban prohibiting live coverage of events in Kenya.

¹¹ <http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=10750&LangID=E>.

¹² http://www.un.org/apps/news/infocus/sgspeeches/statments_full.asp?statID=1034.

¹³ <http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=2122&LangID=E>.

We are also worried about the vague formulation of some domestic legal provisions designed to combat incitement of hatred, discord and intolerance. In the Human Rights Council report on **Angola**,¹⁴ for example, the then Special Rapporteur on freedom of religion or belief noted that four men were arrested on 12 July 2007, during a religious mass while peacefully protesting against the newly appointed Catholic Bishop of Cabinda. The group of defiant Catholics demonstrated by exhibiting pamphlets and red and black scarves, symbolizing blood and grief. They were holding placards with the slogans “The Church of Cabinda is divided”, “The voice of the people is the voice of God” and “Dom Filomeno does not represent heaven for the believers”. The arrest by Provincial Criminal Investigative Police officers, prosecution and conviction by Cabinda Provincial Criminal Court on 23 July 2007, resulting in suspended sentences of three of these amounted to a clear violation of their right to freedom of religious expression. They were charged under a draconian Colonial era Decree dating from 1911, with “injury against a public authority” and “inciting violence against a religious authority”. Special Rapporteur Jahangir called on the Government and other relevant parties to respect international human rights law, particularly the right to freedom of religion or belief but also other interrelated and interdependent rights, for example freedom of expression, association, assembly, liberty and security of the person.¹⁵ Furthermore, Special Rapporteur Jahangir urged that intra-religious dialogue between opposed religious factions is facilitated. Several Special Rapporteurs also took up cases of arrests of human rights defenders and the judicial ban of the Civic Association of Cabinda following allegations that the organization was carrying out political activities and inciting violence.¹⁶

On 24 July 2009, the Special Rapporteur on freedom of opinion and expression sent an urgent appeal to **Somalia**¹⁷ regarding the arrest and detention of the director and news editor of Radio Horyaaland. The two Somaliland journalists were arrested on 13 July 2009 at the radio station in Hargeisa for allegedly inciting clan violence on the border between Gabiley and Awdal provinces in Somaliland. The police chief reportedly claimed that the two journalists had been arrested due to misrepresenting events and inciting violence. However, it has been alleged that Radio Horyaaland merely stated that there “was no positive conclusion” to a meeting held on 10 July 2009, between elders of Gabiley and President Dahir Rayale Kahin to discuss inter-clan violence, which ended in dispute and led to an incident of inter-clan violence the next day. Reports also claim that the Attorney-General, in turn, accused local independent TV broadcaster Horn Cable TV (HCTV) of having incited further bloodshed through its 11 July programming, which showed footage of that day’s violence between clan members. HCTV was banned on 15 July 2009, two days after the arrests of the two journalists. The Special Rapporteur expressed concern that the journalists’ arrest and detention and the banning of HCTV might represent a direct attempt to stifle freedom of expression and to suppress independent media in Somaliland, particularly in light of elections to be held in September 2009. The Government of Somalia did not transmit a reply to the Special Rapporteur’s urgent appeal of 24 July 2009.

3. Policies

We would like to briefly refer to some policies and civil society initiatives conducive to effectively prohibit and prevent advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence.

¹⁴ A/HRC/7/10/Add.4, para. 33.

¹⁵ Ibid., para. 51.

¹⁶ See A/HRC/16/44/Add.1, paras. 34-36; A/HRC/7/10/Add.4, paras. 30-31; and A/HRC/4/27/Add.1, paras. 22-23.

¹⁷ A/HRC/14/23/Add.1, paras. 2154-2159.

In a joint statement for the 2009 **OHCHR seminar on the prevention of genocide**,¹⁸ several Special Procedures mandate holders referred to the situation leading to the genocide in Rwanda in 1994. A year before the outbreak of genocide, the Special Rapporteur on extrajudicial, arbitrary and summary executions, Mr. Bacre Ndiaye, visited Rwanda. In his country report, Mr. Ndiaye stated that “the cases of intercommunal violence brought to the Special Rapporteur’s attention indicate very clearly that the victims of the attacks, Tutsis in their overwhelming majority of cases, have been targeted solely because of their membership of a certain ethnic group”, adding that the Convention on the Prevention and Punishment of the Crime of Genocide “might therefore be considered to apply to these cases”.¹⁹ He recommended that “a national reconciliation campaign should be organized in order to attempt to eliminate the negative effects in people’s minds of the odious disinformation advocating ethnic and political intolerance, hatred and violence which has been disseminated in the past”.²⁰ Five weeks before the genocide started, the Special Rapporteur presented his country report to the Commission on Human Rights and flagged that not only had no comments been received from the authorities of Rwanda concerning his conclusions and recommendations but the situation in that country had worsened.

The tragedy of Rwanda and other instances of large-scale violence have triggered a review of United Nations actions in this regard. More recently, with the appointment of the Special Advisor on the prevention of genocide in 2004, the convening of the 2005 World Summit and the emergence of the “Responsibility to Protect” doctrine, emphasis has been rightly put on strategies to take prompt action on early warning signs. In this context, the Special Procedures mandate holders made the following recommendations during the OHCHR seminar in 2009: (1) The Rwanda example clearly shows that effective channels of communication are needed between different parts of the United Nations system; (2) Member States have the main responsibility to facilitate the work of, and cooperate with, Special Procedures to prevent crimes against humanity and genocide; and (3) Relevant stakeholders could also benefit more from specific recommendations of Special Procedures following large-scale violence in order to address the root causes of such violence and prevent its recurrence.²¹

On 25 February 2011, in their joint statement delivered at the 15th Special Session of the Human Rights Council on the human rights situation in the **Libyan Arab Jamahiriya**, all Special Procedures mandate holders noted with concern the use of provocative language in a recent statement made by the Libyan President and they emphasized that “inciting violence will only lead to an escalation of the situation and to further violations.”²² The Human Rights Council, in its resolution S-15/1, also expressed “deep concern at the deaths of hundreds of civilians and rejecting unequivocally the incitement to hostility and violence against the civilian population made from the highest level of the Libyan Government”.

¹⁸ See joint statement of 21 January 2009 by the Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance; the Special Rapporteur on freedom of religion or belief; the Special Rapporteur on extrajudicial, summary or arbitrary executions; the Special Rapporteur on violence against women, its causes and consequences; the Special Rapporteur on independence of judges and lawyers; the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people; the Independent Expert on minority issues; and the Working Group on arbitrary detention (<http://www2.ohchr.org/english/events/RuleofLaw/docs/SProceduresJointStatement.pdf>).

¹⁹ E/CN.4/1994/7/Add.1, para. 79 (published in August 1993).

²⁰ *Ibid.*, para. 68.

²¹ <http://www2.ohchr.org/english/events/RuleofLaw/docs/SProceduresJointStatement.pdf>. See also the chapter on “Racism, racial discrimination, xenophobia and related intolerance in situations of conflict” in the annual report to the Human Rights Council in 2010 of the Special Rapporteur on racism (A/HRC/14/43, paras. 24-30).

²² [www.unog.ch/80256EDD006B9C2E/\(httpNewsByYear_en\)/2952F407FC5EBC8DC1257842005CEC70?OpenDocument](http://www.unog.ch/80256EDD006B9C2E/(httpNewsByYear_en)/2952F407FC5EBC8DC1257842005CEC70?OpenDocument)

The **Johannesburg Principles on National Security, Freedom of Expression and Access to Information**²³ were adopted on 1 October 1995 and have been endorsed by the Special Rapporteur on freedom of opinion and expression in several reports and referred to by the Commission on Human Rights in annual resolutions on freedom of expression since 1996. The Johannesburg Principles refer to issues of incitement in the following provisions:

“Principle 2: Legitimate National Security Interest

(a) A restriction sought to be justified on the ground of national security is not legitimate unless its genuine purpose and demonstrable effect is to protect a country’s existence or its territorial integrity against the use or threat of force, or its capacity to respond to the use or threat of force, whether from an external source, such as a military threat, or an internal source, such as incitement to violent overthrow of the government. [...]

Principle 6: Expression That May Threaten National Security

Subject to Principles 15 and 16, expression may be punished as a threat to national security only if a government can demonstrate that:

- (a) the expression is intended to incite imminent violence;
- (b) it is likely to incite such violence; and
- (c) there is a direct and immediate connection between the expression and the likelihood or occurrence of such violence.

Principle 7: Protected Expression

(a) Subject to Principles 15 and 16, the peaceful exercise of the right to freedom of expression shall not be considered a threat to national security or subjected to any restrictions or penalties. Expression which shall not constitute a threat to national security includes, but is not limited to, expression that:

- (i) advocates non-violent change of government policy or the government itself;
- (ii) constitutes criticism of, or insult to, the nation, the state or its symbols, the government, its agencies, or public officials, or a foreign nation, state or its symbols, government, agencies or public officials;
- (iii) constitutes objection, or advocacy of objection, on grounds of religion, conscience or belief, to military conscription or service, a particular conflict, or the threat or use of force to settle international disputes;
- (iv) is directed at communicating information about alleged violations of international human rights standards or international humanitarian law.

(b) No one may be punished for criticizing or insulting the nation, the state or its symbols, the government, its agencies, or public officials, or a foreign nation, state or its symbols, government, agency or public official unless the criticism or insult was intended and likely to incite imminent violence.”

The **Camden Principles on Freedom of Expression and Equality**²⁴, prepared in 2009, represent a progressive interpretation of international law and standards, accepted State practice (as reflected, inter alia, in national laws and the judgments of national courts), and the general principles of law recognized by the community of nations. The Camden Principles also address the issue of incitement to hatred and in this context Principle 12 provides the following:

“12.1. All States should adopt legislation prohibiting any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence (hate

²³ E/CN.4/1996/39, Annex.

²⁴ See <http://www.article19.org/advocacy/campaigns/camden-principles>.

speech). National legal systems should make it clear, either explicitly or through authoritative interpretation, that:

- i. The terms ‘hatred’ and ‘hostility’ refer to intense and irrational emotions of opprobrium, enmity and detestation towards the target group.
- ii. The term ‘advocacy’ is to be understood as requiring an intention to promote hatred publicly towards the target group.
- iii. The term ‘incitement’ refers to statements about national, racial or religious groups which create an imminent risk of discrimination, hostility or violence against persons belonging to those groups.
- iv. The promotion, by different communities, of a positive sense of group identity does not constitute hate speech.

12.2. States should prohibit the condoning or denying of crimes of genocide, crimes against humanity and war crimes, but only where such statements constitute hate speech as defined by Principle 12.1.

12.3. States should not prohibit criticism directed at, or debate about, particular ideas, beliefs or ideologies, or religions or religious institutions, unless such expression constitutes hate speech as defined by Principle 12.1.

12.4. States should ensure that persons who have suffered actual damages as a result of hate speech as defined by Principle 12.1 have a right to an effective remedy, including a civil remedy for damages.

12.5. States should review their legal framework to ensure that any hate speech regulations conform to the above.”

We also note the positive development of the adoption, without a vote, by the **Human Rights Council** of resolution 16/18, entitled “Combating intolerance, negative stereotyping and stigmatization of, and discrimination, incitement to violence, and violence against persons based on religion or belief”.²⁵ In this resolution, the Human Rights Council “condemns any advocacy of religious hatred that constitutes incitement to discrimination, hostility or violence, whether it involves the use of print, audio-visual or electronic media or any other means” (operative paragraph 3). It also “recognizes that the open public debate of ideas, as well as interfaith and intercultural dialogue at the local, national and international levels can be among the best protections against religious intolerance, and can play a positive role in strengthening democracy and combating religious hatred, and convinced that a continuing dialogue on these issues can help overcome existing misperceptions” (operative paragraph 4). Furthermore, the resolution notes the speech given by Secretary-General of the Organization of the Islamic Conference, Ekmeleddin İhsanoğlu, at the 15th session of the Human Rights Council and draws on his call on States to take several actions to foster a domestic environment of religious tolerance, peace and respect (operative paragraph 5 (a) to (h)). Finally, the Human Rights Council “calls for strengthened international efforts to foster a global dialogue for the promotion of a culture of tolerance and peace at all levels, based on respect for human rights and diversity of religions and beliefs, and decides to convene a panel discussion on this issue at its seventeenth session within existing resources” (operative paragraph 9). We very much appreciate that the Human Rights Council has – after years of debate – ultimately found a way to unanimously address these worrying phenomena without referring to concepts or notions that would undermine international human rights law. In this context we would like to emphasize the principle that individuals rather than religions *per se* are the rights-holders.

²⁵ See A/HRC/16/L.38, adopted on 24 March 2011.

III. Concluding remarks

We have repeated on a number of occasions that all human rights are universal, indivisible and interdependent and interrelated. Nowhere is this interdependence more obvious than in the discussion of freedom of expression and incitement to national, racial or religious hatred.

The right to freedom of expression constitutes an essential aspect of the right to freedom of religion or belief and therefore needs to be adequately protected in domestic legislation. Freedom of expression is essential to creating an environment in which a critical discussion about religion can be held. For freedom of thought, conscience and religion to be fully realized, robust examination and criticism of religious doctrines and practices – even in a harsh manner – must also be allowed. In recent years, there have been challenges with regard to the dissemination of expressions which offend certain believers. This is not a new phenomenon and historically has concerned countries in all regions of the world and various religions and beliefs. The events of 11 September 2001, have exacerbated tensions in inter-community relations. In that context, a clear distinction should be made between three types of expression:

- expressions that constitute an offence under international law;
- expressions that are not criminally punishable but may justify a civil suit; and
- expressions that do not give rise to criminal or civil sanctions but still raise a concern in terms of tolerance, civility and respect for the religion or beliefs of others.

Notwithstanding this, let us strongly emphasize that freedom of expression and the demands of a pluralist, tolerant, broad-minded and democratic society need to be taken into consideration in all cases being examined. Freedom of expression has to be understood in the positive sense and is one of the essential foundations of a democratic and pluralistic society. We also have to generate, with the exercise of this freedom, an atmosphere of respect and understanding between peoples, cultures and religions.

We have to guarantee freedom of expression equally for all as a form to combat racism and discrimination. The Durban Review Conference Outcome Document reaffirms the positive role that the exercise of the right to freedom of opinion and expression, and the full respect for the freedom to seek, receive and impart information, can play in combating racism, racial discrimination, xenophobia and related intolerance, in line with relevant provisions of international human rights law, instruments, norms and standards.

Whereas the debate concerning the dissemination of expressions which may offend certain believers has throughout the last twelve years evolved around the notion of “defamation of religions”, we welcome the fact that the debate seems to be shifting to the concept of “incitement to national, racial or religious hatred”, sometimes also referred to as “hate speech”.

Indeed, the difficulties in providing an objective definition of the term “defamation of religions” at the international level make the whole concept open to abuse through excessive application or loose interpretation. At the national level, domestic blasphemy laws can prove counter-productive, since this could result in the de facto censure of all inter-religious and intra-religious criticism. Many of these laws afford different levels of protection to different religions and have often proved to be applied in a discriminatory manner. There are numerous examples of persecution of religious minorities or dissenters, but also of atheists and non-theists, as a result of legislation on religious offences or overzealous application of laws that use a *prima facie* neutral language. Moreover, the right to freedom of religion or belief, as enshrined in relevant international legal standards, does not include the right to have a religion or a belief that is free from criticism or ridicule.

Whereas some have argued that “defamation of religions” could be equated to racism, we would like to caution against confusion between a racist statement and an act of “defamation of religion”. We fully concur with the affirmation in the preamble of the International Convention on the Elimination of All Forms of Racial Discrimination that “any doctrine of superiority based on racial differentiation is scientifically false, morally condemnable, socially unjust and dangerous”. However, invoking a direct analogy between concepts of race or ethnicity on the one hand and religion or belief on the other hand may lead to problematic consequences. Religious adherence, membership or identity can be the result of personal choices the possibility of which constitutes an essential component of the human right to freedom of religion or belief. For this reason, freedom of religion or belief also covers the rights to search for meaning by comparing different religions or belief systems, to exchange personal views on questions of religion or belief, and to exercise public criticism in such matters. For this reason the criteria for defining religious hatred may differ from those defining racial hatred. The difficult question of what precisely constitutes religious hatred, at any rate, cannot be answered by simply applying definitions found in the area of racial hatred.

It is necessary to anchor the debate on these issues in the relevant existing international legal framework, provided for by the ICCPR. Whereas the ICCPR provides for freedom of expression, it also clearly defines limitations to it, e.g. in articles 19 and 20. Furthermore, article 20 (2) of the ICCPR requires States to prohibit expressions if they amount to advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility and violence. We would like to underline that any measure to implement article 20 of the ICCPR will have to withstand the clear test that article 19 (3) imposes for restrictions on freedom of expression.

Defining which acts might trigger article 20 (2) of the ICCPR remains difficult. What does “advocacy” mean? Who is targeted by the advocacy of hatred? What constitutes incitement to violence, hostility or discrimination? Where do we draw the line between criticism – even if deemed offensive – and hate speech? From a legal perspective, each set of facts is particular and can only be assessed and adjudicated, whether by a judge or another impartial body, according to its own circumstances and taking into account the specific context. An independent judiciary and respect for the rules of due process are therefore essential pre-conditions when prohibiting certain forms of expression.

Defining which expressions may fall under the categories of incitement to commit *genocide*, *violence* or *discrimination* may be an easier task than to determine which expressions amount to incitement to *hostility*. In the case of genocide, statements inciting violence are more evident to assess. The example of Radio Mille Collines in Rwanda with its calls for Hutus to “kill the cockroaches [Tutsis]” is a case of advocacy of racial hatred which constitutes incitement to violence. Let us never forget our duty to act swiftly when confronted with such cases and to heed early-warning signs. There is much we can learn from the relevant international criminal tribunals or courts which have addressed these difficult issues in a number of leading cases.

The notion of incitement to *hostility* may, however, be more prone to subjective approaches, very much dependent upon the perspective taken. Indeed, the alleged perpetrator of hate speech, the alleged victim, the average man on the street or a judge, may come up with completely different definitions of what constitutes – or not – incitement to hostility. We should bear in mind that whoever interprets the concepts of hostility, there always remains a risk of subjectivity. As elaborated above, the criteria for defining religious hatred or hostility cannot be simply deduced from the criteria applicable to racial hatred or hostility. It is at least

conceivable that some provocative expressions which, if directed to some person's ethnic characteristics would doubtless amount to hostility, may find a different assessment when applied to questions of religion or belief.

The OHCHR expert seminar on articles 19 and 20 of the ICCPR, held in Geneva in October 2008, identified some objective criteria to prevent arbitrary application of national legal standards pertaining to incitement to racial or religious hatred:

- The public intent of inciting discrimination, hostility or violence must be present for hate speech to be penalized;
- Any limitations on freedom of expression should be clearly and narrowly defined and provided by law. In addition, they must be necessary and proportionate to the objective they propound to achieve, i.e. prohibiting hate speech;
- Limitations should not threaten the exercise of the right itself. The least intrusive means insofar as freedom of expression is concerned should be used to prevent a chilling effect;
- The adjudication of such limitations should be made by an independent and impartial judiciary.

In addition, the Camden Principles on Freedom of Expression and Equality provide useful guidance for the interpretation of international law and standards, inter alia with regard to incitement to hatred. We would like to reiterate its Principle 12 which clarifies that the terms *hatred* and *hostility* refer to “intense and irrational emotions of opprobrium, enmity and detestation towards the target group”, that the term *advocacy* is to be understood as “requiring an intention to promote hatred publicly towards the target group” and that the term *incitement* refers to “statements about national, racial or religious groups which create an imminent risk of discrimination, hostility or violence against persons belonging to those groups”.

We should never lose sight that our ultimate goal is to find the most effective ways through which we can protect individuals against advocacy of hatred and violence by others. Hate speech is but a symptom, the external manifestation of something much more profound which is intolerance and bigotry. Therefore, legal responses, such as restrictions on freedom of expression alone, are far from sufficient to bring about real changes in mindsets, perceptions and discourse. To tackle the root causes of intolerance, a much broader set of policy measures are necessary, for example in the areas of intercultural dialogue or education for tolerance and diversity. This set of policy measures should also include strengthening freedom of expression.

The strategic response to hate speech is more speech: more speech that educates about cultural differences; more speech that promotes diversity; more speech to empower and give voice to minorities, for example through the support of community media and their representation in mainstream media. More speech can be the best strategy to reach out to individuals, changing what they think and not merely what they do.
