

**Office of the United Nations High Commissioner for Human Rights**

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**EXPERT SEMINAR ON THE LINKS BETWEEN ARTICLES 19 AND 20 OF THE  
INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS**

**“FREEDOM OF EXPRESSION AND ADVOCACY OF RELIGIOUS HATRED THAT  
CONSTITUTES INCITEMENT TO DISCRIMINATION, HOSTILITY OR VIOLENCE”**

**(GENEVA, 2-3 OCTOBER 2008)**

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*Conference room papers of the 12 experts / Documents de conférence par les 12 experts*

*Excerpt from the International Covenant on Civil and Political Rights*

**Article 19**

1. Everyone shall have the right to hold opinions without interference.
2. Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.
3. The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:
  - (a) For respect of the rights or reputations of others;
  - (b) For the protection of national security or of public order (ordre public), or of public health or morals.

**Article 20**

1. Any propaganda for war shall be prohibited by law.
2. Any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law.

*Extrait du Pacte international relatif aux droits civils et politiques*

**Article 19**

1. Nul ne peut être inquiété pour ses opinions.
2. Toute personne a droit à la liberté d'expression; ce droit comprend la liberté de rechercher, de recevoir et de répandre des informations et des idées de toute espèce, sans considération de frontières, sous une forme orale, écrite, imprimée ou artistique, ou par tout autre moyen de son choix.
3. L'exercice des libertés prévues au paragraphe 2 du présent article comporte des devoirs spéciaux et des responsabilités spéciales. Il peut en conséquence être soumis à certaines restrictions qui doivent toutefois être expressément fixées par la loi et qui sont nécessaires:
  - a) Au respect des droits ou de la réputation d'autrui;
  - b) A la sauvegarde de la sécurité nationale, de l'ordre public, de la santé ou de la moralité publiques.

**Article 20**

1. Toute propagande en faveur de la guerre est interdite par la loi.
2. Tout appel à la haine nationale, raciale ou religieuse qui constitue une incitation à la discrimination, à l'hostilité ou à la violence est interdit par la loi.

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*Opening remarks by Navanethem Pillay,  
United Nations High Commissioner for Human Rights, 2 October 2008*

Mr. President of the Human Rights Council,  
Excellencies,  
Distinguished Experts,  
Ladies and Gentleman,

It gives me great pleasure to welcome you on the occasion of the expert seminar on the links between articles 19 and 20 of the International Covenant on Civil and Political Rights.

It is particularly remarkable that we meet so close to the 60th anniversaries of both the Universal Declaration of Human Rights and the Convention on the Prevention and Punishment of the Crime of Genocide. Emerging from the tragedy of World War II, these two documents highlighted, as never before, the central place of fundamental freedoms and the dangers of intolerance.

The historical circumstances under which provisions on freedom of expression and its permissible limitations were developed in the International Covenant on Civil and Political Rights underscored convincingly the need to devise protections against incitement to discrimination and violence. This was done in order to ensure that rights are exercised while respecting the rights of others.

While the existence of these carefully defined limitations in international human rights law is indisputable, there remains little clarity over their precise meaning and concrete application. The different interpretations that exist regarding these provisions have contributed to fuelling extensive debates nationally and internationally in a variety of fora.

Convening this expert seminar today is therefore an acknowledgement of these divergent views and the recognition that additional precision regarding the contours of this vital debate would enhance the implementation of the Covenant.

As the questions before us are of an intrinsically legal nature, there is no better approach than to gather the range of legal expertise that we have around the table today, which represent varied legal traditions and regions of the world. I would like to express my sincere appreciation to the experts as I look forward to their contribution to this initiative. I would also like to thank the former acting High Commissioner for Human Rights Bertrand Ramcharan who kindly accepted to preside over this meeting.<sup>1</sup>

Dear Colleagues, let us be clear about the stakes in our discussion. By addressing possible limitations to a fundamental right, this seminar also tests whether our commitment to the full and

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<sup>1</sup> The report of the Office of the United Nations High Commissioner for Human Rights on the expert seminar in Geneva, 2 to 3 October 2008, is available in Arabic, Chinese, English, French, Russian and Spanish (see UN Doc. A/HRC/10/31/Add.3).

interdependent set of human rights is truly genuine, and not expediently used in the pursuit of political agendas. We should not lose sight of the fact that while the concept of freedom of expression has been well-established for many centuries in the legal and philosophical traditions of different cultures, its practical application and recognition are still far from universal. In many parts of the world, freedom of expression unfortunately remains a distant dream, facing resistance from those who benefit from silencing dissent and stifling criticism.

In particular, this right has too often been denied to those who are most vulnerable to arbitrary excesses of power. Religious minorities have been frequent targets of violations of freedom of expression that have directly hindered their ability to preach, pray, and practice their faith.

Religions cannot be used to advocate hatred against followers of other religions, religious minorities or non-believers. In fact, the essence of religion is to choose and exercise belief without coercion. Without the freedom to openly profess one's religious affiliation, the ability to honour religious traditions and transmit them from generation to generation is curtailed. This corroborates the view that, contrary to what has been purported by many, freedom of expression and freedom of religion are not contradictory; they are mutually dependent. Likewise, freedom of expression is essential to creating an environment in which a constructive though sometimes critical discussion about religious matters could be held.

My own personal experience has taught me that nothing is more important in the fight against repression and discrimination than the right to voice one's values, opinions and criticisms. This is how resistance to authoritarianism is built. Freedom of expression and freedom of association are essential to expose the abuses committed by those in power and to mobilize individuals to press for change.

In the era of globalization, ever-increasing migration and intersection of cultures, freedom of expression is also the best defence against the enemies of diversity. Freedom to educate others about one's cultural traditions and thus foster a cross-fertilization of cultures is a direct response to mounting intolerance and discrimination. The wealth of diversity that we are fortunate to experience today should be reflected in religious thinking itself, as both a challenge and an opportunity to promote harmonious social interactions.

At the same time, my experience as a judge in the International Criminal Tribunal for Rwanda has also showed me that virulent and hate-laden advocacy can trigger the worst of crimes. A murderous campaign calling for the extermination of the Tutsi people was broadcast live in Rwanda by Radio Mille Collines, sending poisonous messages that in tone and intent echoed the Holocaust propaganda. In international law, as well as in the jurisprudence of most national courts, it has been clearly stated that well-defined and narrowly limited classes of speech, such as the hate messages transmitted by Radio Mille Collines, can be legitimately restricted in order to safeguard against these transgressions.

Distinguished Participants, it is important to focus on these types of extreme cases to better understand our principles and goals. However, it is in less clear-cut situations that the problems of interpretation lie. Defining the line that separates protected from unprotected speech is ultimately a decision that is best made after a thorough assessment of the individual

circumstances of each case. This decision should always be guided by well-defined criteria and in accordance with international standards. I am convinced that we have much to gain from the insight of our experts in order to better understand these issues.

Let me conclude by once again emphasizing that human rights are genuinely universal and deeply rooted in all civilizations and cultures. They are not the product and the exclusive preserve of specific doctrines and traditions. Nowhere is this idea more important than in the discussion about freedom of expression and its possible limitations.

Denying that freedom of expression, freedom of religion and freedom from discrimination are universally valid and mutually reinforcing principles that transcend cultural specificities is to negate core values of humanity. Finding the appropriate ways to ensure that this set of rights is respected can only benefit from the exchange of experiences and sharp legal thinking in a multicultural setting. This is why I hope that your gathering will move us forward in the right direction.

Thank you.

## *1. Conference room paper by Agnès Callamard*

### **Introduction**

The objective of this paper is to assist the expert panel's considerations on whether articles 19 and 20 of the ICCPR are an indivisible whole, and particularly on whether **States can impose restrictions on freedom of expression without first embracing the full scope of such freedom?** The overriding objective is to clarify the nature of the obligations of States under article 20 (limitations as an option or an obligation) following a series of freedom of expression related incidents that have polarised societies, created tensions and fuelled xenophobia and racist attitudes and highlighted the substantive ambiguities as to the “demarcation line” between freedom of expression and hate speech, especially in relation to religious issues.

### **I - Why freedom of expression matters**

Built in the aftermath of the Second World War and the Holocaust, the international human rights has placed non-discrimination as a cross-cutting and central principle, present in all the major human rights treaties. The principle applies to everyone in relation to all human rights and freedoms and it prohibits discrimination on the basis of a list of non-exhaustive categories such as sex, race, colour and so on. The principle of non-discrimination is complemented by the principle of equality, as stated in Article 1 of the Universal Declaration of Human Rights: “All human beings are born free and equal in dignity and rights.”

The importance of non-discrimination to human rights is well known and well understood: human history is replete with instances of racism and intolerance giving rise to genocide and crimes against humanity. That the international community had identified discrimination and racism as an abuse of human dignity and equality, as well as a major cause of other massive violations, including genocide, requires thus little elaboration. Racism, intolerance and discrimination are abhorrent and must be combated with the utmost determination.

Less well known is the fact that international and national bodies and courts worldwide have insisted and demonstrated also that the right to freedom of expression is central to the international human rights regime and human dignity.

That may be the case because all the greatest man-made calamities that have plagued the world for centuries involved and required full control over expressions, opinions and at time conscience: the slave trade and slavery, the inquisition, the Holocaust, the genocide in Cambodia or Rwanda, the Stalin regime and the gulag, ...

Such control over freedom of expression is *“the handmaiden of power, without which it is inconceivable. It is an instrument to assist in the attainment, preservation or continuance of somebody's power, whether exercised by an individual, an institution or a state. It is the extension of physical power into the realm of the mind and the spirit....”*<sup>2</sup>

It encompasses all interferences with the right of all individuals to hold opinions and to express them without fear. It can be pursued through a range of means, both direct and indirect, making censorship particularly complex and difficult to confront and defeat<sup>3</sup>.

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<sup>2</sup> Michael Scammell, “Censorship and its History – A personal View” in 1988 ARTICLE 19 World Report, p5

<sup>3</sup> ARTICLE 19 1988 World Report, Information, Freedom and Censorship, introduction by Kevin Boyle, 1988.

For all these reasons, the importance of freedom of expression has been emphasized on numerous occasions by international courts and bodies alike.

As early as 1946, at its very first session, in the UN General Assembly adopted Resolution 59(I) which states: “*Freedom of information is a fundamental human right and ... the touchstone of all the freedoms to which the United Nations is consecrated.*”

This has been echoed by other courts and bodies. For example, the UN Human Rights Committee has said: “*The right to freedom of expression is of paramount importance in any democratic society.*”<sup>4</sup>

The European Court of Human Rights has recognised the vital role of freedom of expression as an underpinning of democracy: “*Freedom of expression constitutes one of the essential foundations of [a democratic] society, one of the basic conditions for its progress and for the development of every man.*”<sup>5</sup>

The democratic significance of freedom of expression was also recalled by the Inter-American Court of Human Rights:

*Freedom of expression is a cornerstone upon which the very existence of a democratic society rests. It is indispensable for the formation of public opinion. It is also a condition sine qua non for the development of political parties, trade union, scientific and cultural societies and, in general, those who wish to influence the public. It represents, in short, the means that enable the community, when exercising its opinions, to be sufficiently informed. Consequently, it can be said that a society that is not well informed is not a society that is truly free.*<sup>6</sup>

The guarantee of freedom of expression applies with particular force to the media. The media is an important focus of attention for freedom of expression activists: it is *the* first medium that governments and other political and economic forces attempt to control, including through seeking their complete and forced silencing. As key vehicles of communication and expression, the ability of the media to function independently is vital to freedom of expression but also to the ability of a society to function and survive.

Amyrta Sen well demonstrated that in relation to the Chinese famine of 1958-61, not only did censorship and the resulting loss of information impacted devastatingly on poor communities, it also greatly misled the government and the policies it pursued and resulted in millions of lives being lost. There is no famine where there is freedom of the press...

Censorship of the media is exercised most effectively through censorship *by* the media itself. Those who are intent on censoring others will not always seek to silence. They may also aim at dominating and containing what is being conveyed to the public, seeking control over media ownership, imposing particular editorial lines, deciding who can have access to the airwaves and for how long, determining what gets published and what does not etc.

The European Court has consistently emphasised the “*pre-eminent role of the press in a State governed by the rule of law*” and has stated: “*Freedom of the press affords the public one of the best means of discovering and forming an opinion of the ideas and attitudes of their political leaders. In particular, it gives politicians the opportunity to reflect and comment on the*

<sup>4</sup> *Tae-Hoon Park v. Republic of Korea*, 20 October 1998, Communication No. 628/1995, para. 10.3.

<sup>5</sup> *Handyside v. United Kingdom*, 7 December 1976, Application No. 5493/72, para. 49.

<sup>6</sup> *Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism (Arts 13 and 29 American Convention on Human Rights)*, Advisory Opinion OC-5/85, 13 November 1985, Series A, No 5, para 70.



*preoccupations of public opinion; it thus enables everyone to participate in the free political debate which is at the very core of the concept of a democratic society.*<sup>7</sup>

These and many other statements and evidence demonstrating a fundamental characteristic of the right to freedom of expression, including access to information and a free press: it is not only a fundamental human right, *on its own and in its own right*, but it is also a cornerstone right or, to use Donnelly and Howard's categorisation, 'empowerment' right - one that enables other rights to be protected and exercised.

Freedom of expression is essential to the democracy and the democratisation process. It forms a central pillar of the democratic framework through which all rights are promoted and protected, and the exercise of full citizenship is guaranteed. A robust democratic framework in turn, helps create the stability necessary for society to develop in a peaceful and relatively prosperous manner. Through freedom of expression, politics can unfold in an unfettered and constructive manner.

Free expression allows people to demand the right to health, to a clean environment and to effective implementation of poverty reduction strategies. It makes electoral democracy meaningful and builds public trust in administration. Access to information strengthens mechanisms to hold governments accountable for their promises, obligations and actions. It not only increases the knowledge base and participation within a society but can also secure external checks on state accountability, and thus prevent corruption that thrives on secrecy and closed environments.

The free flow of information increases the capacity of all to participate to the life of their nation or community and policy-making. If development is to be realised, people need the freedom to participate in public life, to put forward ideas and potentially have these realised and to demand, without fear of recrimination or discrimination, that governments uphold their obligations. Freedom of expression allows individuals the possibility of becoming active in the development process.

The media has a specific task of informing the public; it can enhance the free flow of information and ideas to individuals and communities, which in turn can help them to make informed choices for their lives. A free, independent and professional media, using investigative methods, plays a key role in providing knowledge and in giving voice to the marginalized, highlighting corruption and developing a culture of criticism where people are less apprehensive about questioning government action.

So whenever freedom of expression is unduly restricted, the realization of many other rights is attacked and undermined.

## **II – Article 19, UDHR and ICCPR**

Freedom of expression is guaranteed under Article 19 of the *Universal Declaration on Human Rights* (UDHR), and more or less in similar terms under article 19 of the *International Covenant on Civil and Political Rights* (ICCPR):

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<sup>7</sup> *Castells v. Spain*, 24 April 1992, Application No. 11798/85, para. 43.

*Everyone has the right to freedom of opinion and expression; this right includes the right to hold opinions without interference and to seek, receive and impart information and ideas through any media regardless of frontiers.*

Freedom of expression is also protected in all three regional human rights treaties, at Article 10 of the *European Convention on Human Rights* (ECHR), at Article 13 of the *American Convention on Human Rights* and at Article 9 of the *African Charter on Human and Peoples' Rights*.

Yet, freedom of expression is **not absolute**.

Both international law and most national constitutions recognise that freedom of expression may be restricted. However, any limitations must remain within strictly defined parameters. Article 19(3) of the ICCPR lays down the conditions which any restriction on freedom of expression must meet:

*The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary: (a) For respect of the rights or reputations of others; (b) For the protection of national security or of public order (ordre public), or of public health or morals.*

A similar formulation can be found in the ACHR and ECHR. It is vague enough to leave much discretion at the hands of states as to how they should restrict freedom of expression to protect the rights of others, national security, and particularly in the matters of personal morals, such as religion.

For instance, whereas the European Court has established particularly stringent restrictions requirements of speeches that have been deemed or characterised as "political", it has left a far greater margin of appreciation to states for restrictions targeting other forms of speeches, particularly those deemed offending public morals or religion.

*"Whereas there is little scope ... for restrictions on political speech or on debate of questions of public interest, a wider margin of appreciation is generally available to the Contracting States when regulating freedom of expression in relation to matters liable to offend intimate personal convictions within the sphere of morals or, especially, religion.*

*Moreover, as in the field of morals, and perhaps to an even greater degree, there is no uniform European conception of the requirements of "the protection of the rights of others" in relation to attacks on their religious convictions. What is likely to cause substantial offence to persons of a particular religious persuasion will vary significantly from time to time and from place to place, especially in an era characterised by an ever growing array of faiths and denominations. By reason of their direct and continuous contact with the vital forces of their countries, State authorities are in principle in a better position than the international judge to give an opinion on the exact content of these requirements with regard to the rights of others as well as on the "necessity" of a "restriction" intended to protect from such material those whose deepest feelings and convictions would be seriously offended."*

In the United States, on the other hand, the Supreme Court steadfastly strikes down any legislation prohibiting blasphemy, on the fear that even well-meaning censors would be tempted to favour one religion over another, as well as because it “is not the business of government ... to suppress real or imagined attacks upon a particular religious doctrine ...”<sup>8</sup>.

In spite of this margin of appreciation, some degrees of consistency and protection have developed over time, particularly in the form of the so-called **three part test**.

For a restriction to be legitimate, all three parts of the test must be met:

- First, the interference must be provided for by law. This requirement will be fulfilled only where the law is accessible and “formulated with sufficient precision to enable the citizen to regulate his conduct<sup>9</sup>.”
- Second, the interference must pursue a legitimate aim. The list of aims in the various international treaties is exclusive in the sense that no other aims are considered to be legitimate as grounds for restricting freedom of expression.
- Third, the restriction must be necessary to secure one of those aims. The word “necessary” means that there must be a “pressing social need” for the restriction. The reasons given by the State to justify the restriction must be “relevant and sufficient” and the restriction must be proportionate to the aim pursued.<sup>10</sup>

In conclusion, and as stated by the European Court of Human Rights: “*Freedom of expression ... is subject to a number of exceptions which, however, must be narrowly interpreted and the necessity for any restrictions must be convincingly established*<sup>11</sup>.”

### **III - Hate speech**

International law imposes one clear positive **duty** upon states as far as restrictions of freedom of expression is concerned, stated in Article 20 of the UN Covenant on Civil and Political Rights – the prohibition on war propaganda and on hate speech:

*“Any propaganda for war shall be prohibited by law”*

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

This is the only duty that States must abide by, as far as restricting freedom of expression is concerned<sup>12</sup>.

There is, however, no agreed definition of propaganda or hate speech in international law. Instead, there are marked different regional or national approaches in restricting it.

At one hand of the spectrum is the US approach which *protects* hate speech unless (1) the speech actually incites to violence and (2) the speech will likely give rise to *imminent* violence. This is a

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<sup>8</sup> *Joseph Burstyn, Inc v. Wilson*, 343 U.S. 495, 504-05 (1952).

<sup>9</sup> *The Sunday Times v. United Kingdom*, 26 April 1979, Application No. 6538/74, para. 49 (European Court of Human Rights).

<sup>10</sup> *Lingens v. Austria*, 8 July 1986, Application No. 9815/82, paras. 39-40 (European Court of Human Rights).

<sup>11</sup> *Thorgeirson v. Iceland*, 25 June 1992, Application No. 13778/88, para. 63.

<sup>12</sup> The Additional Protocol to the Convention on Cybercrime invites Parties to enact prohibitions which can be very broad (for example, on the distribution of racist material through a computer system (Article 3), or on the public insulting of persons “for the reason that they belong” to a racial or ethnic group (Article 5)). However it also permits Parties to opt out of these provisions (or effectively to do so).

very stringent standard indeed: even speech advocating violence and filled with racial insults, will be protected absent a showing that violence is likely to occur virtually immediately.

At the other hand of the spectrum are stringent restrictions on hate speeches, and the development of specific hate speech regulations for denying the Holocaust or other genocides. Nowhere are the substantial differences in the ways states will restrict hate speech clearer than in the European Union where countries have approached and dealt with hate groups and hate speeches with considerable variety, from the French or German position of high restriction, to that of the UK or Hungary where greater protection has been afforded to a variety of speeches<sup>13</sup>.

Finding a common definition of hate speech is further complicated by the fact that the International Convention on the Elimination of Racial Discrimination (ICERD) has established a different standard, which offers the most far-reaching protections against hate speech.

CERD defines discrimination as any distinction based on race, colour, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the enjoyment, on an equal footing, of any human right and/or fundamental freedom. States Parties are required to take a range of measures to combat discrimination, including by not engaging in discrimination, by providing effective remedies and by combating prejudice and promoting tolerance.

Article 4(a) of CERD places a specific obligation on States Parties to declare as offences punishable by law six categories of activity:

1. dissemination of ideas based on racial superiority;
2. dissemination of ideas based on racial hatred;
3. incitement to racial discrimination;
4. acts of racially motivated violence;
5. incitement to acts of racially motivated violence; and
6. the provision of assistance, including of a financial nature, to racist activities.

The article refers to race, colour and ethnic origin but it is probably the case that this was just poor drafting, since there does not seem to be any particular logic behind the choice of terms, and these obligations probably apply to all of the prohibited grounds of discrimination, namely race, colour, descent, and national or ethnic origin. Four of these obligations, namely (1)-(3) and (5), call for restrictions on freedom of expression<sup>14</sup>.

There is no international consensus on the requirements of Article 4 and many states have entered reservations to it<sup>15</sup> – all of which have the effect that the implementation of its

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<sup>13</sup> The Council of Europe's Committee of Ministers' Recommendation (97) 20 on "Hate Speech", *describes* the term 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".

<sup>14</sup> ARTICLE 19, Memorandum Preliminary Draft Inter-American Convention Against Racism and all Forms of Discrimination and Intolerance, April 2007

<sup>15</sup> The reservation of the USA states: "The Constitution of the United States contains provisions for the protection of individual rights, such as the right of free speech, and nothing in the Convention shall be deemed to require or to authorize legislation or other action by the United States of America incompatible with the provisions of the Constitution of the United States of America." See <http://www2.ohchr.org/english/bodies/ratification/2.htm#reservations>

requirements are subject to the state's own norms on the balance between freedom of expression and anti-discrimination<sup>16</sup>.

As summarized by Parmar<sup>17</sup>, the more significant diverging aspects of various international or national law provisions relating to hate speech include:

1. The different weight attributed to *intent*, motivation, medium, context and foreseeable consequences in a given circumstance;
2. Whether *advocacy* of hatred is specifically required (it is not by the ICERD, but is by the ICCPR): there is international disagreement about whether the dissemination of ideas based on racial superiority or hatred, but which do not constitute incitement to discrimination or violence, can legitimately be prohibited<sup>18</sup>.
3. Whether the speech in question must *incite to a proscribed result* or it is sufficient for it merely to fall within a category of prohibited statements (the ICERD and the ICCPR prohibit incitement to discrimination and violence, the ICCPR additionally refers to hostility and ICERD to hatred); and
4. Whether a *state of mind*, without reference to any specific act, can serve as a proscribed result.<sup>19</sup>

#### **IV - Balancing Article 19 and Article 20**

Recognition of the need to balance rights, and to prevent people from using their rights as weapons to attack the rights of others, is reflected in Article 5 of the ICCPR, which states:

*Nothing in the present Covenant may be interpreted as implying for any State, group or person any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms recognized herein or at their limitation to a greater extent than is provided for in the present Covenant.*

Article 5 of the Vienna Declaration even more clearly and forcefully states that:

*All human rights are universal, indivisible and interdependent and interrelated. The international community must treat human rights globally in a fair and equal manner, on the same footing, and with the same emphasis. While the significance of national and*

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<sup>16</sup> Yet, in a detailed legal statement on the subject of reservations, the Human Rights Committee concluded that there are certain provisions in the Covenant that reflected customary international law and these may not be the subjects of reservations by states when they ratify. One such is the duty to prohibit the advocacy of national racial or religious hatred. According to the HRC, customary international law binds all states in most circumstances whether or not they consent, and the prohibition on racial discrimination and advocacy of hatred are part of customary international law. General Comment No.24 Issues Relating to Reservations made upon ratification of accession to the Covenant or the Optional Protocols thereto, or in relation to Declarations under Article 41 of the Covenant 52<sup>nd</sup> Sess., Nov. 11 1994

<sup>17</sup> Sejal Parmar, 2008, Op.cit

<sup>18</sup> In *JRT and the WG Party v Canada*, the committee held that application was inadmissible under Article 19(3), but reasoned that “the opinions which [the applicant] 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”.

<sup>19</sup> The Human Rights Committee and the Committee on the Elimination of Racial Discrimination have said that proscribed result can include a state of mind in which hostility towards a target group is harboured, even though this is not accompanied by any urge to take action to manifest itself. See T Mendel, *Study on International Standards Relating to Incitement to Genocide or Racial Hatred* above at note 5 at 14.

*regional particularities and various historical, cultural and religious backgrounds must be borne in mind, it is the duty of States, regardless of their political, economic and cultural systems, to promote and protect all human rights and fundamental freedoms.*

Balancing different competing rights is at all times a difficult exercise, but it is particularly so in international context. The prevailing position is that balancing can only be done on a case by case basis, taking into account the particular circumstances and implications of the case.

*When faced with a conflict between competing rights and interests, courts usually favour a judicial approach where the relevant rights and interests are “harmonized” with due regard to the particular circumstances of each case. Such ad hoc balancing is more an artistic exercise than a scientific one as the circumstances of each case will ultimately determine which norm shall prevail<sup>20</sup>.*

This being said, a few principles regarding articles 19 and 20 may be extracted:

**1. No hierarchy of rights:** At the heart of the balancing act is the rejection of any formal hierarchy among fundamental rights. Most considered analyses of the relationship between freedom of expression and the prohibition on discrimination seek to find a balance between the right to speak and the pursuit of racial, religious and communal justice and harmony, a balance that requires the least interference with freedom of expression in order to protect individuals from discrimination.<sup>21</sup>

As Kevin Boyle has written, “to point out that there are circumstances in which other interests shall prevail over freedom of expression is not inconsistent with a strong commitment to the value of freedom of expression”.<sup>22</sup>

At the same time, as Sejal Parmar added, “to argue that the law should not interfere with certain types of offending, insulting or denigrating publications does not mean that free speech advocates are indifferent to the rights of racial or religious minorities. Indeed, from the perspective of free expression advocates, there is a case for at least some restrictions on grounds of equality and dignity, while there is a concern about the effects of overbroad restrictions on the values underpinning free speech<sup>23</sup>.”

**2. Coherence between Articles 19 and 20:** There is strong coherence between the two articles and the risks of article 19 allowing greater restrictions on hate speech than article 20 is very negligible. The coherence has been highlighted by a number of academic researchers and the Human Rights Committee.

For instance, as Tarlach McGonagle<sup>24</sup> well elaborates:

<sup>20</sup> Laurent Pech, Balancing Freedom of the Press with Competing Rights and Interests, A Comparative Perspective, 2006, [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=909507](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=909507)

<sup>21</sup> See for example, the compilation Sandra Coliver, Kevin Boyle and Frances D’Souza, *Striking A Balance: Hate Speech, Freedom of Expression and Non-discrimination* (ARTICLE 19 and Human Rights Centre, University of Essex, 1992).

<sup>22</sup> Kevin Boyle, “Overview of a Dilemma: Censorship versus Racism”, in S Coliver, K Boyle and F D’Souza, *Striking A Balance: Hate Speech, Freedom of Expression and Non-discrimination* above at note 7 at 1.

<sup>23</sup> Sejal Parmar, 2008

<sup>24</sup> Tarlach McGonagle, International and European legal standards for combating racist expression: selected current conundrums, presentation for ECRI, 2006

*“It is rarely disputed that Articles 19 and 20, ICCPR, are closely related. Indeed, during the drafting of the ICCPR, the draft article that ultimately became Article 20 was realigned so that it would immediately follow Article 19, thereby emphasising the contiguity of the two articles. Indeed, one leading commentator has even referred to Article 20 as being “practically a fourth paragraph to Article 19 and has to be read in close connection with the preceding article”<sup>25</sup>. It is also noteworthy that Article 20, unlike other substantive articles in the ICCPR, does not set out a right as such. Instead, it sets out further restrictions on other rights, most notably the right to freedom of expression.”*

And he adds:

*“it is generally accepted that there is no real contradiction between Articles 19 and 20. This is borne out by the drafting history of the respective articles”<sup>26</sup>, the UN Human Rights Committee’s (HRC) General Comment 11<sup>27</sup> and various HRC Opinions. It is logical that this coherence should exist: different provisions of the same treaty must be interpreted harmoniously.”*

Similarly Toby Mendel points out that<sup>28</sup>:

*While proposals to restrict Article 20(2) to incitement to violence were rejected, so were proposals to extend it, for example to include ‘racial exclusiveness’, on the basis of concern about free speech.<sup>29</sup> This suggests that the obligations of Article 20(2) are extremely close to the permissions of 19(3), leaving little scope for restrictions on freedom of expression over and beyond the terms of Article 20(2).*

Various Human Rights Committee (HRC) opinions further validate this position.

For instance, In *Ross v Canada*, the HRC recognised the overlapping nature of Articles 19 and 20, stating that it considered that “restrictions on expression which may fall within the scope of Article 20 must also be permissible under Article 19, paragraph 3, which lays down requirements for determining whether restrictions on expression are permissible.”<sup>30</sup>

This reflects the conclusion that any law seeking to implement the provisions of Article 20(2) ICCPR must not overstep the limits on restrictions to freedom of expression set out in Article 19(3).

Mendel also argues that support for this may be found in the jurisprudence of the European Court of Human Rights.

*In Lehideux and Isorni v. France, [...] the Court [...] noted that the Commission had, in that case, held that Article 17 could not prevent the applicants from relying on Article 10,*

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<sup>25</sup> Karl Josef Partsch, “Freedom of Conscience and Expression, and Political Freedoms”, in Louis Henkin, Ed., *The International Bill of Rights: The Covenant on Civil and Political Rights* (New York, Columbia University Press, 1981), pp. 209-245, at p. 227.

<sup>26</sup> See further: Marc Bossuyt, *Guide to the “Travaux Préparatoires” of the International Covenant on Civil and Political Rights* (Dordrecht, Martinus Nijhoff Publishers, 1987), pp. 403-411; Manfred Nowak, *U.N. Covenant on Civil and Political Rights* (2nd revised edition) (Germany, N.P. Engel Publisher, 2005), pp. 468-480.

<sup>27</sup> Prohibition of propaganda for war and inciting national, racial or religious hatred (Art. 20), General Comment 11, United Nations Human Rights Committee, 29 July 1983.

<sup>28</sup> Toby Mendel, *Does International Law Provide Sensible Rules on Hate Speech?*, Forthcoming, 2008

<sup>29</sup> See BOSSUYT, *supra* note 3, at 404-405, 408.

<sup>30</sup> Communication No 736/1997.

*which protects freedom of expression in terms similar to Article 19 of the ICCPR. The Court implicitly agreed as it analysed the case through the filter of Article 10, albeit interpreted in accordance with Article 17.<sup>31</sup> This again suggests close legal proximity between what may be required to protect the rights of others and what is permitted as a restriction on freedom of expression. Similar accommodation between these two interests is found in the Council of Europe Recommendation on Hate Speech, which refers to instances of hate speech which do not enjoy the protection of Article 10, because they are aimed at the destruction of rights and freedoms recognised by the ECHR, that is, which breach Article 17.<sup>32</sup>*

Before turning to the third characteristic, it should be emphasised that the same coherence cannot be found between article 4 of CERD and the other international human rights treaties. This is a major weakness inherent to the article and to what it sought to address.

**3. The three part test applies to article 20:** The implication of the coherence between articles 19 and 20 is that the States' outlawing of advocacy of hatred under Article 20(2) ICCPR must be circumscribed by the requirements of Article 19(3) ICCPR, in particular the requirement that restrictions imposed on freedom of expression be "necessary in a democratic society".

In a series of cases, the European Commission and Court on Human Rights has refused to protect attempts to deny the Holocaust, largely on the basis that these fuel anti-Semitism and states, particularly those in states with a history of anti-Semitism, have the competence to decide whether they would like to legislate specifically against such denials.<sup>33</sup> At the same time, the European Court of Human Rights has also made clear that if the statements in question do not disclose an aim to destroy the rights and freedoms of others,<sup>34</sup> or deny established facts relating to the Holocaust,<sup>35</sup> they are protected by the guarantee of freedom of expression.

In 1997, the Committee of Ministers of the Council of Europe adopted a Recommendation on "Hate Speech", laying down a number of basic principles to be followed by Council of Europe Member States. While affirming the duty of States to take steps to prohibit the advocacy of hatred, including on grounds of religion, the Recommendation warns that "hate speech laws" should not be used to suppress freedom of expression.

Principle 3 states that:

*... [t]he governments of the member states should ensure that in the legal framework referred to in Principle 2 interferences with freedom of expression are narrowly*

<sup>31</sup> 23 September 1998, Application No. 24662/94, paras. 34-35. Article 19 rules out reliance on rights to justify actions which are aimed at the destruction or undue limitation of the human rights of others

<sup>32</sup> Recommendation R(97)20 of the Committee of Ministers of the Council of Europe on 'Hate Speech', 30 October 1997, Appendix, Principle 4.

<sup>33</sup> *Glimmerveen and Hagenbeek v Netherlands*, 11 October 1979, Application No 8406/78; *Kühnen v. Germany*, 12 May 1988, Application No 12194/86; *BH., MW, HP and GK Austria*, 12 October 1989, Application No. 12774/87; *Ochensberger v Austria*, 2 September 1994, Application No 21318/93; and *Nationaldemokratische Partei Deutschlands, Bezirksverband München-Oberbayern v Germany*, 29 November 1995, Application No 25992/94; *Walendy v. Germany*, 11 January 1995, Application No 21128/92; *Remer v Germany*, 6 September 1995, Application No. 25096/94; and *Honsik v Germany*, 28 October 1997, Application No 25062/94. See also *Garaudy v France*, 7 July 2003, Application No 65831/01.

<sup>34</sup> *Ceylan v Turkey*, 8 July 1999, Application No 23556/94.

<sup>35</sup> *Lehideux and Isorni v France*, 23 September 1998, Application No 24662/94.



*circumscribed and applied in a lawful and non-arbitrary manner on the basis of objective criteria.*

The Explanatory Memorandum further warns of the need for “legal protection against arbitrary interferences [with freedom of expression] and adequate safeguards against abuse”.

In conclusion, any hate speech restriction on freedom of expression should be carefully designed to promote equality and protect against discrimination and, as with all such restrictions, should meet the three-part test set out in Article 19 of the ICCPR, according to which an interference with freedom of expression is only legitimate if:

- (a) it is provided by law;
- (b) it pursues a legitimate aim; and
- (c) it is “necessary in a democratic society”.

Such considerations have prompted the UN Special Rapporteur on Freedom of Opinion and Expression, the OSCE Representative, on Freedom of the Media and the OAS Special Rapporteur on Freedom of Expression to adopt in 2001 a Joint Statement on racism and the Media<sup>36</sup> which lays down a number of principles for the restriction of freedom of expression through so-called hate speech regulations:

Any civil, criminal or administrative law measures that constitute an interference with freedom of expression must be provided by law, serve a legitimate aim as set out in international law and be necessary to achieve that aim. This implies that any such measures are clearly and narrowly defined, are applied by a body which is independent of political, commercial or other unwarranted influences and in a manner which is neither arbitrary nor discriminatory, and are subject to adequate safeguards against abuse, including the right of access to an independent court or tribunal. If these safeguards are not in effect, there is a very real possibility of such measures being abused, particularly where respect for human rights and democracy is weak, and “hate speech” laws have in the past been used against those they should be protecting.

In accordance with international and regional law, “hate speech” laws should, at a minimum, conform to the following:

- no one should be penalized for statements which are true;
- no one should be penalized for the dissemination of “hate speech” unless it has been shown that they did so with the intention of inciting discrimination, hostility or violence;
- the right of journalists to decide how best to communicate information and ideas to the public should be respected, particularly when they are reporting on racism and intolerance;
- no one should be subject to prior censorship; and
- any imposition of sanctions by courts should be in strict conformity with the principle of proportionality.

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<sup>36</sup> <http://www.article19.org/pdfs/igo-documents/three-mandates-statement-1999.pdf>

In 2006, in another declaration on Freedom of Expression and Cultural/Religious Tensions<sup>37</sup>, the Special Rapporteurs stated that:

- The exercise of freedom of expression and a free and diverse media play a very important role in promoting tolerance, diffusing tensions and providing a forum for the peaceful resolution of differences. High profile instances of the media and others exacerbating social tensions tend to obscure this fact.
- Governments should refrain from introducing legislation which makes it an offence simply to exacerbate social tensions. Although it is legitimate to sanction advocacy that constitutes incitement to hatred, it is not legitimate to prohibit merely offensive speech. Most countries already have excessive or at least sufficient ‘hate speech’ legislation. In many countries, overbroad rules in this area are abused by the powerful to limit non-traditional, dissenting, critical, or minority voices, or discussion about challenging social issues. Furthermore, resolution of tensions based on genuine cultural or religious differences cannot be achieved by suppressing the expression of differences but rather by debating them openly. Free speech is therefore a requirement for, and not an impediment to, tolerance.

ARTICLE 19 further recommends that:

- Restrictions must be formulated in a way that makes clear that its sole purpose is to protect individuals holding specific beliefs or opinions, whether of a religious nature or not,<sup>38</sup> from hostility, discrimination or violence, rather than to protect belief systems, religions, or institutions as such from criticism. The right to freedom of expression implies that it should be possible to scrutinise, openly debate, and criticise, even harshly and unreasonably,<sup>39</sup> belief systems, opinions, and institutions, including religious ones,<sup>40</sup> as long as this does not advocate hatred which incites to hostility, discrimination or violence against an individual.

### **Conclusion: Beyond hate speech laws: fulfilling the right to equality through Freedom of Expression**

As the overwhelming number of cases across the world all too well illustrates, the relationship between protecting the right to equality and resorting to criminal hate speech laws is weak.

ARTICLE 19’s 20 years experience shows that restrictions on freedom of expression, including hate-speech legislations, rarely protect us against abuses, extremism, or racism. In fact, they are usually and effectively used to muzzle opposition and dissenting voices, silence minorities, and

<sup>37</sup> <http://www.article19.org/pdfs/igo-documents/four-mandates-dec-2006.pdf>

<sup>38</sup> Religion as used here is to be understood broadly and does not depend on formal State recognition.

<sup>39</sup> The right to freedom of expression includes the right to make statements that ‘offend, shock or disturb’. See *Handyside v. United Kingdom*, 7 December 1976, Application No. 5493/72, 1 EHRR 737, para. 49 (European Court of Human Rights).

<sup>40</sup> ARTICLE 19 believes that blasphemy as a criminal offence should be abolished. Tolerance, understanding, acceptance and respect for the diversity of faiths and beliefs cannot be secured by the threat of criminal prosecution and punishment. This is becoming ever more relevant as our societies become more and more diverse.

reinforce the dominant political, social and moral discourse and ideology. This is especially true in period of high stress level and duress, as currently and globally experienced.

In Russia, for instance, Article 282 of the Criminal Code has been applied in a discriminatory fashion and has been used to curtail freedom of expression. It is rarely applied in attacks against religious minorities by ultra-nationalist, neo-Nazi and anti-Semitic groups, instances where it could justifiably be used to safeguard democracy. This suggests selective implementation of the legislation, contrary to the requirement set out in Council of Europe Recommendation 97(20) that prosecutions be based on “objective criteria”<sup>41</sup>.

Hate speech laws, as with blasphemy laws, are often used by states against the very minorities they are designed to protect. In some cases, they are even used to restrict minorities from promoting their culture and identity, or from expressing concern about discrimination against them by the majority. Turkey frequently uses Article 312 of the Penal Code – which provides for up to three years’ imprisonment for anybody who ‘incites hatred based on class, race religion, or religious sect, or incites hatred between different regions’– against those who espouse Kurdish nationalism or even express pride in Kurdish culture. There is no evidence that censoring or banning such groups has any impact on their existence or rising influence. In fact, most evidence testifies to the fact that criminalizing such groups too often results in their radicalisation. Penalising the expression of their ideas does not reduce the problem or make the proponents of such ideas disappear.

Historically, hate speech primarily has been the prerogative of governments rather than so-called extremist groups. More usually it has been the “majority” who have exercised this against minorities or groups of the dominant culture using this against groups perceived as challenging the social order or social norms.

As Kevin Boyle well reminds us, hate speech was at some point mainstream political speech<sup>42</sup>:

*“It was central to European culture. There were no hate groups espousing racism and white superiority when it was in fact the official ideology or mainstream idea. Today’s racists wear our cast offs and we have a responsibility for what is done with those cast offs...”*

*Hate speech in that sense is political speech. It seeks to restore theories and ideas that have been defeated by democratic struggle and their hatred is directed at the beneficiaries of those struggles, such as the black population. Hate speech is also about power and economic competition and that needs to be more clearly recognised in our legal analyzes. It may be that extreme individuals with personal problems are attracted to hate groups but it is mistaken to label the phenomenon as pathological. It is a struggle of ideas: the ideas of restoring white supremacy- the exclusion of Jews and other hated minorities- versus the idea of equal human dignity for all. It must not be assumed that the struggle against intolerance against what in Europe have been termed, the light sleepers –xenophobia, racism and anti- Semitism is won – it needs constant attention.*

This brief analysis on the misuse of hate speech laws is not meant to argue that hate speech regulations are useless or ineffective. But the practical test is important, indeed crucial, to ensure

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<sup>41</sup> See ARTICLE 19, Art, Religion and Hatred: Religious Intolerance in Russia and its Effects on Art, ARTICLE 19: London, December 2005

<sup>42</sup> Kevin Boyle, Hate Speech – The United States versus the rest of the world, Maine Law Review Vol 53 Number 2 2001 pp.488-502

that whatever regulations and restrictions are put in place (both negative and positive ones) fulfill the social functions they are meant to play: protect the right to equality, the right to mental and physical integrity, the right to be free from discrimination, and ultimately the right to life, as hate speeches have too often been associated with ethnic cleansing, wars, and genocide.

From this standpoint, and in view of the objective of protecting substantive equality, hate speech regulations cannot just be reduced or limited to criminal laws and the criminalization of hate speech. They simply cannot constitute the sole or indeed central response to prejudice, racism, and discrimination. Equal or further emphasis must be placed on *positive* State obligations.

This has been increasingly recognized by a number of civil society and international bodies.

For instance, the Durban Declaration and Programme of Action and the Framework Convention for the Protection of National Minorities, in particular, adopt root-and-branch approaches to combating hate speech by targeting the hatred and intolerance from which it spawns. Central to their strategies is the promotion of counter-speech, or more accurately, more speech, or even more accurately, expressive opportunities, especially via the media<sup>43</sup>.

In 2006, the four Special Rapporteurs recommended that a range of mechanisms be used to address intolerance, particularly unleashing the power of the media to do good for tolerance such as<sup>44</sup>:

- Professional and self-regulatory bodies have played an important role in fostering greater awareness about how to report on diversity and to address difficult and sometimes controversial subjects, including intercultural dialogue and contentious issues of a moral, artistic, religious or other nature. An enabling environment should be provided to facilitate the voluntary development of self-regulatory mechanisms such as press councils, professional ethical associations and media ombudspersons.
- The mandates of public service broadcasters should explicitly require them to treat matters of controversy in a sensitive and balanced fashion, and to carry programming which is aimed at promoting tolerance and understanding of difference.

ARTICLE 19 further insists that the media can be play a major function in defeating intolerance, including by:

- designing and delivering media training programmes which promote a better understanding of issues relating to racism and discrimination, and which foster a sense of the moral and social obligations of the media to promote tolerance and knowledge of the practical means by which this may be done;
- ensuring that effective ethical and self-regulatory codes of conduct prohibit the use of prejudicial or derogatory stereotypes, and unnecessary references to race, religion and related attributes;
- taking measures to ensure that their workforce is diverse and reasonably representative of society as a whole;

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<sup>43</sup> Cited by McGonagle, *op cit*.

<sup>44</sup> <http://www.article19.org/pdfs/igo-documents/four-mandates-dec-2006.pdf>

- taking care to report factually and in a sensitive manner on acts of racism or discrimination, while at the same time ensuring that they are brought to the attention of the public;
- ensuring that reporting in relation to specific communities promotes a better understanding of difference and at the same time reflects the perspectives of those communities and gives members of those communities a chance to be heard;
- ensuring that a number of voices within communities are heard rather than representing communities as a monolithic bloc – communities themselves may practice censorship;
- promoting a culture of tolerance and a better understanding of the evils of racism and discrimination.

In addition, an effective response to expression that vilifies others requires a sustained commitment on the part of governments to promote equality of opportunity, to protect and promote linguistic, ethnic, cultural and religious rights, and to implement public education programmes about tolerance and pluralism.

## **ANNEX ONE - TERMS OF REFERENCE FOR THE STUDY**

### **The international legal framework and the interrelatedness between articles 19 and 20 of the ICCPR and States' obligations**

Questions:

- What protection does international law provide on this issue, and how has that law been interpreted by international, regional and national bodies?
- What is the relationship between articles 19 and 20 of the ICCPR, and what are the scope and links between the prohibitions and limitations contained in those articles? In particular, what are the differences / links between permissible limitations under article 19 (3), in particular when it comes to restrictions aimed at protecting the rights of others, and States' obligations under article 20 (2)?

These issues will be examined particularly in the light of national legislative and judicial patterns as well as international and regional legislation and practice.

## **ANNEX TWO – INTERNATIONAL STANDARDS**

### **Universal Declaration of Human Rights**

The UDHR does not specifically provide for prohibitions on hate speech or incitement to hatred.

Article 1(1) UDHR 1948 states: “All human beings are born free and equal in dignity and rights”.

Article 2 then provides for equal enjoyment of the rights and freedoms proclaimed “without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.”

Article 7, however, provides for protection against discrimination, and also against incitement to discrimination.

According to article 19, Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers.

Article 29 also refers to the duties of everyone in the community and states that certain limitations on rights may be necessary and legitimate to secure “due recognition and respect for the rights and freedoms of others”. This clearly includes possible limitations on freedom of expression, which is guaranteed by Article 19 UDHR, for the purposes of protecting equality.

### **International Covenant on Civil and Political Rights (ICCPR)**

#### **Article 19**

1. Everyone shall have the right to hold opinions without interference.
2. Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.
3. The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary
  - (a) For respect of the rights or reputations of others;
  - (b) For the protection of national security or of public order (ordre public), or of public health or morals.

#### **Article 20**

1. Any propaganda for war shall be prohibited by law.
2. Any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law.

### **International Convention on the Elimination of all Forms of Racial Discrimination (ICERD)**

#### **Article 4**

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.

## **European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR)**

### **Article 10**

1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.

2. 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.

## **American Convention on Human Rights**

### **Article 13**

1. Everyone has the right to freedom of thought and expression. This right includes freedom to seek, receive, and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing, in print, in the form of art, or through any other medium of one's choice.

2. The exercise of the right provided for in the foregoing paragraph shall not be subject to prior censorship but shall be subject to subsequent imposition of liability, which shall be expressly established by law to the extent necessary to ensure:

(a) respect for the rights or reputations of others; or

(b) the protection of national security, public order, or public health or morals.

3. The right of expression may not be restricted by indirect methods or means, such as the abuse of government or private controls over newsprint, radio broadcasting frequencies, or equipment used in the dissemination of information, or by any other means tending to impede the communication and circulation of ideas and opinions.

4. Notwithstanding the provisions of paragraph 2 above, public entertainments may be subject by law to prior censorship for the sole purpose of regulating access to them for the moral protection of childhood and adolescence.
5. Any propaganda for war and any advocacy of national, racial, or religious hatred that constitute incitements to lawless violence or to any other similar illegal action against any person or group of persons on any grounds including those of race, color, religion, language, or national origin shall be considered as offenses punishable by law.

### **African Charter on Human and Peoples' Rights**

#### **Article 9**

1. Every individual shall have the right to receive information.
2. Every individual shall have the right to express and disseminate his opinions within the law.

### **ANNEX THREE – THE THREE PART TEST**

Source: ARTICLE 19 Submission to ICJ Panel of Eminent Jurists on Terrorism, Counter-Terrorism and Human Rights – ARTICLE 19, London, 2006 – Index Number: LAW/2006/0424

According to the three-part test, interferences with freedom of expression are legitimate only if they (a) are prescribed by law; (b) pursue a legitimate aim; and (c) are “necessary in a democratic society”.

Each of these elements has specific legal meaning. The first requirement will be fulfilled only where the restriction is ‘prescribed by law’. This implies not only that the restriction is based in law, but also that the relevant law meets certain standards of clarity and accessibility. The European Court of Human Rights has elaborated on the requirement of “prescribed by law” under the ECHR:

[A] norm cannot be regarded as a “law” unless it is formulated with sufficient precision to enable the citizen to regulate his conduct: he must be able – if need be with appropriate advice – to foresee, to a degree that is reasonable in the circumstances, the consequences which a given situation may entail.<sup>45</sup>

This is akin to the “void for vagueness” doctrine established by the US Supreme Court and which is also found in constitutional doctrine in other countries.<sup>46</sup> The US Supreme Court has explained that loosely worded or vague laws may not be used to restrict freedom of expression:

Vague laws offend several important values. First, because we assume that man is free to steer between lawful and unlawful conduct, we insist that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly. Vague laws may trap the innocent by not providing fair warning. Second, if arbitrary and discriminatory enforcement is to be prevented, laws must provide

<sup>45</sup> *The Sunday Times v. United Kingdom*, 26 April 1979, Application No. 6538/74, para. 49.

<sup>46</sup> See, for example, the Canadian Charter of Rights and Freedoms, Section 1; Dutch Constitution, Article 13.



explicit standards for those who apply them. A vague law impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an ad hoc and subjective basis, with the attendant dangers of arbitrary and discriminatory application. Third, but related, where a vague statute “abut[s] upon sensitive areas of basic First Amendment freedoms,” it “operates to inhibit the exercise of [those] freedoms.” Uncertain meanings inevitably lead citizens to “‘steer far wider of the unlawful zone’ . . . than if the boundaries of the forbidden areas were clearly marked.” (references omitted)<sup>47</sup>

Laws that grant authorities excessively broad discretionary powers to limit expression also fail the requirement of “prescribed by law”. The European Court of Human Rights has stated that when a grant of discretion is made to a media regulatory body, “the scope of the discretion and the manner of its exercise [must be] indicated with sufficient clarity, having regard to the legitimate aim in question, to give the individual adequate protection against arbitrary interference.”<sup>48</sup> The UN Human Rights Committee, the body of independent experts appointed under the ICCPR to monitor compliance with that treaty, has repeatedly expressed concern about excessive ministerial discretion.<sup>49</sup>

National courts have expressed the same concern. For example, the South African Constitutional Court has warned in relation to the regulation of obscenity that:

It is incumbent upon the legislature to devise precise guidelines if it wishes to regulate sexually explicit material. Especially in light of the painfully fresh memory of the executive branch of government ruthlessly wielding its ill-checked powers to suppress political, cultural, and, indeed, sexual expression, there is a need to jealously guard the values of free expression embodied in the Constitution of our fledgling democracy.<sup>50</sup>

The second requirement relates to the legitimate aims listed in Article 10(2). To satisfy this part of the test, a restriction must truly pursue one of the legitimate aims; it is illegitimate to invoke a legitimate aim as an excuse to pursue a political or other illegitimate agenda.<sup>51</sup>

The third requirement, that any restrictions should be “necessary in a democratic society”, is often key to the assessment of alleged violations. The word “necessary” means that there must be a “pressing social need” for the limitation.<sup>52</sup> The reasons given by the State to justify the limitation must be “relevant and sufficient”; the State should use the least restrictive means

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<sup>47</sup> *Grayned v. City of Rockford*, 408 U.S. 104, 108-9.

<sup>48</sup> *Wingrove v. United Kingdom*, 25 November 1996, Application No. 17419/90 (European Court of Human Rights), para. 40.

<sup>49</sup> Particularly in the context of media regulation: see, for example, its Concluding Observations on Kyrgyzstan, 24 July 2000, UN Doc. CCPR/CO/69/KGZ, para. 21; and its Concluding Observations on Lesotho, 8 April 1999, UN Doc. CCPR/C/79/Add.106, para. 23.

<sup>50</sup> *Case & Anor, v. Minister of Safety and Security & Ors*, 1996 (5) BCLR 609 (Constitutional Court of South Africa), para. 63 (per Mokgoro).

<sup>51</sup> Article 18, ECHR. See also *Benjamin and Others v. Minister of Information and Broadcasting*, 14 February 2(1), Privy Council Appeal No. 2 of 1999, (Judicial Committee of the Privy Council).

<sup>52</sup> See, for example, *Handyside v. the United Kingdom*, 7 December 1976, Application no. 5493/72, para. 48.

available and the limitation must be proportionate to the aim pursued.<sup>53</sup> The European Court of Human Rights has warned that one of the implications of this is that States should not use the criminal law to restrict freedom of expression unless this is truly necessary. In *Sener v. Turkey*, the Court stated that this principle applies even in situations involving armed conflict:

[T]he dominant position which a government occupies makes it necessary for it to display restraint in resorting to criminal proceedings, particularly where other means are available for replying to the unjustified attacks and criticisms of its adversaries ... Contracting States cannot, with reference to the protection of territorial integrity or national security or the prevention of crime or disorder, restrict the right of the public to be informed of them by bringing the weight of the criminal law to bear on the media.<sup>54</sup>

While States must act to protect their citizens from public order and terrorist threats, their actions must be appropriate and without excess.<sup>55</sup> This implies that the relevant criminal offences should be narrowly defined and applied with due restraint. It also implies that the offence of ‘terrorism’, which triggers the most severe restrictions on the enjoyment of rights, is particularly narrowly defined and employed only in circumstances when the accompanying serious restrictions on rights are truly “necessary”.

## ARTICLE 19 POLICY ON HATE SPEECH

ARTICLE 19 works to promote freedom of expression around the world. ARTICLE 19 takes its name and purpose from Article 19 of the *Universal Declaration of Human Rights* (UDHR),<sup>56</sup> which states:

*Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers.*

ARTICLE 19 takes international human rights standards as its starting point and aims to promote the interpretation and application of those standards in a manner which ensures maximum protection for the right to freedom of expression, consistently with their spirit and intent.

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<sup>53</sup> See, for example, *Lingens v. Austria*, 8 July 1986, Application No. 9815/82, paras. 39-40 (European Court of Human Rights).

<sup>54</sup> *Sener v. Turkey*, Application no. 26680/95, 18 July 2000, paras. 40, 42.

<sup>55</sup> See, for example, *Incal v. Turkey*, application no. 22678/93, 18 May 1998, para. 54.

<sup>56</sup> UN General Assembly Resolution 217A(III), 10 December 1948.

The right to freedom of opinion and expression is a fundamental right<sup>57</sup> which safeguards the exercise of all other rights and is a critical underpinning of democracy, which depends on the free flow of a diversity of information and ideas. Equally fundamental to the protection of human rights are the principles of the inherent dignity and equality of all human beings and the obligation of all Member States of the United Nations to take measures to promote “universal respect for, and observance of, human rights and fundamental freedoms for all, without distinction as to race, sex, language or religion.”<sup>58</sup>

Ensuring respect for the right to freedom of expression is a key aspect of States’ obligation to promote equality and respect for the “inherent dignity of the human person”,<sup>59</sup> as well as security of the person and freedom of thought, conscience and religion. The exercise of the right to freedom of expression can, in particular, play a key role in promoting tolerance and mutual understanding in society, which in the longer term are essential to ensuring equality.

At the same time, certain forms of hateful expression can threaten the dignity of targeted individuals and create an environment in which the enjoyment of equality is not possible. International law recognises that the right to freedom of expression may be subject to carefully drawn limitations to protect the right to be free from discrimination and to enjoy equality. To this end, Article 20(2) of the ICCPR provides:

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

ARTICLE 19’s Position on Hate Speech, articulated below, sets out the ways in which the organisation believes respect for freedom of expression can promote tolerance. It also sets out the organisation’s interpretation of where an appropriate balance lies between the right to freedom of expression and any restrictions on this right to protect equality and prevent discrimination.

### **Promoting Tolerance**

ARTICLE 19 believes that an effective response to vilifying expression requires a sustained commitment on the part of governments to promote equality of opportunity, to protect and promote linguistic, ethnic, cultural and religious rights, and to implement public education programmes about tolerance and pluralism. All of these depend on respect in practice for the right to freedom of expression.

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<sup>57</sup> It is guaranteed by Article 19 of the UDHR, Article 19 of the *International Covenant on Civil and Political Rights* (ICCPR), adopted and opened for signature, ratification and accession by UN General Assembly Resolution 2200A (XXI), 16 December 1966, entered into force 3 January 1976, Article 10 of the *European Convention on Human Rights* (ECHR), adopted 4 November 1950, E.T.S. No. 5, entered into force 3 September 1953, Article 13 of the *American Convention on Human Rights*, adopted at San José, Costa Rica, 22 November 1969, O.A.S. Treaty Series No. 36, 1144 U.N.T.S. 123, entered into force 18 July 1978 and Article 9 of the *African Charter on Human and Peoples’ Rights*, adopted at Nairobi, Kenya, 26 June 1981, OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982), entered into force 21 October 1986, the texts of which are reproduced in Annex One.

<sup>58</sup> Article 55(c) of the Charter of the United Nations. See also Article 55 of the Charter.

<sup>59</sup> See the first preamble paragraph and Article 1 of the UDHR and the first and second preamble paragraphs of the ICCPR.

In addition, ARTICLE 19 believes that the media has a crucial role to play in preventing and counter-acting discrimination. Public service broadcasters should be legally obliged to make a positive contribution to the fight against racism, discrimination, xenophobia and intolerance, while other media organisations, media enterprises and media workers have a moral and social obligation to do so. There are many ways in which these bodies and individuals can make such a contribution, including by:

- designing and delivering media training programmes which promote a better understanding of issues relating to racism and discrimination, and which foster a sense of the moral and social obligations of the media to promote tolerance and knowledge of the practical means by which this may be done;
- ensuring that effective ethical and self-regulatory codes of conduct prohibit the use of racist terms and prejudicial or derogatory stereotypes, and unnecessary references to race, religion and related attributes;
- taking measures to ensure that their workforce is diverse and reasonably representative of society as a whole;
- taking care to report factually and in a sensitive manner on acts of racism or discrimination, while at the same time ensuring that they are brought to the attention of the public;
- ensuring that reporting in relation to specific communities promotes a better understanding of difference and at the same time reflects the perspectives of those communities and gives members of those communities a chance to be heard; and
- promoting a culture of tolerance and a better understanding of the evils of racism and discrimination.<sup>60</sup>

Governments should take firm steps to eliminate discrimination (including on grounds of nationality, race, religion, colour, descent, gender, language, belief or ethnic origin) in all its forms (including in the fields of economic, social, cultural, civil and political rights, and where in trenches on the ability of different groups to exercise their right to freedom of expression), and should undertake effective measures to protect all those within their borders, including immigrants and asylum-seekers, from violence, threats of violence and incitement to violence.

## Restrictions

ARTICLE 19 recognises that reasonable restrictions on freedom of expression may be necessary or legitimate to prevent advocacy of hatred based on nationality, race, religion that constitutes incitement to discrimination, hostility or violence.<sup>61</sup>

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<sup>60</sup> This list is based on the 2001 Joint Statement on Racism and Media by the UN Special Rapporteur on Freedom of Opinion and Expression, the OSCE Representative on Freedom of the Media and the OAS Special Rapporteur on Freedom of Expression.

<sup>61</sup> This standard is based on Article 20 of the ICCPR.

Two key elements are involved in this standard. First, only advocacy of *hatred* is covered. Second, it must constitute *incitement* to one of the listed results.

- In this context, “hatred” is understood to mean an irrational and intense antagonism towards an individual or group of individuals based simply on one of the listed characteristics.
- “Incitement” is understood to mean instigation or encouragement which is virtually certain to lead directly to discrimination, hostility or violence. Central to the idea of incitement is the creation of an environment where enjoyment of the right to equality in dignity is not impossible.
- Incitement implies a very close link between the expression and the resulting risk of discrimination, hostility or violence, and may be distinguished, for example, from mere advocacy which supports or even calls for these results but where they are unlikely to come about.<sup>62</sup>
- Context is central to a determination of whether or not a given expression constitutes incitement; the likelihood of ethnic violence in the immediate aftermath of an ethnic conflict, for example, will be higher than in a peaceful, democratic environment.

Any so-called hate speech restriction on freedom of expression should be carefully designed to promote equality and protect against discrimination and, as with all such restrictions, should meet the three-part test set out in Article 19 of the ICCPR (see Annex Two), according to which an interference with freedom of expression is only legitimate if:

- (a) it is provided by law;
- (b) it pursues a legitimate aim; and
- (c) it is “necessary in a democratic society”.<sup>63</sup>

Specifically, any restriction should conform to the following:

- it should be clearly and narrowly defined;
- it should be applied by a body which is independent of political, commercial or other unwarranted influences, and in a manner which is neither arbitrary nor discriminatory, and which is subject to adequate safeguards against abuse, including the right of access to an independent court or tribunal;
- no one should be penalised for statements which are true;

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<sup>62</sup> An academic text suggesting that the world would be better off without a certain race or religion would, for example, be far less likely to meet the incitement standard than shouting out practically the same words in the midst of a racist demonstration.

<sup>63</sup> Article 19(3) of the ICCPR provides:

The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:

- (a) For respect of the rights or reputations of others;
- (b) For the protection of national security or of public order (*ordre public*), or of public health or morals.

- no one should be criminally penalised for the dissemination of hate speech unless it has been shown that they did so with the intention of inciting discrimination, hostility or violence;<sup>64</sup>
- the right of journalists to decide how best to communicate information and ideas to the public should be respected, particularly when they are reporting on racism and intolerance;
- prior censorship should not be used as a tool against hate speech;
- care should therefore be taken to apply the least intrusive and restrictive measures, in recognition of the fact that there are various available measures some of which exert less of a chilling effect on freedom of expression than others; and
- any imposition of sanctions should be in strict conformity with the principle of proportionality and criminal sanctions, in particular imprisonment, should be applied only as a last resort.<sup>65</sup>

A restriction must be formulated in a way that makes clear that its sole purpose is to protect individuals holding specific beliefs or opinions, whether of a religious nature or not,<sup>66</sup> from hostility, discrimination or violence, rather than to protect belief systems, religions, or institutions as such from criticism. The right to freedom of expression implies that it should be possible to scrutinise, openly debate, and criticise, even harshly and unreasonably,<sup>67</sup> belief systems, opinions, and institutions, including religious ones,<sup>68</sup> as long as this does not advocate hatred which incites to hostility, discrimination or violence against an individual.

All existing hate speech laws should be reviewed and amended as necessary to bring them into line with these standards. Consideration of new hate speech legislation should always be preceded by an analysis of whether existing legislation is in line with these standards and whether it is already sufficient to tackle the problem.

## **ANNEX TWO - Restrictions to Freedom of Expression**

The first requirement – “provided by law” – will be fulfilled only where the law is accessible and sufficiently precisely worded. Vague laws or provisions that leave an implementing agency

<sup>64</sup> In certain circumstances, the authorities may be able to claim reasonably and in good faith that they could not prevent injury if an expression were to occur, due to the likelihood that it will provoke a direct and serious hostile reaction. This may be the case, for example, in the context of a demonstration by a fringe political party or group. In such cases, it may be legitimate to take measures to prevent the injury, including by preventing the expression from taking place, but the speaker should not, however, be penalised.

<sup>65</sup> This list draws on the 2001 Joint Statement of the specialised mandates on freedom of expression, note 60.

<sup>66</sup> Religion as used here is to be understood broadly and does not depend on formal State recognition.

<sup>67</sup> The right to freedom of expression includes the right to make statements that ‘offend, shock or disturb’. See *Handyside v. United Kingdom*, 7 December 1976, Application No. 5493/72, 1 EHRR 737, para. 49 (European Court of Human Rights).

<sup>68</sup> ARTICLE 19 believes that blasphemy as a criminal offence should be abolished. Tolerance, understanding, acceptance and respect for the diversity of faiths and beliefs cannot be secured by the threat of criminal prosecution and punishment. This is becoming ever more relevant as our societies become more and more diverse.

excessive discretion cannot justify restricting a right. Uncertainty about what is and what is not covered by the hate speech regulation will have a chilling effect on media professionals, artists and others who see it as their task to provide information on or comment on matters of public interest.<sup>69</sup>

The second requirement – “pursues a legitimate aim “ – relates to the legitimate aims listed in Article 19 of the ICCPR, cited above. Addressing hate speech, in as far as it endangers rights of others, is a legitimate aim.

The third requirement – “necessary in a democratic society” – is often key to the assessment of alleged violations. The word “necessary” means that there must be a “pressing social need” for the restriction. The reasons given by the State to justify the restriction must be “relevant and sufficient” and the restriction must be proportionate to the aim pursued.<sup>70</sup> In the case of hate speech legislation, this means that there must be a **clear causal relationship** between the expression and that no other measures which may reasonably be expected to prevent such hostility, discrimination or violence that are less restrictive of freedom of expression are available.<sup>71</sup>

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<sup>69</sup> In *The Sunday Times v. United Kingdom*, 26 April 1979, Application No. 6538/74, para.49, the European Court of Human Rights elaborated on the requirement of “prescribed by law” as follows: “[A] norm cannot be regarded as a ‘law’ unless it is formulated with sufficient precision to enable the citizen to regulate his conduct: he must be able – if need be with appropriate advice – to foresee, to a degree that is reasonable in the circumstances, the consequences which a given situation may entail.”

<sup>70</sup> *Lingens v. Austria*, 8 July 1986, Application No. 9815/82, paras. 39-40 (European Court of Human Rights).

<sup>71</sup> This standard has been established by the European Court of Human Rights in *Karatas v. Turkey* 8 July 1999, Application No. 23168/94, paras. 50-52. The complainant had been convicted for the publication of poetry that allegedly condoned and glorified acts of terrorism (note the similarity to the proposed category of “foment, justify or glorify terrorist violence...”). The Court accepted as a matter of fact that in Turkey violent terrorist attacks occurred regularly. Despite this, the Court found that the applicant’s conviction constituted a violation of his right to freedom of expression. Emphasising that there was simply no causal connection between the poems and violence, the Court held: [T]here is little scope under Article 10 § 2 of the Convention for restrictions on political speech or on debate on matters of public interest ... In a democratic system the actions or omissions of the government must be subject to the close scrutiny not only of the legislative and judicial authorities but also of public opinion. Moreover, the dominant position which the government occupies makes it necessary for it to display restraint in resorting to criminal proceedings, particularly where other means are available for replying to the unjustified attacks and criticisms of its adversaries ... [E]ven though some of the passages from the poems seem very aggressive in tone and to call for the use of violence, the Court considers that the fact that they were artistic in nature and of limited impact made them less a call to an uprising than an expression of deep distress in the face of a difficult political situation ...

## 2. Conference room paper by Mohamed Saeed M. Eltayeb<sup>©</sup>

### The Limitations on Critical Thinking on Religious Issues under Article 20 of ICCPR and Its Relation to Freedom of Expression

"Thoughts have wings, no one can stop them".<sup>1</sup>

"What is going on now is a trial of thought. From any judicial point of view, it is impossible to use legal principles to try someone's thoughts".<sup>2</sup>

"Mugesera himself did not commit genocide, although his speech sparked a series of atrocities against Tutsi in the Gisenyi region of the country. His remarks constituted direct and public incitement to commit genocide. Mugesera's speech has been cited as one of the defining moments in the build-up to genocide. The road to genocide in Rwanda was paved with hate speech."<sup>3</sup>

"Freedom of speech is not a core value, requiring special protection. It is a value that must be balanced against equally, if not more, compelling values, namely non-discrimination, multiculturalism and social harmony".<sup>4</sup>

On September 30, 2005, the Danish newspaper *Jyllands-Posten* published a previously solicited twelve cartoons depicting the Prophet Muhammad. One cartoon showed the Prophet wearing a bomb-shaped turban with a lit fuse. Another depicted him as a devil holding a grenade, and another imagined him in paradise offering young virgins to suicide bombers.<sup>5</sup> The consequences of publishing these cartoons have been far-reaching. There have been riots, demonstrations, and widespread violent protests throughout the world.<sup>6</sup>

<sup>©</sup> Dr. Eltayeb is a human rights lawyer, scholar and consultant and holds a Ph.D. in international human rights law from Utrecht University (The Netherlands). He has published several works on human rights in Muslim countries. He is currently working as a legal expert for the Bureau of Human Rights of the Qatari Ministry of Foreign Affairs. The views expressed in this Paper are a strictly of personal nature and are not necessarily shared by the Qatari Ministry of Foreign Affairs. The author wishes to thank Professor Abdullahi Ahmed An-Na'im and Farrah Ahmed for their valuable information and materials and Abdullatif A.O. Elhag for his valuable comments on earlier drafts.

<sup>1</sup> - Quoted from the film *al-Massir* (The Destiny), directed by Youssef Shahine, Cairo, Egypt, 1997.

<sup>2</sup> - Adnan Buyung Nasution, defence lawyer for independent labour leader Mukhtar Pakahan, *Jakarta Post*, 20 December 1996. Quoted by Amnesty International "Indonesia: The Trial of Thought", AI Index: ASA 21/19/97, April 1997.

<sup>3</sup> - William A. Schabas, "Hate Speech in Rwanda: The Road to Genocide", in *McGill Law*, Vol. 46, p. 144.

<sup>4</sup> - Rhoda E. Howard-Hassmann, "Canadians Discuss Freedom of Speech: Individual Rights versus Group Protection", in *International Journal on Minority and Group Rights*, Vol., 2000, p. 138.

<sup>5</sup> - The cartoons, along with information on the issue, can be seen at [http://www.zombietime.com/mohammed\\_image\\_archive/jyllands-posten\\_cartoons/](http://www.zombietime.com/mohammed_image_archive/jyllands-posten_cartoons/). For a detailed discussion of the cartoons, see the Report of the UN Special Rapporteur on Contemporary Forms of Racism, Racial Discrimination, Xenophobia and Related Intolerance, Mr. Doudou Diene, UN Doc. E/CN.4/2006/17, pp. 9-13, Kevin Boyle, "The Danish Cartoons" in *Netherlands Quarterly of Human Rights*, Vol. 24, 2006, pp. 185-191 and Robert Post, "Religion and Freedom of Speech: Portraits of Muhammad" in *Constellations*, Vol. 14, No. 1, 2007, pp. 72-90.

<sup>6</sup> - See Robert Post, *Ibid*, p. 72.



On March 27, 2008, the Dutch Member of Parliament, Mr. Geert Wilders released a film entitled “Fitna” on the Internet. The film illustrates an increasing pattern in which Muslims are associated exclusively with violence and terrorism.<sup>7</sup> These are just two recent examples of a series of freedom of expression related incidents which continue to polarize multicultural societies, cause tensions and fuel xenophobia and racist attitudes.<sup>8</sup>

This Paper aims at examining the admissible scope of limitations on critical thinking on religious issues and the circumstances under which criticism of a religion may fall within the scope of article 20 of the ICCPR. What does this imply in relation to freedom of expression, in particular artistic freedom? To what extent does the promotion of freedom of expression requires States to punish advocacy of religious hatred which constitutes incitement to discrimination, hostility or violence?<sup>9</sup>

The main premise of Paper is that the questions mentioned above should be seen in terms of the balance and complementarity of competing rights, namely, the right to freedom of religion and respect for human dignity of believers *vis-à-vis* the right to freedom of expression. This balance can not invariably be set for all places, but should instead be maintained taking into account the historical experiences and local conditions, and can not be set for all places in the same way. For example, the manner in which freedom of expression, in particular artistic freedom, is exercised is extremely important. While trying to push for more freedom of expression, the cultural and contextual conditions of communities must be respected. Freedom of expression is a universal human right, but it can not be defined in universal terms. Thus, the main theoretical point here is that freedom of expression is not absolute. However, the question of where to draw its boundaries against “advocacy of religious hatred which constitutes incitement to discrimination,

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<sup>7</sup> - See the Press Release of March 28, 2008, issued by three UN Special Rapporteurs: the Special Rapporteur on Contemporary Forms of Racism, Racial Discrimination, Xenophobia and Related Intolerance, Mr. Doudou Diene, Special Rapporteur on Freedom of Religion or Belief, Mrs. Asma Jahangir, and the Special Rapporteur for the Promotion and Protection of the Right to Freedom of Opinion and Expression, Mr. Ambeyi Ligabo, at <http://www.ohchr.org>

<sup>8</sup> - The case of Salman Rushdie, a British citizen of Indian origin and the author of the novel “The Satanic Verses”, can be cited as another example which has generated extensive and vigorous debate in many parts of the world. The novel was condemned and banned in almost all Islamic countries, and the author sentenced to death by the late Ayatollah Khomeini of Iran in 1989. For review of the debate and analysis of this case, see M.M. Slaughter, ‘The Salman Rushdie Affair: Apostasy, Honour, and Freedom of Speech’ in 79 Virginia Law Review, 153 (1993).

<sup>9</sup> - Throughout this paper the term “advocacy of religious hatred which constitutes incitement to discrimination, hostility or violence”, as it appears in article 20 (2) of the ICCPR will be used instead of the well-known term “Hate Speech”, which is generally defined in words similar to those used in article 20 (2) of ICCPR – speech advocating or inciting acts of discrimination or violence towards a group of people or an individually based on hatred for their nationality, race, religion, or any other immutable characteristic. However, the paper notes that the two terms are generally used interchangeably. For literature on “Hate Speech” see for example, Sandra Coliver (ed.) *Striking a Balance : Hate Speech, Freedom of Expression and Non-Discrimination* (1992), Scott J. Catlin, “A Proposal for Regulating Hate Speech in the United States: Balancing Rights under the International Covenant on Civil and Political Rights” in *Notre Dam Law Review* Vol. 69:4, 1994, pp. 771-813, Elizabeth F. Defeis, “Freedom of Speech and International Norms: A Response to Hate Speech” in *Stanford Journal of International Law*, Vol.29 (1992-1993), pp. 57-130, Stephanie Farrior, “Molding the Matrix: the Historical and Theoretical Foundations of International Law Concerning Hate Speech” in *Berkeley Journal of International Law*, Vol. 14:1, 1996, pp. 1-98, Stanley Fish, “Boutique Multiculturalism, or Why Liberals Are Incapable of Thinking about Hate Speech” in *Critical Inquiry*, Vol. 23 2 (Winter, 1997), pp. 378-395 and David O. Brink, “Millian Principles, Freedom of Expression and Hate Speech” in *Legal Theory*, Vol. 7, 2001, pp. 119-157.

hostility or violence” is contextual implying due regard to local conditions, history, political tensions, etc.

Part I of this Paper explores the question regarding the balance and complementarity between freedom of expression and freedom of religion. While endorsing the principle of universality, indivisibility, interdependence and interrelatedness of all human rights, including both freedom of expression and freedom of religion, this Part, however, argues that the right to freedom of expression is not absolute and, as will be seen later, recognizes that international human rights law affirms several limitations on exercising it. As this Part will indicate, the question of defining those limitations is contextual.

Part II of this Paper examines the circumstances under which criticism of a religion could fall within the scope of article 20 of the ICCPR and hence constitutes “incitement to discrimination, hostility or violence”.

Part III of the Paper examines whether or not protection of the right to freedom of expression in international human rights law requires States to punish advocacy of religious hatred which constitutes incitement to discrimination, hostility or violence in accordance with article 20 of the ICCPR.

Finally, the Paper ends with some conclusions in Part IV.

## **I. The Balance and Complementarity Between Freedom of Religion and Freedom of Expression**

The principle of universality, indivisibility and interdependence of human rights suggests that human rights are exercised in a context where rights coexist with each other.<sup>10</sup> The coexistence of rights does not only imply that the exercise of these rights should be seen in a restrictive manner because of the existence of other rights, but also implies the fundamental notion of interdependency of human rights.<sup>11</sup> The enjoyment of freedom of religion,<sup>12</sup> by way of example, essentially requires guaranteeing and securing of other freedoms, including freedom of

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<sup>10</sup> - This principle is expressly stated at the Vienna Declaration [See Vienna Declaration and Programme of Action, U. N. Doc A/CONF.157/23 (1993), Para 5].

<sup>11</sup> - See the Report of Special Rapporteur on Freedom of Religion or Belief, Mrs. Asma Jahangir and Special Rapporteur on Contemporary Forms of Racism, Racial Discrimination, Xenophobia and Related Intolerance, Mr. Doudou Diene UN Doc.A/HRC/2/3, p. 10.

<sup>12</sup> - In describing the nature of the right to freedom of thought, conscience, and religion or belief, international law of human rights makes a distinction between freedom of thought, conscience, and religion or belief, on the one hand, and freedom to manifest one's religion or belief, on the other. The former is conceived as admitting no restriction, while the latter is assumed to be subject to limitation by the state for certain defined purposes. In his landmark study, Kishnaswami has pointed out that the rationale behind this distinction originates from the distinction between the *forum internum* and the *forum externum*: “freedom to maintain or change religion or belief falls primarily within the domain of the inner faith and conscience of an individual. Viewed from this angle, one would assume that any intervention from outside is not only illegitimate but impossible”. Since the manifestations of religion or belief might have a direct impact on society at large, limitations of such manifestations may be a legitimate goal of overall social policy [see Mohamed S. M. Eltayeb, *A Human Rights Approach to Combating Religious Persecution: Cases from Pakistan, Saudi Arabia and Sudan* (Antwerpen: Intersentia – Hart Publishers, 2001), pp. 11-14].

expression and freedom of assembly and association.<sup>13</sup> Although the right to freedom of religion is characterized both as an individual and a collective right,<sup>14</sup> but it does not protect religions or beliefs per se.<sup>15</sup> It has been pointed out that “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 belief that is free from criticism or ridicule. Moreover, internal religious obligations that may exist within a given faith (for example, prohibitions on representing religious figures) do not of themselves constitute binding obligations of general application. They are therefore inapplicable to persons who are not members of that religious group or community, unless their content corresponds to rights that are protected by human rights law”.<sup>16</sup> In other words, freedom of religion primarily confers a right to act in accordance with one’s religion but does not bestow a right for believers to have their religion itself protected from all adverse comment.<sup>17</sup> However, this is not to suggest that the protection of religious symbols from insult and denigration does not fall within the scope of freedom of religion. The question whether criticism, derogatory comment, insults or ridicule of a religion may encroach on the believer’s right to freedom of religion or belief can only be determined by examining whether such acts negatively affect the various aspects of right to freedom of religion by the believer.<sup>18</sup>

Despite the fact that the exercise of freedom of expression could in certain cases seriously affect the right to freedom of religion, it is inaccurate to present this phenomenon as a conflict between freedom of religion and freedom of expression. The two freedoms are interconnected and interdependent and what is required is an approach that endorses the principle of universality, indivisibility and interdependence of the two freedoms, on one hand, and strikes the balance and complementarity between them, on the other.

The right to freedom of expression is cherished and guaranteed as a fundamental right in international human rights law. Article 19 of both the Universal Declaration of Human Rights (UDHR) and the International Covenant on Civil and Political Rights (ICCPR) protect freedom of expression.<sup>19</sup> Moreover, both instruments set out certain limits on the exercise of the right to freedom of expression. However, it has to be noted in this regard that article 19 in both instruments maintains a clear distinction between freedom of opinion, on one hand, and freedom of expression on the other. By contrast, while freedom of opinion is subject to no restrictions, freedom of expression is subject to certain specified limitations. Article 19 of the UDHR does

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<sup>13</sup> - Ibid. pp. 13-14.

<sup>14</sup> - In contrast to the majority of rights and freedoms set forth in the UDHR and ICCPR, article 18 of both instruments explicitly affirms the individual as well as the collective aspects of religious freedom. The article provides that freedom to manifest one's religion or belief may be exercised either "alone" or "in community with others". The collective aspect of freedom to manifest religion or belief is of particular importance since intervention by the State to regulate or to limit manifestations of a religion or belief are more frequent when those manifestations are performed "in community with others" than when they are performed "alone"[Ibid. p13].

<sup>15</sup> - See the Report of the Rapporteurs, *supra* note 11, p. 10.

<sup>16</sup> - Ibid. p. 10.

<sup>17</sup> - Ibid. p. 10.

<sup>18</sup> - Ibid. p. 10.

<sup>19</sup> - Freedom of expression is also declared a fundamental human right in regional human rights instruments: article 10 of the European Convention for the Protection of Human Rights and Fundamental Freedoms; article 13 of the American Convention on Human Rights; article 9 of the African Charter of Human and Peoples’ Rights; and article 32 of the Arab Charter on Human Rights.

not provide for a limitation clause. However, the UDHR contains a general limitation clause in article 29 which is applied to all the rights and freedoms set forth in UDHR.<sup>20</sup> Unlike article 19 of the UDHR, article 19 (3) of the ICCPR expressly provides for a limitation clause. These limitations shall only be such as are provided by law and are necessary: (a) for respect of the rights and reputations of others; (b) for the protection of national security or of public order, or of public health or morals.<sup>21</sup> As will be discussed in Part II, freedom of expression under article 19 of the ICCPR is further restricted by article 20, which specifies that any propaganda for war and any advocacy of national, racial, or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law.

It has to be emphasized that freedom of expression, like all other human rights, should not be conceived, articulated, or asserted in abstract terms; rather its nature should be informed by its internal and external political, economic, social, and cultural context.<sup>22</sup> Moreover, it is important in this regard to acknowledge the dynamics of the tripartite relationship of mutual conflict and interdependence between those seeking self-expression and others who oppose it, as well as between such parties and the state, who is supposed to be the arbiter.<sup>23</sup>

## II. Criticism of a Religion which Falls under Article 20 of the ICCPR

The phenomenon of globalization has brought with it a series of new challenges. In particular, there is now much more awareness of, and prompt access to, information across borders and cultures. As a result, people of all opinions, beliefs and faith live in greater proximity, making the need for tolerance even more urgent.<sup>24</sup> The protection of peaceful coexistence in today's multicultural societies requires a balance between freedom of expression and freedom of religion and, consequently, the non-incitement of racial or religious hatred.<sup>25</sup>

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<sup>20</sup> - For the limitation to be legitimate under article 29 of the UDHR, it must satisfy two essential criteria: (i) it must be determined by law, and (ii) it must be enforced solely for one or several of the purposes mentioned in the article. The first purpose that makes the limitation permissible, is to secure "due recognition and respect for the rights and freedoms of others". The other grounds used by article 29 of are morality, public order and the general welfare of a democratic society [For an extensive study of the limitations under article 29, see Erica-Irene A. Daes, "Freedom of the Individual under Law: Study on the Individual's Duties to the Community and the Limitations on Human Rights and Freedoms under Article 29 of the Universal Declaration of Human Rights", United Nations Study Series No. 3, New York, 1990, and Törkel Opsahl, "Articles 29 and 30" in Asbjørn Eide, Gudmundur Afredsson, and Göran Melander (eds.), *The Universal Declaration of Human Rights: A Commentary*, Oslo: Scandinavian University Press (1992), pp. 449-470]. It has been argued that the drafting history of article 7 of the UDHR, which proclaims the right to equality before the law and to the equal protection of the law and prohibits (in its second sentence) any incitement to discrimination in violation of the Declaration, indicates that the prohibition of incitement to discrimination clause was adopted with the understanding that it protected against propaganda of national, racial and religious hostility and hatred, as well as the understanding that although article 19 protected freedom of expression, it did not protect expression that incites discrimination [see Stephanie Farrow, *supra* note 9, pp. 14-18].

<sup>21</sup> - See article 19 (3) of the ICCPR.

<sup>22</sup> - Abdullahi A. An-Naim, "The Contingent Universality of Human Rights: The Case of Freedom of Expression in Africa and Islamic Contexts" in *Emory International Law Review*, Vol. 11, spring 1997, pp. 53-54.

<sup>23</sup> - *Ibid.* p. 51.

<sup>24</sup> - See the Report of the Rapporteurs, *supra* note 11, p. 7.

<sup>25</sup> - See the Report of the UN Special Rapporteur on Contemporary Forms of Racism, Racial Discrimination, Xenophobia and Related Intolerance, Mr. Doudou Diene, UN Doc.A/HRC/6/6, pp. 16-17.

As indicated above ICCPR contains three articles that deal with the relationship between freedom of religion and freedom of expression, namely article 18 protects freedom of religion, subject to such limitations as are necessary to protect public safety and order or the fundamental rights and freedoms of others [article 18 (3)]; article 19 protects freedom of expression, subject to certain restrictions such as respect of right and reputations of others [article 19 (3); and article 20 which states that any propaganda for war and any advocacy of national, racial, or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law. The basic principle underlines the three articles is that any freedom or right is limited by respect for others and their rights. This part of the Paper primarily examines the admissible scope of limitations on critical thinking on religious issues and explores the circumstances under which criticism of a religion could fall within the scope of article 20. It begins by analyzing article 20 (2) and then addresses the question of the admissible limitations on critical thinking on religious issues under article 20 (2).

### **Article 20 of the ICCPR**

Article 20 of the ICCPR contains two specific prohibitions on two types of expression. This article provides that:

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

The *travaux préparatoires* (drafting history) of article 20 is characterized by considerable controversy.<sup>26</sup> This is evident by the voting roll, which is particularly true for paragraph 2 of article 20, which was adopted with fifty votes in favor, eighteen votes against, and fifteen abstentions.<sup>27</sup> The countries voted against paragraph 2 expressed the concern that article 19 already subject to too many restrictions in paragraph 3, and that article 20 went too far in placing further restrictions. Those countries further pointed out that article 20 did not belong to civil and political rights since it did not proclaim a human right.<sup>28</sup> The controversy over article 20 illustrates the complexity of the issues that are addressed in the article. These complex issues include, *inter alia*

- The early drafting history of article 19 showed that the Commission on Human Rights was considering to exclude from the right to freedom of expression “publications and other media of public expression which aim or tend to inflict injury, or incite prejudice or hatred, against persons or groups because of their race, language, religion, or national origin”. The language, however, was limited to incitement to violence.<sup>29</sup> The early drafting history also reveals that a number of delegates were concerned not only with

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<sup>26</sup> - For a detailed discussion of the drafting history of article 20, see M.J.Bossuyt, Guide to the Travaux Préparatoires of the International Covenant on Civil and Political Rights (Dordrecht: Martinus Nijhoff Publishers, 1987) and Stephanie Farrior, *supra note 9*, pp. 21-49.

<sup>27</sup> -See Stephanie Farrior, *supra note 9*, pp. 39-42.

<sup>28</sup> - Ibid. pp. 40-41.

<sup>29</sup> - Ibid. pp. 21-22.

advocacy of hatred that would incite imminent violence, but also about the causal connection they saw between such advocacy and the problem of discrimination.<sup>30</sup>

- The question of protection against private actors generated considerable debate. Unlike most of the articles set forth in the ICCPR, article 20 does not declare a right that individual holds *vis-à-vis* the government, instead it requires governments to prohibit certain behavior of private actors *vis-à-vis* other private actors.<sup>31</sup> It has been pointed out that although this provision is not the only one addressing private behavior, it is more controversial than the others because involves government control of expression, with the attendant risk of government abuse of that control.<sup>32</sup>
- The question of whether to prohibit only incitement to violence or incitement to hatred generated considerable debate. Several delegates expressed the opinion that a provision which prohibited only incitement to violence would leave the door open to all other forms of intolerance.<sup>33</sup> Furthermore, there was debate on whether to use the phrase “hatred or violence” instead of the phrase “hatred and violence”.<sup>34</sup>
- The drafting history of article 20 reveals considerable discussion on the question of potential abuse by governments and some delegates pointed out that the wording of article 20 would provide too much opportunity for government abuse.<sup>35</sup>

Thus, the disagreement between the proponents and the opponents of article 20 lies in two main issues: the potential abuse by the governments of the restriction placed by article 20 on the right to freedom of expression and the difficulty of defining the terms ‘incitement’, ‘hostility’ and ‘hatred’.

In its General Comment No. 11 on article 20, the Human Rights Committee indicates that the prohibitions imposed by article 20 are fully compatible with the right to freedom of expression as contained in article 19, the exercise of which carries with it special duties and responsibilities.<sup>36</sup> The Committee further points out that the prohibition under paragraph 1 extends to all forms of propaganda threatening or resulting in an act of aggression or breach of peace contrary to the UN Charter, while paragraph 2 is directed against any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence, whether such propaganda or advocacy has aims which are internal or external to the State concerned.<sup>37</sup> Moreover, the Committee holds that the measures contemplated by article 20 (2) constitute important safeguards against infringement of the rights of religious minorities and of other religious groups to exercise the rights guaranteed by articles 18 and 27 of the ICCPR, and against acts of violence and persecution directed towards those

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<sup>30</sup> - Ibid. pp. 22-23.

<sup>31</sup> - For the debate on this issue, see Ibid. pp. 23-24.

<sup>32</sup> - Ibid. p. 8.

<sup>33</sup> - Ibid. pp. 25-26.

<sup>34</sup> - Ibid. p. 26.

<sup>35</sup> - Ibid. pp. 27-34.

<sup>36</sup> - See General Comment No. 11: Prohibition of propaganda for war and inciting national, racial or religious hatred (Art. 20) adopted by the Human Rights Committee on 29/07/1983.

<sup>37</sup> - Ibid.

groups.<sup>38</sup> However, the Committee did not attempt to offer any definition or interpretation of the phrase “any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence”. Furthermore, the Committee expressly indicates the distinctive nature of article 20 as being explicitly not self-executing and, therefore, States parties to the ICCPR are obliged to adopt the necessary legislative measures prohibiting the action referred to in article 20.<sup>39</sup> The Committee states that for article 20 to become fully effective there ought to be a law making it clear that propaganda and advocacy as described therein are contrary to public policy and providing for an appropriate sanction in case of violation.<sup>40</sup>

### **Admissible limitations on critical thinking on religious issues under article 20 (2)**

Numerous situations can be identified in which religious communities or beliefs have been the target of acts ranging from critical analysis of a purely theological nature to the most extreme forms of incitement to violence or hatred against member of a religious group. Between these two extremes, one can find all sorts of expressions, including stereotyping, ridicule, derogatory comments and insults.<sup>41</sup> These forms of expressions target either the content of religious beliefs themselves or the behavior of its followers.<sup>42</sup> It has been rightly argued that with regard to situations in which certain forms of expression confront religions or beliefs or members of religious or belief communities, it is essential to make a careful distinction between (a) forms of expression that should constitute an offence under international law, (b) forms of expression that are not criminally punishable but may justify a civil suit and (c) forms of expression that do not give rise to neither criminal nor civil sanctions but still raise a concern in terms of tolerance, civility and respect for the religion or belief of others.<sup>43</sup> It has to be emphasized that each of these situations should be assessed in its context according to its own merits and circumstances. Thus, the right to freedom of expression can legitimately be restricted for advocacy of religious hatred that constitutes incitement to discrimination, hostility or violence against individuals or groups on the basis of their religion. Consequently, the threshold of the acts that are referred to in article 20 (2) is that they have to constitute advocacy of religious hatred that constitutes incitement to discrimination, hostility or violence. The underlying human rights concerns of “defamation of religions” should, therefore, be addressed in this context.

The phenomenon of defamation of religions is a worldwide phenomenon.<sup>44</sup> Incitement to racial discrimination, xenophobia and other related intolerance and the defamation of religions and religious hatred are interconnected issues.<sup>45</sup> Discrimination and intolerance

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<sup>38</sup> - Ibid.

<sup>39</sup> - Ibid.

<sup>40</sup> - Ibid.

<sup>41</sup> - See the Report of the Rapporteurs, *supra note 11*, p. 8.

<sup>42</sup> - Ibid.

<sup>43</sup> - Ibid.

<sup>44</sup> - See Human Rights Council’s Resolution “Combating defamation of religions” adopted 20 March 2008, UN Doc. A/HRC/7/L.15. Although this resolution is entitled “Combating defamation of religions”, but it does not define the term ‘defamation of religions’. It refers to the negative stereotyping of all religions and manifestations of intolerance and discrimination in matters of religion or belief.

<sup>45</sup> - See the Report of the Rapporteurs, *supra note 11*, p. 6.

against religious communities and their members, which have historical and cultural roots, are facilitated in an environment where religions and beliefs are degraded or maligned through a deliberate intellectual and/or political discourse which demonizes them.<sup>46</sup> While it is true that acts of defamation of religions are common in various parts of the world, it must be recognized that each one of these phenomena bears its specificity in their manifestations, expressions and frequency.<sup>47</sup> A key issue in the analysis of the close link existing between defamation of religions and the right to freedom of expression lies in understanding the political and ideological context.<sup>48</sup> However, for acts of defamation of religions to be prohibited and hence legitimately restricting the right to freedom of expression, they should satisfy the criteria set forth by article 20 (2), i.e. they advocate religious hatred that constitutes incitement to discrimination, hostility or violence. This may indicate that defamation of religions may offend people and hurt their religious feelings. But it does not thereby necessarily nor directly result in a violation of their rights, and the right to freedom of religion in particular.<sup>49</sup> Thus, the questions arise in this regard include: what are the criteria and the definition for “advocacy of religious hatred that constitutes incitement to discrimination, hostility or violence? How could we distinguish between acts of defamation of religions that tantamount to advocacy of religious hatred that constitutes incitement to discrimination, hostility or violence and those which are not? What are the available guarantees against the potential abuse by governments when applying and invoking the criteria imposed by article 20 (2) on the exercise of both the right to freedom of religion and the right to freedom of expression? Is an act of religious defamation similar to or different from a racist statement, or in other words, what is the relationship between article 20 (2) of the ICCPR and article 4 of the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD)?

Neither the drafting history of article 20 nor the General Comment No. 11 of the Human Rights Committee has defined the phrase “any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence”. Although the crucial question of distinguishing those forms of expressions that satisfy the criteria mandated by article 20 (2), and therefore constitute advocacy of religious hatred that constitutes incitement to discrimination, hostility or violence, is a contextual and takes into account the local conditions, history, culture and political tensions, it is, nevertheless, of utmost important to define the threshold of article 20 (2), particularly the phrase “advocacy of religious hatred that constitutes incitement to discrimination, hostility or violence”, in order to draw the boundaries of the right to freedom of expression and hence the admissible limitations on critical thinking on religious issues falling within the scope of article 20 (2).

The jurisprudence developed by the Human Rights Committee regarding article 20 (2) of the ICCPR does not shed much light on the definition and the interpretation of acts of religious

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<sup>46</sup> - Ibid.

<sup>47</sup> - Ibid.

<sup>48</sup> - According to the Special Rapporteur on Contemporary Forms of Racism, Racial Discrimination, Xenophobia and Related Intolerance, Mr. Doudou Diene, this political and ideological context favors the incitement to racial and religious hatred and this can be indicated by the controversies about the caricatures of the Prophet Muhammad published by the *Jyllands-Posten* newspaper in Denmark [see Ibid. p. 4].

<sup>49</sup> - Ibid. p. 10.



hatred that constitutes incitement to discrimination, hostility or violence.<sup>50</sup> However, according to the Special Rapporteur on freedom of religion or belief only expressions that constitute incitement to imminent acts of violence or discrimination against specific individual or group should be prohibited under article 20 (2).<sup>51</sup>

In this respect recourse may be made to the doctrine of ‘margin of appreciation’, which was developed by the former European Commission and the European Court of Human Rights. This will prove very useful not only in cases involving competing rights, but also in cases pertaining to restrictions of rights as well.<sup>52</sup> ‘Margin of appreciation’ essentially expresses the latitude allowed to States parties in their observance of the European Convention for the Protection of Human Rights and Fundamental Freedoms, and its scope is influenced by the circumstances of the case.<sup>53</sup>

Identifying the permissible limitations on critical thinking on religious issues that might fall under the scope of article 20 (2) requires a distinction between those acts of defamation of religions that tantamount to advocacy of religious hatred that constitutes incitement to discrimination, hostility or violence and those which are not. This distinction should be made with particular emphasis on the fact that embracing the full scope of both the right to freedom of religion and the right to freedom of expression is a pre-requisite to addressing the limitations on both rights. Moreover, such distinction should account for possible abuse by the governments in invoking the restrictions set forth in article 20 (2). Such abuse may result in undermining or nullifying the measures contemplated by article 20 (2) as important safeguards against both infringement of the rights of religious minorities and of other religious groups under articles 18 and 27 of the ICCPR, and against acts of violence and persecution directed towards those groups.<sup>54</sup> This might have far-reaching consequences in the case of a theocratic state where the claims of superiority, exclusivity, and monopoly of interpreting religious texts may lead to harassment, intimidation, and punishment of those individuals and groups who dissent from the official position as proclaimed by the state assuming the role of the guardian of faith.<sup>55</sup> Furthermore, the distinction should also take into account that wide application of the restrictions imposed by article 20 (2) might have far-reaching implications not only on the right to freedom of expression, but also on scholarship on religious issues and may asphyxiate honest debate or research.<sup>56</sup> Thus, the question of

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<sup>50</sup> - The Human Rights Committee has dealt with article 20 (2) in a number of communications, which reveal that the Committee tends to assess article 20 (2) in the light of article 19, particularly paragraph 3 [see *Taylor v. Canada* (Communication No. R. 24/104, 1981, ICCPR, A/38/40 (April 1983), *Faurisson v. France* (Communication No. 550/1993, ICCPR, A/52/40, Vol. II, November 1996, and *Ross v. Canada* (Communication No. 736/1997, ICCPR, A/56/40, Vol. II, October 2000)].

<sup>51</sup> - *Ibid.* p. 11.

<sup>52</sup> - For a detailed discussion on the doctrine of ‘margin of appreciation’ see P. van Dijk and G.J.H. van Hoof, “Theory and Practice of the European Convention of Human Rights”, (Deventer/ Boston: Kluwer Law and Taxation Publishers, 1990), pp. 583-606, Robert Post, *supra note 5*, pp. 78-85 and Heleen Bosma, “Freedom of Expression in England and Under ECHR: in Search of a Common Ground”, (Antwerpen: Intersentia – Hart Publishers, 2000), pp. 173-205.

<sup>53</sup> - Heleen Bosma, *supra note 51*, pp. 132-133.

<sup>54</sup> - See General Comment No. 11, *supra note 51*.

<sup>55</sup> - Mohamed S.M. Eltayeb, *supra note 12*, pp. 185-191.

<sup>56</sup> - See the Report of the Rapporteurs, *supra note 11*, p. 11.

striking a balance between the right to freedom of religion and the right to freedom of expression is an extremely delicate exercise. It requires neutral and impartial implementation and must be weighed by independent and non-arbitrary bodies.<sup>57</sup> In this respect, an independent judiciary is thus a vital component in the process of effectively adjudicating cases related to incitement of religious hatred under article 20 of the ICCPR.<sup>58</sup>

The relationship between article 20 (2) of the ICCPR and article 4 of the ICERD will be considered below in Part III.

### III. Punishing Advocacy of Religious Hatred

The question of whether the promotion of freedom of expression requires States to punish advocacy of religious hatred that constitutes incitement to discrimination, hostility or violence might be better illustrated and analyzed in the light of and with reference to article 4 of the ICERD. Article 4 of the ICERD is considered among the central provisions of the Convention and it was regarded as central to struggle against racial discrimination. The International Convention on the Elimination of All Forms Racial Discrimination seeks to abolish racial discrimination through two methods: prohibiting incitement to racial hatred and promoting education.<sup>59</sup> Article 4 thereof reads as follows:

“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”.

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<sup>57</sup> - Ibid. p. 14.

<sup>58</sup> - Ibid.

<sup>59</sup> - See Stephanie Farrior, *supra note 9*, p. 48.

The Committee on the Elimination of Racial Discrimination (CERD) explained that the provisions of article 4 are of a mandatory character and of a preventive nature.<sup>60</sup> The Committee pointed out that in order to satisfy their obligations under article 4, States parties have not only to enact appropriate legislation, but also have to ensure that it is effectively enforced.<sup>61</sup> Article 4 requires States parties to penalize four categories of misconduct: (i) dissemination of ideas based upon racial superiority or hatred; (ii) incitement to racial hatred; (iii) acts of violence against any race or group of persons of another colour or ethnic origin; and (iv) incitement to such acts.<sup>62</sup> In the opinion of the Committee, the prohibition of the dissemination of all ideas based upon racial superiority or hatred is compatible with the right to freedom of opinion and expression.<sup>63</sup> The Committee stated that the citizen's exercise of this right carries special duties and responsibilities, specified in article 29 (2) of the UDHR, among which the obligation not to disseminate racist ideas is of particular importance.<sup>64</sup>

Thus, in contrast to article 20 of the ICCPR, article 4 of ICERD requires States to prohibit not only advocacy of hatred, but also all dissemination of ideas based on racial superiority or hatred. Moreover, article 4 mandates that incitement be made an offence punishable by law, which has been interpreted by the Committee as meaning a criminal offence, whereas article 20 only requires that incitement be punishable by law, which could be met by a civil or administrative remedy in addition to criminal sanction.<sup>65</sup> However, it has to be noted in this regard that not all States parties accord with the interpretation that article 4 requires criminalizing incitement. Belgium, for example, has noted that article 4 (a) does not explicitly require that the prohibited activities be made criminal offences, but simply refers to 'offences punishable by law', which can include civil law.<sup>66</sup> Other States have pointed to the utility of civil liability in certain cases such as those involving unintentional discriminatory acts.<sup>67</sup> However, the Committee has pointed out that article 4 (a) addresses racial discrimination *per se*, and nowhere mentions intent.<sup>68</sup> The Committee has further pointed out that the imposition of civil liability falls short of the requirement of article 4 to declare certain acts or activities as offence punishable by law.<sup>69</sup> Furthermore, the Committee has emphasized that article 4 is not self-executing, and thus requires implementing legislation.<sup>70</sup> The "due regard" clause in article 4 has been interpreted to give greater weight to the right to freedom from racial discrimination than to the right to freedom of expression.<sup>71</sup>

<sup>60</sup> - See General Comment No. 7: Legislation to Eradicate Racial Discrimination (Art. 4) adopted by the Committee on Elimination of Racial Discrimination on 23/08/1985.

<sup>61</sup> - See General Comment No. 15: Organized Violence based on Ethnic Origin (Art. 4) adopted by the Committee on Elimination of Racial Discrimination on 23/03/1993.

<sup>62</sup> - Ibid.

<sup>63</sup> - Ibid.

<sup>64</sup> - Ibid.

<sup>65</sup> - See Stephanie Fariior, *supra note 9*, pp. 48-53.

<sup>66</sup> - Ibid. p. 51.

<sup>67</sup> - Ibid.

<sup>68</sup> - Drew Mahalic & Joan Gambee Mahalic, "The Limitation Provisions of the International Convention on the Elimination of All Forms of Racial Discrimination" in *Human Rights Quarterly*, Vol. 9, 1987, p. 96.

<sup>69</sup> - Annual Report of the Committee on the Elimination of Racial Discrimination, General Assembly Official Records, 40<sup>th</sup> Session, Supplement No. 18 (UN. Doc. A/40/18), p. 39.

<sup>70</sup> - Ibid.

<sup>71</sup> - See Drew Mahalic & Joan Gambee Mahalic, *supra note 68*, pp. 74 and 89 and Stephanie Fariior, *supra note 9*, pp. 51-52.

Regard to the question of what is the available redress under article 4, the Committee noted that article 4 requires States parties to actively prosecute cases of alleged racial discrimination.<sup>72</sup>

Despite the fact that defamation of religions and religious hatred in most cases are interconnected with and interrelated to incitement to racial discrimination, xenophobia and related intolerance, it is nonetheless of utmost importance not to confuse racist statement with an act of defamation of religion. The elements constituting a racist statement are not the same as those constituting a statement of defamation of religion.<sup>73</sup> The legal measures, and in particular the criminal measures, which have been adopted by national legal systems to fight racism may not necessarily be applicable to defamation of religion.<sup>74</sup> Thus, whether the prohibition on dissemination of all ideas related to racial superiority or hatred is equally applicable to incitement of religious hatred should be addressed cautiously. It requires taking into account both the particularities of the question of advocacy of religious hatred that constitutes incitement to discrimination, hostility or violence, and the contextual nature of the question of where to draw the boundaries of the right to freedom of expression against advocacy of religious hatred that constitutes incitement to discrimination, hostility or violence. It also requires bearing in mind the primary objective of article 20 in providing important safeguards against infringement of the rights of religious minorities and of other religious groups to exercise the rights guaranteed by articles 18 and 27 of the ICCPR, and against acts of violence and persecution directed towards these groups. Legal measures should be seen as a part of wider strategies for combating advocacy of religious hatred that constitutes incitement to discrimination, hostility or violence. In this regard education and both intra- and inter-religious dialogue are indispensable strategies in supporting legal measures.

#### IV. Concluding Remarks

The discussion above aimed at examining the admissible scope of limitations on critical thinking on religious issues and the circumstances under which criticism of a religion may fall within the scope of article 20 of the ICCPR. As argued above, this question should be seen in terms of the balance and complementarity of the right to freedom of religion and respect for human dignity of believers against the right to freedom of expression. It is maintained that such a balance can not be set for all places in the same way, but instead be maintained with respect to historical experiences and local conditions. Furthermore, it is argued that the right to freedom of expression is not absolute and that international human rights law affirms certain restrictions on exercising this right. The question, however, of where to draw the boundaries between the right to freedom of expression and advocacy of religious hatred that constitutes incitement to discrimination, hostility or violence can best be answered contextually and with due regard to, *inter alia*, local conditions, history, culture and political tensions.

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<sup>72</sup> - Communication No. 1/1984, *Yilmaz-Dogan v. The Netherlands* in Annex IV of Report of the Committee on the Elimination of Racial Discrimination, General Assembly Official Records, 43<sup>rd</sup> Session, Supplement No. 18 (U. N. Doc. A/43/18), p. 64.

<sup>73</sup> - See the Report of the Rapporteurs, *supra note 11*, p. 12.

<sup>74</sup> - *Ibid.*

The following points in the preceding analysis may be emphasized as important criteria in examining the question of the admissible limitations on critical thinking on religious issues which may fall under the scope of article 20 of the ICCPR.

- Balancing the right to freedom of expression and the right to freedom of religion, and consequently combating advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence is a central value for promoting peaceful coexistence in today's multicultural societies.
- Despite the presence of a series of recent incidents relating to freedom of expression that polarize multicultural societies, cause tensions and fuel xenophobia and racist attitudes, it is rather inaccurate to present the phenomenon as an inherent conflict between freedom of religion and freedom of expression. The two freedoms are interconnected and interdependent and what is required is an approach that endorses the principle of universality, indivisibility and interdependence of the two freedoms, on one hand, and strikes the balance and complementarity between them, on the other.
- Although the right to freedom of religion or belief as enshrined in international human rights law does not *per se* protect religions or beliefs it does protect the right to freedom of thought, conscience and religion or belief and the right to freedom to manifest one's religion or belief either individually or collectively, including the protection of religious symbols from insult and denigration. Moreover, respect for religions and beliefs and their protection from contempt is an essential and conducive element for all to exercise the right to freedom of thought, conscience and religion or belief.
- The measures contemplated by article 20 (2) constitute important safeguards against infringement of the rights of religious minorities and of other religious groups to exercise the rights guaranteed by articles 18 and 27 of the ICCPR, and against acts of violence and persecution directed towards those groups.
- The right to freedom of expression can legitimately be restricted for advocacy of religious hatred that constitutes incitement to discrimination, hostility or violence against individuals or groups on the basis of their religion. Hence, the threshold of the acts referred to in article 20 (2) is that they have to constitute advocacy of religious hatred that constitutes incitement to discrimination, hostility or violence. The underlying human rights concerns of "defamation of religions" should, therefore, have to be addressed in this context.
- For acts of defamation of religions to be prohibited and, hence, legitimately restricting the right to freedom of expression, they should satisfy the criteria set forth by article 20 (2), i.e. they should advocate religious hatred that constitutes incitement to discrimination, hostility or violence.
- The question of distinguishing those forms of expressions that qualify the criteria mandated by article 20 (2), and therefore constitute advocacy of religious hatred that constitutes incitement to discrimination, hostility or violence, is a contextual and takes into account the local conditions, history, culture and political tensions.
- Identifying the permissible limitations on critical thinking on religious issues falling under the scope of article 20 (2) requires a distinction between those acts of defamation of religions that tantamount to advocacy of religious hatred that constitutes incitement to

discrimination, hostility or violence and those which are not. This distinction should be made with particular emphasis on embracing the full scope of both the right to freedom of religion and the right to freedom of expression as a pre-requisite to addressing the limitations on both rights. Moreover, the distinction should account for possible abuse by the governments in invoking the restriction sets forth in article 20 (2). Furthermore, the distinction should take into account that wide application of the restrictions imposed by article 20 (2) might have far-reaching implications not only on the right to freedom of expression, but also on scholarship on religious issues.

- It is of utmost importance not to confuse a racist statement with an act of defamation of religion. The elements constituting a racist statement are not the same as those constituting a statement of defamation of religion. The legal measures, and in particular the criminal measures, which have been adopted to fight racism may not necessarily be applicable to defamation of religion.
- Legal measures should be seen as a part of wider strategies for combating advocacy of religious hatred that constitutes incitement to discrimination, hostility or violence. In this regards education and both intra- and inter-religious dialogue are indispensable strategies in supporting legal measures.

### 3. Conference room paper by Nazila Ghanea<sup>1</sup>

#### Articles 19 and 20 of the ICCPR

“The peculiar evil of silencing the expression of an opinion is, that it is robbing the human race; posterity as well as the existing generation; those who dissent from the opinion, still more than those who hold it. If the opinion is right, they are deprived of the opportunity of exchanging error for truth: if wrong, they lose, what is almost as great a benefit, the clearer perception and livelier impression of truth, produced by its collision with error.”<sup>2</sup>

“Freedom of speech is not a core value, requiring special protection. It is a value that must be balanced against equally, if not more, compelling values, namely nondiscrimination, multiculturalism and social harmony.”<sup>3</sup>

“The road to genocide in Rwanda was paved with hate speech.”<sup>4</sup>

#### *I. Text and Definitions*

Both Article 19 and Article 20 of the International Covenant on Civil and Political Rights [ICCPR] bear testament to the fact that although freedom of expression is “one of the most widely accepted rights”,<sup>5</sup> it is not absolute right and there are prohibitions and limitations attached to it. Indeed the related jurisprudence has outlined the “complex jurisprudential weighting of rights, interests and values”.<sup>6</sup>

This paper will focus on the content and scope of Articles 19 and 20 of the ICCPR, the inter-relationship between them and the obligations of States parties in that regard. Attention will be given to context, interpretations and jurisprudence in attempting to sketch a preliminary response to these questions.

#### Article 19

The right to hold opinions without interference *is* an absolute right, as observed by the Human Rights Committee. Article 19(1) “permits no exception or restriction”,<sup>7</sup> it is only in its *expression*

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<sup>1</sup> Dr Nazila Ghanea is a Lecturer in International Human Rights Law, University of Oxford; Editor-in-Chief, international journal of *Religion and Human Rights*. The author would like to thank Jeroen Temperman, David Kretzmer, Alexandra Xanthaki and Farrah Ahmed for comments on an earlier draft. Any mistakes, of course remain the author’s alone.

<sup>2</sup> John Stuart Mill, *On Liberty* (1859) in *On Liberty and Other Writings*, Cambridge, Cambridge University Press, 1989, pp. 20-21

<sup>3</sup> Rhoda E. Howard-Hassmann, *Canadians Discuss Freedom of Speech: Individual Rights versus Group Protection*, (2000) 7 *International Journal on Minority and Group Rights*, p. 138

<sup>4</sup> William A. Schabas, *Hate Speech in Rwanda: The Road to Genocide*, (2000) 46 *McGill Law Journal*, p. 144

<sup>5</sup> Dominic McGoldrick and Thérèse O’Donnell, ‘Hate-speech laws: consistency with national and international human rights law’, (1998) 18 *Legal Studies*, p. 454

<sup>6</sup> *Ibid.*, p. 455

<sup>7</sup> General Comment 10 on Article 19 of the ICCPR, *Freedom of Expression*, adopted at the nineteenth session on 29/6/83, para. 1

that ‘special duties and responsibilities’, and hence possible restrictions, may apply. These special duties and responsibilities are addressed in Article 19(3) and relate to “the interests of other persons or to those of the community as a whole”.<sup>8</sup> The note of caution is that the State party “may not put in jeopardy the right itself”<sup>9</sup> in its application of these restrictions. Any restrictions must be:

- 1- Provided for by law; and
- 2- They must be imposed for one of the following purposes:
  - a. respect of the rights or reputations of others [Article 19(3)(a)]; OR the protection of:
  - b. national security,
  - c. public order (ordre public),
  - d. public health OR
  - e. morals, [Article 19(3)(b)]
- 3- AND be justified by the State party concerned for one of those purposes. I.E. be necessary to achieve that legitimate purpose or aim – hence the restriction imposed on freedom of expression must be proportional to the value which the restriction serves to protect.

### Article 20

Article 20 places an obligation on States parties “to adopt the necessary legislative measures prohibiting the actions referred to therein”,<sup>10</sup> by showing that they have been “prohibited in law” or show that “appropriate efforts intended or made to prohibited them”<sup>11</sup> have been made. According to the Human Rights Committee, full and effective compliance with this obligation requires “a law making it clear that propaganda and advocacy as described therein are contrary to public policy and providing for an appropriate sanction in case of violation”.<sup>12</sup> Other than saying that such propaganda and advocacy ‘shall be prohibited by law’, the article itself is silent. One would presume that the threshold set for this *requirement* on the state for action, this positive obligation – rather than permission – on the state to take action must be high, but how high?

### Hate Speech

Nowak has noted the lack of uniformity and extraordinary vagueness – and hence risk of abuse – of the term ‘advocacy’.<sup>13</sup> However, reference in Article 20 to both ‘propaganda for war’ as well as ‘advocacy of national, racial or religious hatred’ is indicative of the gravity of hatred that it is

<sup>8</sup> Ibid., para. 4. This has also been confirmed since this General Comment, for example in the following jurisprudence from the Human Rights Committee: *Faurisson v. France* (550/1993), ICCPR, A/52/40 vol. II (8 November 1996) 84 (CCPR/C/58/D/550/1993), para. 9.6 and *Ross v. Canada* (736/1997), ICCPR, A/56/40 vol. II (18 October 2000) 69 (CCPR/C/70/D/736/1997), para. 6.11

<sup>9</sup> General Comment 10 on Article 19 of the ICCPR, para. 4

<sup>10</sup> General Comment 11 on Article 20 of the ICCPR, Prohibition of propaganda for war and inciting national, racial or religious hatred, adopted at the nineteenth session on 29/7/83, para. 1

<sup>11</sup> Ibid., para. 1

<sup>12</sup> Ibid., para. 2

<sup>13</sup> Manfred Nowak, U.N. Covenant on Civil and Political Rights, CCPR Commentary, Kehl/Strasbourg/ Arlington, NP Engel Publisher, 1993, p. 472



concerned with. It goes on to qualify it as hatred which is conditioned by that which ‘constitutes incitement to discrimination, hostility or violence’. Brink notes

“There is much speech that is discriminatory but does not count as hate speech. It reflects and encourages bias and harmful stereotyping, but it does not employ epithets in order to stigmatize and insult ... vilify and wound. ... hate speech is worse than discriminatory speech ... hate speech’s use of traditional epithets or symbols of derision to vilify on the basis of group membership expresses contempt for its targets and seems more likely to cause emotional distress and to provoke visceral, rather than articulate, response.”<sup>14</sup>

The advocacy of hatred constituting incitement is certainly a lot more specific and damaging than all expressions that may be deemed discriminatory.

### Discrimination, Hostility and Violence

Article 20’s concern is with hate which ‘constitutes incitement to discrimination, hostility or violence’. Clearly there is a wide spectrum between ‘discrimination’, ‘hostility’ and ‘violence’; and their respective thresholds.

‘Discrimination’ at least has the benefit of specific protection elsewhere in the ICCPR.<sup>15</sup> Its Article 26<sup>16</sup> articulation upholds “an autonomous right”,<sup>17</sup> clearly offering a “substantive equality guarantee, rather than a guarantee limited only to the rights of the ICCPR”.<sup>18</sup> Nowak makes what Article 26 adds to Article 2 crystal clear in the following: “The Covenant contains no provision granting a right to sit on a park bench. But when a State party enacts a law forbidding Jews or blacks from sitting on public park benches, then this law violates Art. 26.”<sup>19</sup> However, “not every differentiation of treatment will constitute discrimination, if the criteria for such differentiation are reasonable and objective and if the aim is to achieve a purpose which is legitimate under the Covenant”.<sup>20</sup> Indeed “identical treatment in every instance”<sup>21</sup> may itself be discriminatory as “the principle of equality sometimes requires States parties to take affirmative action”<sup>22</sup> and this constitutes “legitimate differentiation”.<sup>23</sup> So the ‘advocacy of hatred’ that ‘incites discrimination’ that we are looking for is not concerned with differentiation alone. Indeed since ‘discrimination’

<sup>14</sup> David O. Brink, *Millian Principles, Freedom of Expression, and Hate Speech*, (2001) 7 *Legal Theory*, pp. 138-139

<sup>15</sup> For example see Articles 2(1), 3, 4(1), 14(1) and 14(3), 20(2), 23(4), 24, 25 and 26 of the ICCPR.

<sup>16</sup> Article 26 states: ‘All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground...’. See also General Comment 18 on Non-discrimination, adopted at the thirty-seventh session on 10/11/89, para. 1. Article 26 offers an independent right and is to be distinguished from Article 2 of the ICCPR which is the more limited non-discrimination provision that needs to be read in conjunction with a specific right guaranteed elsewhere in the ICCPR i.e. it is a parasitic on other ICCPR rights. Article 26 can be violated independently, therefore, and Article 2 cannot.

<sup>17</sup> General Comment 18 on Non-discrimination, para. 12

<sup>18</sup> Dominic McGoldrick and Thérèse O’Donnell, ‘Hate-speech laws: consistency with national and international human rights law’, pp. 471-472.

<sup>19</sup> Manfred Nowak, *U.N. Covenant on Civil and Political Rights, CCPR Commentary*, Kehl, NP Engel Publisher, 2005, 2<sup>nd</sup> rev. ed, pp. 604–605. The author thanks Jeroen Temperman for bringing this to her attention.

<sup>20</sup> General Comment 18 on Non-discrimination, para. 13

<sup>21</sup> *Ibid.*, para. 8

<sup>22</sup> *Ibid.*, para. 10

<sup>23</sup> *Ibid.*, para. 10

has the lowest threshold, we would be wise to take on Post's suggestion in relation to Article 20(2) that "states must show that the harm of discrimination cannot be ameliorated by means other than the suppression of protected speech".<sup>24</sup> He gives, for example, the example of educational initiatives. So, whilst prohibited by law, a well calibrated process of responding to hate speech that incites discrimination needs to be carefully ascertained in order for the sanctions adopted at each stage to indeed be "appropriate".<sup>25</sup>

The question of what will give rise to incitement of hostility and violence<sup>26</sup> is yet harder to ascertain. Clarke suggests that "Where certain parts of the population have previously responded violently to perceived criticism ... there will be a genuine threat of riots and violence".<sup>27</sup> As one writer has observed regarding racial hatred

"In the area of hate speech regulation, the most serious problems often relate to owing up to past examples of ethnic violence. While all types of hate speech have the power to intimidate minority groups and in the process disrupt society, hate speech that attempts to minimize or justify past instances of such violence can be extremely disruptive".<sup>28</sup>

A history of violence and persecution are useful indicators. We should, however, be wary of those waiting at the margins to encourage the instrumentalisation of violence, in part perhaps in order to justify the infringement of freedom of expression. This may be just too easy to manipulate, not least by the government itself. Here again we need to be cautious of not losing the full context of advocacy of hatred as well as the incitement to hostility or violence. It is not the violence that should be indicative of the gravity of the speech, the threshold of advocacy of hate should be determined independently of the fact of the incitement of violence. One implication of the terms 'hostility or violence' is that, as Nowak has argued, Article 20(2) "does not require States parties to prohibit advocacy of hatred in private that instigates non-violent acts of racial or religious discrimination".<sup>29</sup>

### Other Instruments

Article 9(2) of the African Charter states that "[e]very individual shall have the right to express and disseminate his opinions within the law."<sup>30</sup> It is clear that 'within the law' covers legislative limitations such as those contained in the ICCPR. Article 13(5) of the American Convention on Human Rights upholds Freedom of Thought and Expression and offers a similar protection of

<sup>24</sup> Robert Post, Religion and Freedom of Speech: Portraits of Muhammad, (2007) 14.1 Constellations, p. 83

<sup>25</sup> General Comment 11 on Article 20 of the ICCPR, para. 2

<sup>26</sup> Much has been written about hostility being of a lower nature than violence, hence its redundancy in Article 20(2). The author will not enter into this discussion at this point in the discussion.

<sup>27</sup> Ben Clarke, Freedom of Speech and Criticism of Religion: What are the Limits? (2007) 14.2 Murdoch University E Law Journal, p. 104

<sup>28</sup> Robert A. Kahn, Cross-Burning, Holocaust Denial, and the Development of Hate Speech Law in the United States and Germany, (2006) 83 University of Detroit Mercy Law Review, p. 192

<sup>29</sup> Manfred Nowak, U.N. Covenant on Civil and Political Rights, CCPR Commentary, Kehl/Strasbourg/ Arlington, NP Engel Publisher, 1993, p. 475

<sup>30</sup> African Charter on Human and Peoples' Rights, June 27, 1981, O.A.U. Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982)

Article 20(2),<sup>31</sup> though its criteria of “incitements to lawless violence or to any other similar action” offers greater clarity and is “narrower”<sup>32</sup> regarding the required threshold than Article 20(2)’s “incitement to discrimination, hostility *or* violence”.<sup>33</sup> Indeed, the early drafts of the ICCPR, too, only restricted incitement to violence.<sup>34</sup>

The relationship between, and possible tensions arising from, Article 19 and 20 of the ICCPR mirror those in the Universal Declaration of Human Rights [UDHR]. There it is Article 7 that notes that, in the context of equality before the law and equal protection of the law without discrimination.<sup>35</sup> Its Article 19<sup>36</sup> protects freedom of opinion and expression without the stating of any limitations, though separately in Article 29(2) – the UDHR’s general limitation clause – upholds limitations that are “determined by law solely for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society”.

## II. Protections Offered and State Obligations Incurred

Article 20(2) “does not declare a right that individuals hold vis-à-vis the government; instead, it requires governments to prohibit certain behavior of private actors vis-à-vis other private actors”.<sup>37</sup> I would disagree with the latter point, in that it seems to suggest that the government would not have a role in prohibiting the behaviour of public actors. This is contradicted by the view of the Human Rights Committee itself, in that it observes that States parties “should themselves refrain from any such propaganda or advocacy”.<sup>38</sup>

Article 20, does, however, is said to have introduced “an alien element in the system of the Covenant in that it does not set forth a specific human rights but merely establishes limitations on other rights”,<sup>39</sup> through “a separate provision”.<sup>40</sup> It departs from the limitation grounds within

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<sup>31</sup> Article 13(5) of the American Convention on Human Rights states: “Any propaganda for war and any advocacy of national, racial, or religious hatred that constitute incitements to lawless violence or to any other similar action against any person or group of persons on any grounds including those of race, color, religion, language, or national origin shall be considered as offenses punishable by law.” American Convention on Human Rights, Nov. 22, 1969, O.A.S.T.S. No. 36, 9 I.L.M. 99

<sup>32</sup> Elizabeth F Defeis, Freedom of Speech and International Norms: A Response to Hate Speech, (1992) 29.57 Stanford Journal of International Law, p. 112

<sup>33</sup> Emphasis added

<sup>34</sup> Stephanie Farrior, Molding The Matrix: The Historical and Theoretical Foundations of International Law Concerning Hate Speech, (1996) 14.1 Berkeley Journal of International Law, p. 22 and also pp. 25-26

<sup>35</sup> Article 7 of the UDHR states: “All are entitled to equal protection against any discrimination in violation of this Declaration and against any incitement to such discrimination.”

<sup>36</sup> Article 19 of the UDHR states: “Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers.” Universal Declaration of Human Rights, G.A. Res. 217A(III), U.N. GAOR, 3<sup>rd</sup> Sess., U.N. Doc. A/810 (1948)

<sup>37</sup> Stephanie Farrior, Molding The Matrix: The Historical and Theoretical Foundations of International Law Concerning Hate Speech, p. 8

<sup>38</sup> General Comment 11 on Article 20 of the ICCPR, para. 2

<sup>39</sup> Manfred Nowak, U.N. Covenant on Civil and Political Rights, CCPR Commentary, p. 468

<sup>40</sup> *Ibid.*, p. 468

existing rights articles in that “it not only authorizes interference with these freedoms but also requires States parties to provide for corresponding restrictions”.<sup>41</sup> This, however, should be understood within the broader context of the state-centred nature of international human rights obligations. Whilst Article 20(2)’s explicit reference is to the state establishing prohibitions in law for *inter alia* the advocacy of hatred that incites to discrimination, that should not distract us from the wider responsibility of States parties to prevent discrimination, for example by “altering the social conditions that cause discrimination”. Put it in other terms, the state itself should not be deemed a victim of such incitement. The occurrence of such advocacy of hate serves as a warning to the state concerned of its overarching role in obliterating such discrimination through multifaceted interventions at numerous levels.<sup>42</sup> It heightens, rather than lessens, its obligations.<sup>43</sup>

Stating that it may be ‘alien’ to the ICCPR, however, is an over statement. As Article 5(1) of the ICCPR emphasises that “Nothing in the present Covenant may be interpreted as implying for any State, group or person any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms recognized herein or at their limitation to a greater extent than is provided for in the present Covenant.” Since “no one may engage in an activity aimed at destroying the rights of others”,<sup>44</sup> then this clearly provides us with the clearest rationale for the obligations stemming from Article 20. This therefore indicates that “[t]he use of the right to freedom of expression, if aimed to destroy the rights of others, constitutes an abuse of that right and as such may be restricted by law”.<sup>45</sup>

But what is the rationale for this restriction? Kretzmer explores three rationales for the restriction of freedom of expression, particularly in relation to racist speech. The first rationale is that this limits the spread of racist ideas, the second that it protects the feelings of victims and maintain public peace, and the third and final one is the symbolic importance of restricting free speech – stressing the “indignity of living in a society in which such speech is tolerated”.<sup>46</sup> He finds all three to be problematic and indeed inadequate. He is particularly scathing regarding the second, “Suppressing a view because of its offensiveness is ... unacceptable as a general proposition. Many, if not most, political views are offensive to some. Denying the right to express views because of their offensiveness would spell the end of democracy.”<sup>47</sup> This, however, is precisely where Caitlin situates the Covenant: “the ICCPR considers the victim’s perspective”<sup>48</sup> in

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<sup>41</sup> Ibid., p. 468

<sup>42</sup> The General Recommendations of the Committee on the Elimination of Racial Discrimination, alone, are illustrative of the range and scope of efforts required by states to respond effectively to entrenched discrimination. See: General Recommendation 27, Discrimination against Roma, adopted at the fifty-seventh session on 16/8/2000 and General Recommendation 29 on Article 1(1) of the Convention (Descent), adopted at the sixty-first session on 1/11/2002.

<sup>43</sup> This appears to be a point lost on States who have been propelling forward resolutions on Defamation at the former Commission on Human Rights, and now the Human Rights Council, since 1999.

<sup>44</sup> Stephanie Farior, *Molding The Matrix: The Historical and Theoretical Foundations of International Law Concerning Hate Speech*, p. 4

<sup>45</sup> Ibid., p. 5

<sup>46</sup> David Kretzmer, *Freedom of Speech and Racism*, (1987) 8 *Cardozo Law Review*, pp. 455-456

<sup>47</sup> Ibid., p. 457

<sup>48</sup> Scott J. Caitlin, *A Proposal for Regulating Hate Speech in the United States: Balancing Rights Under the International Covenant on Civil and Political Rights*, (1994) 69.4 *Notre Dame Law Review*, p. 777

balancing free speech “against the listener’s right to have her inherent human dignity protected from hate speech injuries”.<sup>49</sup> Kretzmer seeks to go beyond these arguments to search for a causal relationship between racist speech and particular harms caused by it – the spread of racial prejudice and the affront to personal dignity in particular. His analysis finds a sufficient enough relationship between racial prejudice and racial discrimination and violence to justify not disregarding it.<sup>50</sup> As the Supreme Court of Canada put it in the *R v Keegstra* case

“There is obviously a rational connection between the criminal prohibition of hate propaganda and the objective of protecting target group members and of fostering harmonious social relations in a community dedicated to equality and multiculturalism. Section 319(2) [where the Canadian Criminal Code places a limit on freedom of expression] serves to illustrate to the public the severe reprobation with which society holds messages of hate directed towards racial and religious groups. It makes that kind of expression less attractive and hence decreases acceptance of its content. Section 319(2) is also a means by which the values beneficial to a free and democratic society in particular, the value of equality and the worth and dignity of each human person can be publicized.”<sup>51</sup>

However, the Court does go on to emphasise the importance of clear definitional limits in order to ensure that “only the harm at which the prohibition is targeted” is in fact attacked. The *mens rea* standard of ‘wilfully’, its public nature and focus on an identifiable group, and requirements of the severity of ‘hatred’ – i.e. “only the most severe and deeply felt form of opprobrium” – serve to ensure that it is “a narrowly confined offence”<sup>52</sup> that is only occasionally resorted to.

Returning now to the question of protections offered, and obligations flowing, from these articles – what light does existing jurisprudence shed on this matter?

### **III. The Jurisprudential Context: Interpretation and Application of International Standards at the National, Regional and International Levels**

A swift review of hate speech case law at the national level – for example, Canada, South Africa, Norway and the US – suggests that little reference is made in such decisions to Articles 19 and 20 of the ICCPR. Where there is reference to international standards – for example the Norwegian Supreme Court case *Re Morgenavisen*<sup>53</sup> – relevant criminal codes and constitutions tend to refer to Article 4 of the International Convention on the Elimination of All Forms of Racial Discrimination [ICERD] rather than the ICCPR.

Reference to international standards is also rare in regional courts. We will examine only the Convention for the Protection of Human Rights and Fundamental Freedoms [ECHR or European

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<sup>49</sup> *Ibid.*, p. 795

<sup>50</sup> David Kretzmer, *Freedom of Speech and Racism*, p. 465

<sup>51</sup> *R v Keegstra*, [1990] 3 S.C.R. 697, 13/12/90, at 697 (Can.), para. 1. Thanks to Farrah Ahmed for bringing this reference to my attention.

<sup>52</sup> *Ibid.*, para. 1

<sup>53</sup> [1979] E.C.C. 139 (23 Sept. 1978), as cited in Stephanie Farrior, *Molding The Matrix: The Historical and Theoretical Foundations of International Law Concerning Hate Speech*, p. 58

Convention]<sup>54</sup> in the examination of both the balance struck on the question of hate speech and prohibition of advocacy of incitement as well as references – if any – to ICCPR standards.

### European Convention on Human Rights

In general, ECHR case law “indicates that the Court’s tolerance of speech restrictions depends on a myriad factors, including the breadth of the restriction, the public interest involved and proportionality”,<sup>55</sup> and it focuses on an analysis of “the content of the opinions expressed”.<sup>56</sup> Defeis has observed that whereas the European Court “has not decided directly the issue of whether criminal prosecution for speech promoting racial or ethnic hatred violates Article 10”, its decisions “support the position that such restrictions are permissible and indeed encouraged”.<sup>57</sup> The (former) Commission’s views are, however, clearer on the matter as it has “indicated that speech which promotes ethnic hatred is inimicable in a democratic society”<sup>58</sup> and found such cases as manifestly unfounded, as will be seen below.

The specific cases broadly related to the limits on hate speech have included *Lingens v. Austria*<sup>59</sup> which addressed a journalist who was accused of defamation for publishing two articles criticising a politician who had supported a Nazi candidate, the European Court found that the restriction of the journalists freedom of expression constituted a breach of his freedom of expression; *X v. Austria*<sup>60</sup> was addressed by the European Commission regarding imprisonment for neo-Nazi activities, the Commission did not object and cited ICERD<sup>61</sup> in its decision; *Glimmerveen and Habenbeek v. The Netherlands*<sup>62</sup> where the Commission ruled the case of individuals distributing leaflets inciting racial discrimination as inadmissible. Here the Commission noted the relevance of Article 17 of the ECHR (the right *inter alia* of any group to destroy any of the protected rights and freedoms) and considered that the applicants were “essentially seeking to use Article 10 to provide a basis under the Convention for a right to engage in these activities [i.e. as addressed in Article 17] ... which would contribute to the destruction of the rights and freedoms referred to”.<sup>63</sup> The Commission found that the applicants could not “by reason of the provisions of Article 17 of the Convention, rely on Article 10 of the Convention”.<sup>64</sup> *X v Federal Republic of Germany*<sup>65</sup> dealt with a case where both a civil prosecution for group defamation and a criminal conviction for incitement to hatred was brought against an individual who had displayed pamphlets denying the Holocaust in Germany and

<sup>54</sup> Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, art. 19(2), 213 U.N.T.S. 22

<sup>55</sup> Elizabeth F Defeis, *Freedom of Speech and International Norms: A Response to Hate Speech*, p. 100

<sup>56</sup> Stephanie Farior, *Molding The Matrix: The Historical and Theoretical Foundations of International Law Concerning Hate Speech*, p. 66

<sup>57</sup> *Ibid.*, p. 103

<sup>58</sup> *Ibid.*, p. 104

<sup>59</sup> *Lingens v. Austria*, 103 Eur. Ct. H.R. (ser..A) (1986). Available at <http://www.legislationline.org/legislation.php?tid=219&lid=7137&less=false> (last accessed September 2008)

<sup>60</sup> *X v. Austria*, App. No. 1747/62, 6 Y.B.Eur.Conv. on H.R. 424 (1963)

<sup>61</sup> No reference is made to the ICCPR, though The Netherlands had ratified it on 11 December 1978.

<sup>62</sup> *Glimmerveen and Habenbeek v. The Netherlands*, App. No. 8348/78, 18 Eur. Comm’n H.R. 187 (1979)

<sup>63</sup> *Ibid.*

<sup>64</sup> *Ibid.*

<sup>65</sup> *X v. Federal Republic of Germany*, App. No. 9235/81, 29 Eur. Comm’n H.R. 194 (1982)

referring to it as a “zionist swindle or lie”,<sup>66</sup> the Commission upheld the restrictions on his Article 10 rights. The Commission considered the pamphlets to have rightly been “considered defamatory of all [J]ews persecuted or killed during the Third Reich and their surviving relatives”. Interestingly, the Commission also stated that “[t]he fact that collective protection against defamation is limited to certain groups including [J]ews is based on objective considerations and does not involve any element of discrimination contrary to Article 14 of the Convention”.<sup>67</sup> One case where the Commission did find violation of Article 10 and passed on to the Court – which concurred – was that of *Jersild v. Denmark*.<sup>68</sup> This case did make reference to international standards on prohibition of race discrimination and propaganda of racist views, including ICCPR Article 20(2), but found Article 4 of the ICERD to be the “most directly relevant”<sup>69</sup> to this case. Despite the recognition of its importance, however, the case centred on the necessity of convicting a journalist who had addressed the views of a racist youth group in a documentary.

### ICERD

This echoes the wider reasons why there is such a dearth of jurisprudence considering Article 20 of the ICCPR. Article 4 of ICERD’s stronger language is relied up instead in so much of the case law. Article 4 imposes a positive and immediate duty on States Parties to condemn both propaganda and organisations “based on ideas or theories”<sup>70</sup> of racial superiority, hatred and discrimination by making it punishable by law, by prohibiting such organisations – whether public or private. Its limitation, however, is its explicit concern with race, colour and ethnicity rather than Article 20 of the ICCPR’s “national, racial or religious”<sup>71</sup> hatred, discrimination, hostility or violence. A number of authors, however, have observed that Article 1’s expansive definition of racial discrimination may well include most manifestations of national and religious discrimination too, as it recognises that the “term ‘racial discrimination’ shall mean any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life.”<sup>72</sup>

### ICCPR

An overview of the jurisprudence of the Human Rights Committee related to Article 20 shows that it is assessed in conjunction with Article 19 in most cases, demonstrating its close nexus with freedom of expression. Three such cases will be examined below.

*J. R. T. and the W.G. party. v. Canada*<sup>73</sup> concerned Mr T., the founder of the political party W.G., alleging violation of Article 19 of the ICCPR. T. attempted to promote membership of the party

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<sup>66</sup> Ibid.

<sup>67</sup> Ibid.

<sup>68</sup> *Jersild v. Denmark*, 19 Eur. Ct. H.R. (ser.A) 1 (1994)

<sup>69</sup> Ibid., para. 21

<sup>70</sup> ICERD, Article 4

<sup>71</sup> ICCPR, Article 20(2)

<sup>72</sup> ICERD, Article 1(1)

<sup>73</sup> *J. R. T. et al. v. Canada* (104/1981), ICCPR, A/38/40 (6 April 1983) 231

by playing tape recorded messages condemning the conspiracy of international ‘Jewry’ on advertised telephone numbers. Canada claimed that there had been no breach of the ICCPR (including Article 19) and that in fact the court case preventing T. from further distribution of these messages had given “effect to article 20(2) of the Covenant”<sup>74</sup> as his right to “communicate racist ideas” was not protected by the Covenant and was “in fact incompatible with its provisions”.<sup>75</sup> The Human Rights Committee concurred that T.’s messages “clearly constitute the advocacy of racial or religious hatred which Canada has an obligation under article 20 (2) of the Covenant to prohibit”.<sup>76</sup> Ultimately, however, the communication was declared inadmissible for having failed to exhaust domestic remedies. In this case therefore, although the applicant made a claim in relation to Article 19, the State party concerned raised the exception of Article 20(2) and the Human Rights Committee upheld its relevance, and underlined it in fact as an obligation on the State party to do so. Clarity is clearly lacking here, as the case was inadmissible. However, it would appear that in this case the Human Rights Committee recognised a higher relevance for Article 20(2) above the restrictions already contained within Article 19(3).

*Ross v. Canada*<sup>77</sup> concerned an author who acted as a resource teacher and who promoted anti-Jewish views in his publications, in the media and in the classroom. He was dismissed from his post and claimed violation of Articles 18 and 19 of the ICCPR. The State party asserted that his publications fell within the scope of Article 20(2).<sup>78</sup> Canada made an interesting argument that deserves to be included in full. “The State party argues that articles 18, 19 and 20 of the Covenant must be interpreted in a consistent manner, and that the State party therefore cannot be in violation of articles 18 or 19 by taking measures to comply with article 20. It is submitted that freedom of religion and expression under the Covenant must be interpreted as not including the advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence. In this regard, the State party also invokes article 5, paragraph 1, of the Covenant, and submits that to interpret articles 18 and 19 as protecting the dissemination of anti-Semitic speech cloaked as Christianity denies Jews the freedom to exercise their religion, instills fear in Jews and other religious minorities and degrades the Christian faith.”<sup>79</sup>

The implications of this argument go beyond the scope of this paper, but the overarching role of Article 20 – due to its triggering of Article 5(1)<sup>80</sup> – are worth considering. For good measure, however, the State party also claimed that the limitations on Mr Ross were justified pursuant to those recognized in both Article 18(3) and 19(3) respectively.<sup>81</sup> Interestingly, the Human Rights Committee didn’t echo Canada’s claim for an overarching role for Article 20 as such, however it recognized the relevance of Article 20 and stated that “the Committee considers that restrictions

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<sup>74</sup> Ibid., para. 6.2

<sup>75</sup> Ibid., para. 6.2

<sup>76</sup> Ibid., para. 8(b)

<sup>77</sup> *Ross v. Canada*

<sup>78</sup> Ibid., para. 6.2

<sup>79</sup> Ibid., para. 6.3

<sup>80</sup> Article 5(1) of the ICCPR states “1. Nothing in the present Covenant may be interpreted as implying for any State, group or person any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms recognized herein or at their limitation to a greater extent than is provided for in the present Covenant.”

<sup>81</sup> *Ross v. Canada*, para. 6.9



on expression which may fall within the scope of article 20 *must also be permissible* under article 19, paragraph 3, which lays down requirements for determining whether restrictions on expression are permissible”.<sup>82</sup> It therefore recognized the more exacting threshold of Article 20(2) above and beyond the general limitation grounds of Article 19(3); as well as the relevance of both the former’s restrictions and the latter’s permission. The Committee *additionally* takes on board the relevance of the restrictions under Article 18(3) of the ICCPR which relates particularly to limitations on manifestation of freedom of religion or belief.<sup>83</sup> In the consideration of the merits, the Committee explored the restrictions under Article 19(3) and noted that here, as in *Faurisson v France*, “[s]uch restrictions ... derive support from the principles reflected in article 20(2) of the Covenant”.<sup>84</sup> The Committee ultimately found no violation of any of the articles of the Covenant. The Committee’s reference to the collective “right to be protected from religious hatred”<sup>85</sup> here gives rise to some questions.

The dissenting opinion of Hipólito Solari Yrigoyen noted that “[i]t must also be pointed out that the exercise of freedom of expression cannot be regarded in isolation from the requirements of article 20 of the Covenant”.<sup>86</sup> In this case, the Human Rights Committee states that restrictions that fall within the scope of Article 20 should also fall within the permissible restrictions of Article 19(3). One could therefore consider Article 20 as a specialist restriction built upon those already contained within Article 19(3).

*Faurisson v. France*<sup>87</sup> concerned the case of a professor of literature at the University of Lyon until he was dismissed and later fined under the French Gayssot law due to alleging that the gas chambers at Auschwitz and other Nazi concentration camps were not used for the extermination of the Jews. He claimed violation of his human rights, invoking “less a violation of the right to freedom of expression, which does admit of some restrictions, but of his right to freedom of opinion and to doubt, as well as freedom of academic research”.<sup>88</sup> The State party invoked Article 20(2) of the ICCPR and Article 4 of ICERD, as well as the limitation grounds within Article 19(3) itself. France also asserted that the Gayssot law “does not punish the expression of an opinion, but the denial of a historical reality universally recognized. The adoption of the provision was necessary in the State party’s opinion, not only to protect the rights and the reputation of others, but also to protect public order and morals”.<sup>89</sup> The Human Rights Committee decided the case on the basis of the legitimacy of the restriction on Faurisson under Article 19(3)(a) and the necessity thereof, and did not further explore the relevance of Article 20(2). However, four of the five individual opinions (signed by seven Committee members)<sup>90</sup> appended to the judgment *did* and are worth considering in some detail.

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<sup>82</sup> *Ibid.*, para. 10.6. Emphasis added.

<sup>83</sup> *Ibid.*, para. 10.7

<sup>84</sup> *Ibid.*, para. 11.5

<sup>85</sup> *Ibid.*, para. 11.5. This right is referred to in relation to the Jewish community.

<sup>86</sup> Dissenting opinion of Hipólito Solari Yrigoyen in *Ross v. Canada*

<sup>87</sup> *Faurisson v. France*

<sup>88</sup> *Ibid.*, para. 5.3

<sup>89</sup> *Ibid.*, para. 7.10

<sup>90</sup> It should be noted that a further two members of the Committee, Christine Chanet and Thomas Buergenthal, withdrew themselves from this case in accordance with rule 85 of the Committee’s rules of procedure.

The individual opinion by Elizabeth Evatt and David Kretzmer, co-signed by Eckart Klein, concurred but elaborated on some points due to the importance of the issues raised. They note that the right of the individual to be free from discrimination on grounds of race, religion and national origins extends also to incitement to such discrimination, as “implicit in the obligation placed on States parties under article 20, paragraph 2”.<sup>91</sup> Whilst holding that the Gayssot Act does not make explicit reference to incitement, and that Faurisson’s statements did not “fall clearly within the boundaries of incitement”<sup>92</sup> as intended by Article 20(2), the authors go on to say “However, there may be circumstances in which the right of a person to be free from incitement to discrimination on grounds of race, religion or national origins cannot be fully protected by a narrow, explicit law on incitement that falls precisely within the boundaries of article 20, paragraph 2. This is the case where, in a particular social and historical context, statements that do not meet the strict legal criteria of incitement can be shown to constitute part of a pattern of incitement against a given racial, religious or national group, or where those interested in spreading hostility and hatred adopt sophisticated forms of speech that are not punishable under the law against racial incitement, even though their effect may be as pernicious as explicit incitement, if not more so.”<sup>93</sup> Recognizing the significance of Holocaust denial within the context of French context, therefore, they go on to suggest that the intent of Article 20(2) may in such circumstances best be met by Article 19(3). Referring to General Comment 10’s recognition that restrictions under Article 19(3) “may relate to the interests of a community as a whole. This is especially the case in which the right protected is the right to be free from racial, national or religious incitement”,<sup>94</sup> they recognize the restriction on Faurisson as falling within this as it served “to protect the right of the Jewish community in France to live free from fear of incitement to anti-semitism”.<sup>95</sup> They go on to assert the necessity and proportionality of this restriction under Article 19(3) itself when considering not the Gayssot act in abstracto but on Faurisson in particular and with full consideration of his statements as a whole. Here they note that “anti-semitic allegations of the sort made by the author, which violate the rights of others in the way described, do not have the same claim to protection against restriction. The restrictions placed on the author did not curb the core of his right to freedom of expression, nor did they in any way affect his freedom of research; they were intimately linked to the value they were meant to protect - the right to be free from incitement to racism or anti-semitism; protecting that value could not have been achieved in the circumstances by less drastic means”.<sup>96</sup> The necessity of the restriction under Article 19(3), therefore, is established by reference to ‘the value’ of protecting from incitement. In making this argument they do not refer again back to Article 20(2), though this is clearly implied. So here Article 20 is projected as a value that may inform the necessity of restrictions imposed under Article 19(3)(a) and (b).

Bhagwati’s individual opinion also rested on Article 19, considering that “the restriction on freedom of expression imposed by the Gayssot Act satisfied all the three elements required for the applicability of article 19, paragraph 3, and was not inconsistent with article 19, paragraph 2,

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<sup>91</sup> Individual opinion by Elizabeth Evatt and David Kretzmer, co-signed by Eckart Klein, para. 4 attached to *Faurisson v. France*

<sup>92</sup> *Ibid.*

<sup>93</sup> *Ibid.*

<sup>94</sup> *Ibid.*, para. 7

<sup>95</sup> *Ibid.*

<sup>96</sup> *Ibid.*, para. 10

and consequently, the conviction of the author under the Gayssot Act was not violative of his freedom of expression guaranteed under article 19, paragraph 2”.<sup>97</sup>

Another individual opinion drew a sharper relationship between Articles 19 and 20. In identifying “what restrictions or prohibitions a State party may legitimately impose, by law, on the right to freedom of expression or opinion, whether under article 19, paragraph 3, or 20, paragraph 2, of the Covenant”,<sup>98</sup> with an emphasis on the latter. “In so far as restrictions or prohibitions in pursuance of article 20, paragraph 2, are concerned, the element of necessity is merged with the very nature of the expression which may legitimately be prohibited by law, that is to say, the expression must amount to advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence.”<sup>99</sup> Lallah contrasts this content-based approach of restrictions on expression contained in Article 20(2) with Article 19(3)’s restriction based on “the adverse effect that the expression must necessarily have on the specified objects or interests which paragraphs (a) and (b) are designed to protect. It is the prejudice to these objects or interests which becomes the material element of the restriction or prohibition and, consequently, of the offence”.<sup>100</sup> Since “the statements of the author amounted to the advocacy of racial or religious hatred constituting incitement, at the very least, to hostility and discrimination towards people of the Jewish faith which France was entitled under article 20, paragraph 2, of the Covenant to proscribe.”<sup>101</sup> Lallah therefore finds that “the creation of the offence provided for in the Gayssot Act, as it has been applied by the Courts to the author's case, falls more appropriately, in my view, within the powers of France under article 20, paragraph 2, of the Covenant”.<sup>102</sup> He also goes on to warn of an excessive reliance on Article 19(3), hence underlining his preference for recourse to Article 20(2) in this case. “Recourse to restrictions that are, in principle, permissible under article 19, paragraph 3, bristles with difficulties, tending to destroy the very existence of the right sought to be restricted. The right to freedom of opinion and expression is a most valuable right and may turn out to be too fragile for survival in the face of the too frequently professed necessity for its restriction in the wide range of areas envisaged under paragraphs (a) and (b) of article 19, paragraph 3.”<sup>103</sup> So here Article 20(2) is emphasized as the preferred grounds of restriction as an excessive reliance on Article 19(3)(a) and (b) may destroy rather than just restrict freedom of expression.

#### **IV. Scope and Links Between Prohibitions and Limitations (Between Articles)**

Rights in general are considered interrelated, and in relation to hate speech international instruments “provide safeguards” in the “conflict between speech rights and equality rights”.<sup>104</sup> It is also worth recalling that at the international level “speech and expression rights and equality and nondiscrimination rights developed concurrently”,<sup>105</sup> lending both centrality in the ICCPR. But what of the question of priority and relationship between Articles 19 and 20? The different

<sup>97</sup> Individual opinion by Prafullachandra Bhagwati, attached to *Faurisson v. France*

<sup>98</sup> Individual opinion by Rajsoomer Lallah, para. 2 attached to *Faurisson v. France*

<sup>99</sup> *Ibid.*, para. 4

<sup>100</sup> *Ibid.*, para. 5

<sup>101</sup> *Ibid.*, para. 9

<sup>102</sup> *Ibid.*, para. 11

<sup>103</sup> *Ibid.*, para. 13

<sup>104</sup> Elizabeth F Defeys, *Freedom of Speech and International Norms: A Response to Hate Speech*, p. 127

<sup>105</sup> *Ibid.*, p. 126

conceptions on this matter – as depicted during the drafting of Article 20 – reflect “the split in conceptions of hierarchy in the goals of free speech and non-discrimination”.<sup>106</sup>

The positions in the *travaux préparatoires* were so contradictory that they are unlikely to assist us in making a determination. The positioning of Article 20 after that of 19 was due to a Chilean proposal at the Third Committee in order to make the relationship between the two clearer, it had previously been intended as Article 26 in the draft. Nevertheless, at the same discussion, Austria commented that the content of Article 20 had no direct connection with freedom of expression; Ghana observed Article 19 to protect individual rights and Article 20 collective rights whereas Ireland observed that Article 20 didn’t deal with rights at all; and the Philippines believed Article 20 to uphold the right to life and to live in peace with one’s neighbours.<sup>107</sup>

The opinions of observers, too, differ vastly. Catlin has said that Articles 19 and 20 show recognition of “the importance of balancing both sides of a conflict between two individual rights”.<sup>108</sup> Furthermore, “Article 19, paragraph 2 provides the right to free expression. Article 20 directly limits free speech in its prohibition of national, racial, and religious hate advocacy. ... Article 19, paragraph 3, reinforces the Article 20 principle by requiring respect for the rights of others, including listeners. ... Articles 19 and 20 demonstrate a balancing approach to conflicting, interrelated rights by allowing for the limited restriction of one right in order to more fully effectuate another.”<sup>109</sup> To Catlin, therefore, these articles are interrelated and they balance and complete one another. Kretzmer, though, argues that the ICCPR has given precedence to “antiracism above freedom of expression”,<sup>110</sup> and certainly within the narrow confines of Article 20 that is true and extends to other hate speech too. Nowak finds that “[t]he *travaux préparatoires* [on Article 20] reveal a close nexus to freedom of expression”.<sup>111</sup> He also argues that the restriction on Article 20 regarding advocacy of hatred, should be “consistent with the limitation clauses in Arts. 18(3), 19(3), 21 and 22(2)”.<sup>112</sup> The Human Rights Committee too confirms this close nexus in that they note in General Comment 11 that the required prohibitions in Article 20 “are fully compatible with the right of freedom of expression as contained in article 19, the exercise of which carries with it special duties and responsibilities”.<sup>113</sup>

#### IV. Interim Observations

From this, let’s move to our interim observations. The first is that the fact of the interrelatedness and link between Articles 19 and 20 is unquestionable. The question is their precise relationship.

<sup>106</sup> Stephanie Farior, *Molding The Matrix: The Historical and Theoretical Foundations of International Law Concerning Hate Speech*, p. 37

<sup>107</sup> *Ibid.*, p. 36

<sup>108</sup> Scott J. Catlin, *A Proposal for Regulating Hate Speech in the United States: Balancing Rights Under the International Covenant on Civil and Political Rights*, (1994) 69 *Notre Dame Law Review*, p. 796

<sup>109</sup> *Ibid.*, pp. 797-8

<sup>110</sup> He also notes that ICERD has gone further than the ICCPR in doing so. David Kretzmer, *Freedom of Speech and Racism*, p. 448

<sup>111</sup> Manfred Nowak, *U.N. Covenant on Civil and Political Rights, CCPR Commentary*, p. 469

<sup>112</sup> *Ibid.*, p. 474

<sup>113</sup> General Comment 11 on Article 20 of the ICCPR, para. 2

The objective of Article 20 is clearly to prohibit extreme expression that reaches a particularly high threshold of propaganda for war or advocacy of (particular) hatreds that constitute incitement to discrimination, hostility or violence. Its relationship with freedom of expression – as well as limitation (or ‘clawback’) clauses and the non-discrimination protections in the ICCPR – are the ones most often highlighted. However, the objectives of this article should not be distanced from the existing obligations within the ICCPR, namely: to give effect to the rights contained in the ICCPR - Article 2(2); full equality before the law, the presumption of innocence, and due process - Article 14; non-retroactivity - Article 15; and equal participation in public affairs - Article 25. The aim of Article 20 can be understood within the overarching objective of Article 5 in that it prohibits and addresses one type of action that would have the effect of destroying the rights and freedoms protected in the ICCPR. It should be noted that this includes action taken by “any State, group or person”. Under Article 20, as in other actions that destroy the rights and freedoms included in the ICCPR, the State may be complicit or indeed the engineer.

Having acknowledged that much broader, and richer, understanding, however, it is clear that Article 20’s bearing will most often be on Article 19 rights. The little jurisprudence that already exists (whether in relation to Articles 19 and 20, or bringing into play the additional ammunition of Article 4 of ICERD too) testifies to that. Here, it is clear that the narrower and more taxing threshold of Article 20 should certainly not contradict the limitations of Article 19(3), and that much more attention needs to be given to questions that arise.<sup>114</sup> When applying the positive obligation of Article 20, it should also be noted that its scope goes beyond the *possibility* of interfering allowed for in Article 19(b) to the more exacting requirements of *prohibiting* such ‘advocacy’, ‘hatred’ and ‘incitement’. One should also understand from this that sweeping prohibitions in the law that fall short of Article 20 in fact go against the purpose and spirit of the ICCPR.

It has been suggested that ‘hostility and violence’ should both be subsumed under the term ‘violence’. Secondly, one should ensure caution so that the content of the alleged hate speech under Article 20 is assessed as reaching the required threshold *before* examining the existence, or otherwise, of violence. In other words, the extent of the violence does not determine *in itself* the advocacy of hatred. This assessment may be carried out differently in relation to Article 19(3)(b), where the protection of national security or public order itself is set out as one of the limitation grounds. Even in *this* case, however, this assessment should be carried out in the light of obligations under Articles 26 and 27 of the ICCPR - the State party would need to ensure that this does not have the indirect effect of discriminating against minorities or minority positions. The reason for this distinction between Articles 19 and 20, is that Article 19(3)(b) allows for a limitation on freedom of expression for the protection of national security or public order. Article 20(2)’s test, however, is hatred “that constitutes incitement to ... [*inter alia*] hostility or violence”. The hatred needs to be established first, and then prohibited only if it incites violence (or hostility, or discrimination) - not the other way around. There also needs to be an exacting

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<sup>114</sup> These questions include the following: Does reputation of others include the deceased? How does the reputation of Manifestations of God and other religious figures figure, if at all? Or do ‘others’ in fact need rights in order for it to also be required for their ‘reputations’ to be respected?

and ‘rational connection’ drawn between that violence and the group concerned. Care needs to be taken so that neither random nor orchestrated acts of violence, which bear no reasonable relationship with the expression concerned, are taken on board to sway the decision.

For hatred *in itself* to incite discriminate or lead to violence necessarily points to a history or pattern of violations. This, therefore, draws attention to the State parties’ failure in eliminating that embedded discrimination against that particular national, racial or religious group. The State should not use strong interference under Article 20 as a fig leaf for justifying such a failure and, indeed, should be vigilant in ensuring that its own officials are not, directly or indirectly, involved in perpetuating such discrimination.

Article 20’s requirement of prohibiting ‘by law’ triggers all the due process guarantees upheld in the ICCPR, as outlined above. The difficulties of upholding these standards in the context of alleged incitement of hatred should not be underestimated. Further to prohibition by law, however, there is the suggestion of a spectrum of well-calibrated sanctions in order not to infringe or have a chilling effect on freedom of expression in general. The obligation of this prohibition by law leads to further questions regarding the balance between responding to, curtailing and attempting to prevent such expression.

To all of this is added the ongoing challenge of clarifying the threshold of Article 20. The contours of a universal standard on this threshold are yet to emerge from further jurisprudence at the international, regional and national levels. Whilst such jurisprudence will necessarily be decided in a carefully contextualised way, the application of the margin of appreciation doctrine in assessing such cases should not distract from the requirement of a careful supervision of its application. In the longer term, it is hoped, that Article 20 will lend its force to an educative and positive effect on the reduction of instances that will require its use.

#### *4. Conference room paper by Asma Jahangir*

### **Special Rapporteur on freedom of religion or belief - References to “incitement to religious hatred”**

#### **A/HRC/2/3**

### **Report of the Special Rapporteur on freedom of religion or belief, Asma Jahangir, and the Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance, Doudou Diène, further to Human Rights Council decision 1/107 on incitement to racial and religious hatred and the promotion of tolerance**

[...]

#### **II. Defamation of religion and the right to freedom of religion or belief**

22. The use of religious beliefs for political purposes, along with the negative stereotyping of some religions and beliefs, has often posed a challenge to the growth of a tolerant global society. In addition, the phenomenon of globalization has brought with it a series of new challenges. In particular, there is now much more awareness of, and prompt access to, information across borders and cultures. As a result, people of all opinions, beliefs and faiths live in greater proximity, making the need for tolerance even more urgent.

23. In the context of her activities, the Special Rapporteur on freedom of religion or belief has been made aware of numerous situations in which religious communities or beliefs have been the target of critical analysis from a merely theological point of view to the most extreme forms of incitement to violence or hatred against members of a religious group. Between these two extremes, one can find all sorts of expressions, including stereotyping, ridicule, derogatory comments and insults.

24. The Special Rapporteur has noted that these forms of expression target either the content of religious beliefs themselves or members of religious or belief communities because of the beliefs they hold. She has further noted that these forms of expression are directed towards many religious and belief communities, whether they are old or new, big or small. In this regard, the Special Rapporteur has been able to note that, while criticism of major religions attracts a lot of attention, numerous cases of criticism of smaller religions can go relatively unnoticed.

25. Regarding the authors of these forms of expression, the Special Rapporteur notes that they are not necessarily secularists, but also members of religious communities. Religious groups and communities are therefore not only the target of critical forms of expression, but also in many cases the origin.

26. The protection of the rights of religious minorities is central to the mandate on freedom of religion or belief. It should not be compromised even if other members of the community engage in intolerant acts, including defamation of other religions. This approach is particularly

relevant when a certain religious community may be in a minority in one part of the world and suffer accordingly, but it may constitute the major religious community in another part of the world and be accused of intolerant treatment towards its own religious minorities.

27. Moreover, individuals who belong to a majority religion are not always free from being pressured to adhere to a certain interpretation of that religion. From a human rights perspective, members of religions or communities of belief should therefore not be viewed as parts of homogenous entities. For that reason, inter alia, international human rights law protects primarily individuals in the exercise of their freedom of religion and not religions per se.

28. With regard to situations in which certain forms of expression confront religions or beliefs or members of religious or belief communities, it is essential to make a careful distinction between forms of expression that should constitute an offence under international law, forms of expression that are not criminally punishable but may justify a civil suit and forms of expression 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 belief of others.

29. 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. Certain situations will undoubtedly raise an issue in terms of international human rights law but other situations, while not raising a human rights law issue, will give rise to concerns if the circumstances and nature of expression could lead to a climate of intolerance.

30. The challenge is to decide what type of incident justifies action. In this respect, the Special Rapporteur seeks first and foremost guidance from international human rights law in general and the human rights standards that govern her mandate in particular.<sup>1</sup>

### **1. The scope of the right to freedom of religion or belief**

31. According to article 18 of the International Covenant on Civil and Political Rights, freedom of religion includes freedom to have or to adopt a religion or belief of his choice, and freedom, either individually or in community with others and in public or private, to manifest his religion or belief in worship, observance, practice and teaching.

32. In its general comment No. 22 on article 18 of the Covenant, the Human Rights Committee provides that:

the right to freedom of thought, conscience and religion (which includes the freedom to hold beliefs) [...] is far-reaching and profound; it encompasses freedom of thought on all matters, personal conviction and the commitment to religion or belief, whether manifested individually or in community with others

and that

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<sup>1</sup> For a more detailed description of the legal framework of the mandate, see paragraphs 15 to 20 of the report of the Special Rapporteur to the sixty-first session of the Commission on Human Rights (E/CN.4/2005/61) and the annex of her report to the sixty-second session of the Commission on Human Rights (E/CN.4/2006/5).



Article 18 protects theistic, non-theistic and atheistic beliefs, as well as the right not to profess any religion or belief. The terms “belief” and “religion” are to be broadly construed. Article 18 is not limited in its application to traditional religions or to religions and beliefs with institutional characteristics or practices analogous to those of traditional religions.

33. The same general comment contains a non-exhaustive catalogue of the different aspects that are covered by the right to freedom of religion or belief (see CCPR/C/21/Rev.1/Add.4, para. 4).

34. Like other fundamental human rights, the right to freedom of religion remains primarily an individual right. However, it is often rightly argued that due to the manifestation aspects of the right, the right to freedom of religion or belief is also a collective right.

35. Acts of religious intolerance or other acts that may violate the right to freedom of religion or belief can be committed by States but also by non-State entities or actors. States have an obligation to address acts that are perpetrated by non-State actors and which result in violations of the right to freedom of religion of others. This is part of the positive obligation under article 18 of the Covenant.

36. As such, 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 belief that is free from criticism or ridicule. Moreover, the internal obligations that may exist within a religious community according to the faith of their members (for example, prohibitions on representing religious figures) do not of themselves constitute binding obligations of general application and are therefore not applicable to persons who are not members of the particular religious group or community, unless their content corresponds to rights that are protected by human rights law.

37. The right to freedom of expression can legitimately be restricted for advocacy that incites to acts of violence or discrimination against individuals on the basis of their religion. Defamation of religions may offend people and hurt their religious feelings but it does not necessarily or at least directly result in a violation of their rights, including their right to freedom of religion. Freedom of religion primarily confers a right to act in accordance with one’s religion but does not bestow a right for believers to have their religion itself protected from all adverse comment.

38. The right to freedom of religion or belief protects primarily the individual and, to some extent, the collective rights of the community concerned but it does not protect religions or beliefs per se. While the exercise of freedom of expression could in concrete cases potentially affect the right to freedom of religion of certain identified individuals, it is conceptually inaccurate to present this phenomenon *in abstracto* as a conflict between the right to freedom of religion or belief and the right to freedom of opinion or expression.

39. Therefore, the question as to whether criticism, derogatory statements, insults or ridicule of one religion may actually negatively affect an individual’s right to freedom of religion or belief can only be determined objectively and, in particular, by examining whether the different aspects of the manifestation of one’s right to freedom of religion are accordingly negatively affected.

## **2. Religion and freedom of opinion and expression**

40. Human rights are exercised in a context where rights coexist with each other. In this regard, most international human rights conventions provide that, in the exercise of their human rights, individuals have to respect the rights of others.

41. However, the coexistence of rights does not only imply that rights should be seen in a restrictive manner because of the existence of other rights; it also implies the fundamental notion of interdependency of human rights. The right to freedom of religion or belief needs other human rights to be fully exercised, including the right to freedom of association or the right to freedom of expression. The right to freedom of expression as it is protected by international standards, including article 19 of the Covenant, constitutes an essential aspect of the right to freedom of religion or belief.

42. In a number of States, in all regions of the world and with different religious backgrounds, some forms of defamation of religion constitute a criminal offence. While the different responses to such defamations depend on various factors, including historical and political factors, criminalizing defamation of religion can be counterproductive. The rigorous protection of religions as such may create an atmosphere of intolerance and can give rise to fear and may even provoke the chances of a backlash. There are numerous examples of persecution of religious minorities as a result of excessive legislation on religious offences or overzealous application of laws that are fairly neutral. As a limit to freedom of expression and information, it can also limit scholarship on religious issues and may asphyxiate honest debate or research.

43. Criminalizing speech that defames religions, whilst not amounting to forms of expression prohibited by international law, can limit discussion of practices within religions that may impinge upon other human rights. In such a context, criticism of practices - in some cases adopted in the form of a law - appearing to be in violation of human rights but that are sanctioned by religion or perceived to be sanctioned by religion would also come within the ambit of defamation of religion. The dilemma deepens, as independent research on the impact of such laws may not be possible, as a critical analysis of the law may by itself, in certain situations, be considered as defaming the religion itself.

## **3. Religious intolerance and incitement to religious hatred**

44. According to article 20 of the Covenant, “any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law”.

45. In its general comment 11, the Human Rights Committee holds that the measures contemplated by article 20, paragraph 2, of the Covenant constitute important safeguards against infringement of the rights of religious minorities and of other religious groups to exercise the rights guaranteed by articles 18 and 27, and against acts of violence or persecution directed towards those groups. Unfortunately this general comment does not give much more guidance about the interpretation that should be given to article 20 of the Covenant and, in particular, with regard to its threshold of application.

46. Compared to the other provisions of the Covenant, this provision is unusual because it does not provide for a human right but establishes limitations on other rights and requires States parties to enact legislative restrictions. Interestingly, commentators have pointed out that the limitations provided for in article 20 were not included in the provision dealing with freedom of expression, but were made the object of a separate provision. This implies that article 20 contains limitations for other rights, including freedom of religion. The exercise of freedom of religion could therefore potentially give rise to instances of advocacy that are prohibited by article 20.

47. The Special Rapporteur notes that article 20 of the Covenant was drafted against the historical background of the horrors committed by the Nazi regime during the Second World War. The threshold of the acts that are referred to in article 20 is relatively high because they have to constitute advocacy of national, racial or religious hatred. Accordingly, the Special Rapporteur is of the opinion that expressions should only be prohibited under article 20 if they constitute incitement to imminent acts of violence or discrimination against a specific individual or group.

48. A link is often made between article 20 and the relevant provisions of the International Convention on the Elimination of All Forms of Racial Discrimination, and in particular its article 4 which provides, inter alia, that States parties:

“(a) [s]hall declare an offence punishable by law all dissemination of ideas based on racial superiority or hatred, incitement to racial discrimination, [...] against any race or group of persons of another colour or ethnic origin,”.

49. However, the 1981 Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief does not contain a prohibition of incitement to religious discrimination similar to article 4 above. The Special Rapporteur cautions against confusion between a racist statement and an act of defamation of religion. The elements that constitute a racist statement are not the same as those that constitute a statement defaming a religion. To this extent, the legal measures, and in particular the criminal measures, adopted by national legal systems to fight racism may not necessarily be applicable to defamation of religion.

50. Domestic and regional judicial bodies - where they exist - have often laboured to strike the delicate balance between competing rights, which is particularly demanding when beliefs and freedom of religion are involved. In situations where there are two competing rights, regional bodies have often extended a margin of appreciation to national authorities and in cases of religious sensitivities, they have generally left a slightly wider margin of appreciation, although any decision to limit a particular human right must comply with the criteria of proportionality. At the global level, there is not sufficient common ground to provide for a margin of appreciation. At the global level, any attempt to lower the threshold of article 20 of the Covenant would not only shrink the frontiers of free expression, but also limit freedom of religion or belief itself. Such an attempt could be counterproductive and may promote an atmosphere of religious intolerance. [...]

**E/CN.4/2006/5/Add.1****Summary of cases transmitted and replies received****[...] Denmark**

Communication sent on 14 November 2005 with the Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance

110. The Special Rapporteurs were informed that cartoons representing the prophet Muhammad in a defamatory and derogatory manner were published in the newspaper Jyllands Posten in the course of September 2005. It was reported that the series of cartoons were published after a writer complained that nobody dared illustrate his book about Muhammad. Following the publication, two cartoons illustrators allegedly received death threats.

111. The Special Rapporteurs, while believing that limitations to the freedom of expression have to be applied in a restrictive manner, expressed their concern regarding actions that seem to reveal intolerance and absence of respect for the religion of others, particularly in the aftermath of 11 September 2001. Such actions may also constitute threats to the religious harmony of a society, and the source of incitement to discrimination, hostility or violence on the basis of religion which are prohibited by article 20 of the International Covenant on Civil and Political Rights.

112. The Special Rapporteurs requested the Government to provide them with information as to whether the facts alleged in the summary of the case were accurate, whether a complaint had been lodged by or on behalf of the persons affected by the consequences of these publications and whether any judicial or administrative decision had been taken so far. The Special Rapporteurs also requested information about the existing policy measures to promote religious tolerance and the ones to closely monitor that kind of developments.

**Response from Government dated 24 January 2006**

113. The Government confirmed that the Danish newspaper Jyllandsposten had published 12 cartoons depicting the prophet Muhammad on 30 September 2005. Following publication several threats were made against the cartoonists, some of which are still under investigation. The cartoons prompted several private associations to file a complaint under the sections 140 and 266b of the Danish Criminal Code with the police. According to section 140 of the Criminal Code, any person, who, in public, ridicules or insults the dogmas of worship of any lawfully existing religious community in Denmark shall be liable to imprisonment for any term not exceeding four months, or, in mitigating circumstances, to a fine. Section 266b of the Criminal Code criminalizes the dissemination of statements or other information by which a group of people are threatened, insulted or degraded in account of e.g. their religion.

114. The complaint was taken up by the Regional Public Prosecutor in Viborg who decided that cartoons fall within the scope of sections 266b and 140. However, on 6 January 2006 the Prosecutor decided to discontinue the investigation for lack of a reasonable suspicion that a criminal offence indictable by the state has been committed. The Prosecutor stated that when

assessing what constitutes an offence the freedom of speech must also be taken into consideration. The freedom of speech must be exercised with the necessary respect for other human rights, including the right to protection against discrimination, insult and degradation. In finding that there was no reasonable suspicion that a criminal offence indictable by the state had been committed, the Prosecutor attached importance to the fact that the article in question concerns a matter of public interest, which means that there is an extended access to make statements without these statements constituting a criminal offence. Furthermore according to Danish case law journalists have extended editorial freedom when it comes to subjects of public interest. These reasons led to the conclusion that in this case no criminal offence under section 140 or 266b of the Criminal Code had been committed. A complaint against the Prosecutor's decision can be lodged with the office of the Director of Public Prosecutions.

115. In general the Danish Government strongly focuses on ensuring an inclusive, multicultural society characterized by mutual respect and shared democratic values. In his New Year's address of 2006 the Danish Prime Minister stressed the important and absolute nature of the freedom of speech and that it was necessary to exercise that freedom in a civilized respectful manner so as not to cause fragmentation within Danish society. Other members of cabinet have put forward similar views. Furthermore the Danish Government is continuing its dialogue with representatives of minorities and leaders of religious communities in order to achieve mutual respect and understanding as well as stronger community participation, active citizenship, freedom and equality, better opportunities for the young and prevention of radicalization.

### **Observations**

116. The Special Rapporteur is grateful for the Government's response and encourages the Government to continue its efforts to increase mutual understanding and religious tolerance, in accordance with article 10 of Resolution 2005/40 of the Commission on Human Rights. She would like to reiterate the words from her joint press statement with the Special Rapporteur for contemporary forms of racism, racial discrimination, xenophobia and related intolerance and the Special Rapporteur for the promotion and protection of the right to freedom of opinion and expression on 8 February 2006. In this statement the Special Rapporteurs expressed their concern at the grave offence caused by the cartoons and at the violent response the cartoons had provoked and they made a special call for tolerance and dialogue. The Special Rapporteurs acknowledged that while both freedom of religion and freedom of expression should be equally respected, the exercise of the right to freedom of expression carries with it special duties and responsibilities. It requires good judgment, tolerance and a sense of responsibility. Furthermore the Special Rapporteurs feel that peaceful expression of opinions and ideas, either orally, through the press or other media, should always be tolerated. The press must enjoy large editorial freedom to promote a free flow of news and information, within and across national borders, thus providing an arena for debate and dialogue. Nevertheless, the use of stereotypes and labeling that insult deep-rooted religious feelings do not contribute to the creation of an environment conducive to constructive and peaceful dialogue among different communities. [...]

**A/HRC/4/21****I. ACTIVITIES OF THE MANDATE**

[...] 12. A significant proportion of the communications were sent concerning cases in which violations of the right to freedom of religion or belief were coupled with violations of other human rights. For instance, there have been cases where freedom of expression was also violated and where the situation concerned intra-religious conflicts and/or incitement to religious hatred. There were further communications sent with regard to alleged cases of torture or ill treatment of persons held in custody on the basis of their religion or belief, one case of death in custody, as well as recurring cases of religiously motivated forms of punishment. As mentioned above, in cases which raised a number of human rights violations, the Special Rapporteur acted jointly with other relevant mandates. She considers these joint communications to be a vital component of the whole system of special procedures, underlining the fact that all human rights are universal, indivisible and interdependent and interrelated. She trusts that the particular features of her mandate can add some wealth to the human rights values and to the monitoring approaches. [...]

**IV. CONCLUSIONS AND RECOMMENDATIONS**

[...] 55. Legislation with regard to advocacy of religious hatred that constitutes incitement to discrimination, hostility or violence must be applied by independent and non-arbitrary bodies. Accordingly the prosecution, while retaining their prosecutorial discretion, should rely on transparent and neutral standards when applying the legislation to specific cases. Furthermore an independent judiciary is an absolutely vital component in the process of effectively combating forms of expression that incite to religious or racial hatred. The need for bodies which comply with international standards on the independence of the judges and lawyers in this context is a prime example of the importance of the interdependence of human rights. It should also be noted that the application of so-called “hate speech” legislation can be particularly problematic where the law itself favours one religion, or where a religion rather than freedom of religion or belief is the object of protection. [...]

**A/HRC/4/21/Add.2****Visit to Azerbaijan****[...] VI. CONCLUSIONS**

[...] Religious literature

90. The control exercised by SCWRA on the content of religious literature, in particular that which is imported from abroad, is very tight. The Special Rapporteur considers that the authorities have not demonstrated that their meticulous scrutiny of religious books was necessary to protect public safety, order, health, or morals and that they exercised this control in a reasonable manner. On the contrary, certain instances of control may have constituted undue limitations to the right to manifest one’s religion or belief.

91. Moreover, the Special Rapporteur believes that the right to freedom of expression as protected by international standards provides a certain latitude for religious communities in the drafting and dissemination of their literature, even in cases where they do not agree with other religions, provided that they do not raise to the level of incitement to religious hatred as prohibited by article 20 of the Covenant.

## **VII. RECOMMENDATIONS**

92. The Government should primarily ensure that all individuals who may have been the victim of violations of their right to freedom of religion or belief or of other human rights because of their religion or belief receive appropriate redress, including through a judicial procedure. It should also ensure that the perpetrators of acts that have caused such violations are prosecuted according to applicable criminal procedures. Such measures should also be systematically enforced for any future acts of religious intolerance or other forms of persecutions of members of religious communities in accordance with the criminal laws of the country.

93. In particular, the Special Rapporteur urges the Government to give special attention to any form of religious intolerance towards religious minorities and take the appropriate measures to address and prosecute all forms of incitement to religious hatred in accordance with article 20 of the International Covenant on Civil and Political Rights and other relevant human rights provisions, including when these acts are perpetrated by the media. [...]

### **A/HRC/7/10/Add.3**

#### **Visit to the United Kingdom of Great Britain and Northern Ireland**

##### **[...] Provisions on offences related to religions**

73. While noting that blasphemy charges have rarely been successful in court cases during the last decades, the Special Rapporteur is concerned at the continued existence of the blasphemy offence. The common law still imposes a strict liability on everybody who intends to make a statement on a Christian topic, even though he cannot know at that stage whether or not he will be found to have blasphemed. The Special Rapporteur shares the criticism that the blasphemy offence is discriminatory because it favours Christianity alone and lacks a mechanism to take account of the proper balance with freedom of expression. She also agrees with the Assembly of the Council of Europe which recommended in its resolution 1805 (2007) that the Committee of Ministers ensure that national law and practice in Council of Europe member States be “reviewed in order to decriminalize blasphemy as an insult to a religion”. The Special Rapporteur would like to reiterate that a useful alternative to blasphemy laws could be to fully implement the protection of individuals against advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence according to article 20, paragraph 2, of the International Covenant on Civil and Political Rights.

74. In this regard and in view of the Government’s declarations made upon ratification of the ICCPR (see above paragraph 12)<sup>2</sup>, the Special Rapporteur welcomes that the Racial and

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<sup>2</sup> “The Government of the United Kingdom interpret article 20 consistently with the rights conferred by articles 19 and 21 of the Covenant and having legislated in matters of practical concern in the interests of public order (*ordre*

Religious Hatred Act 2006 has recently entered into force in England and Wales. This closes the partial protection gap for people subjected to hatred because of their religion; they previously did not have the same protection under the criminal law as those targeted because of their race, especially since courts and tribunals have defined “race” so as to include Jews and Sikhs but no other religions. The Special Rapporteur notes with appreciation that the Racial and Religious Hatred Act 2006 also refers to non-religious believers in defining the meaning of “religious hatred” as “hatred against a group of persons defined by reference to religious belief or lack of religious belief”. Furthermore, the Act tries to strike the delicate balance with freedom of expression by banning threatening words and behaviour rather than restricting discussion, criticism or expressions of antipathy, dislike, ridicule or insult.

75. In order to allow a profounder analysis and to avoid misinformation about the application of the new provisions, the Special Rapporteur recommends that the Government should regularly publish statistics of prosecutions and convictions for incitement to religious or racial hatred. The Government also needs to monitor the situation closely in terms of the background of the victims and perpetrators. In addition, the Special Rapporteur encourages the introduction of similar legislation against racial and religious hatred in Scotland. [...]

#### **E/CN.4/2005/61/Add.1**

#### **Communications and replies received**

#### **United Kingdom of Great Britain and Northern Ireland**

282. On 26 March 2004, the Special Rapporteur sent a communication to the Government of the United Kingdom of Great Britain and Northern Ireland in connection with information received according to which on 18 March 2004, vandals had attacked around 40 Muslim graves at a cemetery in Charlton, south-east London, in an apparent hate crime. Headstones were reportedly smashed and pictures removed from graves. British Islamic leaders had allegedly warned about a possible backlash against Muslims in the wake of attacks blamed on Al-Qaeda or other hard-line Islamic groups.

283. By letter dated 10 September 2004, the Government of the United Kingdom of Great Britain and Northern Ireland provided the Special Rapporteur with a summary prepared by the United Kingdom Home Office, the department with lead responsibility for these issues.

284. On 18 March 2004, approximately 72 graves in Charlton Cemetery, south-east London, were discovered to have been desecrated or damaged in the course of the previous night. Some of the headstones had been pushed over and the flowers that had been placed by relatives removed and thrown about. Other headstones had been smashed to pieces with what appeared to have been a hammer. The desecration had been limited to a part of the cemetery that was occupied mainly by the deceased of Turkish or Cypriot descent and Muslim faith. The majority of the desecrated graves had markings or writing on them that would indicate that the occupant was of Muslim faith. One Catholic grave, which was situated next to the Muslim plots, had also been desecrated.

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*public*) reserve the right not to introduce any further legislation. The United Kingdom also reserves a similar right in regard to each of its dependent territories.”



285. The Government indicated that three suspects were charged with Racially Aggravated Criminal Damage contrary to section 1 of the Criminal Law Act 1977 as defined by section 28 of the Crime and Disorder Act 1998. The suspects admitted involvement in the desecration but two of them denied any racial or religious motivation for the attacks. The names of the suspects could not be disclosed as all three were juveniles. The cases had been committed to the Crown Court for trial. Although no trial date had been set yet, it was expected to take place sometime next year.

286. According to the Government's response, considerable resources were allocated to the investigation in its early stages and the inquiry team worked over two weekends to ensure a rapid response to all information. New Scotland Yard deployed a Metropolitan Police Officer with connections to the Turkish community and a Turkish-speaking police officer was employed during the investigation to assist with the victims of this crime. This had a very positive effect on the victims, who expressed their thanks both verbally and in writing.

287. The Government indicated that a National Community Tension Team had been established through the Home Office. The team's core business was to receive reports of tension from all forces in the United Kingdom and compile them into a national assessment. Particular focus was given to Muslim communities because of the fear they have of victimization. The Association of Chief Police Officers had recommended that all forces specifically record religiously aggravated offences and this would happen once local recording systems were updated. Police meetings with community representatives would be held following such incidents to ensure that any police responses were sensitive to community fears. All police forces have third party reporting schemes that could be used to enable better reporting of Islamophobic incidents and a help line for this purpose was also being considered.

### **Observations**

288. The Special Rapporteur is grateful for the details provided in the reply of the Government and would like to refer to the most recent concluding observations of the Committee on the Elimination of Racial Discrimination of 20 August 2003 (CERD/C/63/CO/11) in which concern was expressed "about reported cases of 'Islamophobia' following the 11 September attacks. Furthermore, while the Committee [noted] that the State party's criminal legislation includes offences where religious motives are an aggravating factor, it regret[ted] that incitement to racially motivated religious hatred is not outlawed. The Committee recommend[ed] that the State party give early consideration to the extension of the crime of incitement to racial hatred to cover offences motivated by religious hatred against immigrant communities". [...]

### **United States of America**

292. On 28 June 2004, the Special Rapporteur transmitted a communication to the Government of the United States of America in connection with information received according to which acts of religious intolerance against Muslims and their religion had continued to occur throughout the country. In particular, it was reported that the number of hate crimes coincided with a rise in Islamophobic rhetoric in the public discourse in the United States.

293. In this connection, the Special Rapporteur provided the following illustrations of alleged incidents whereby public persons or professionals of the media had portrayed or criticized Islam in ways that could constitute incitement to religious hatred as prohibited by article 20 of the International Covenant on Civil and Political Rights.

294. It was reported in October 2003 that the Deputy Under-Secretary of Defence for Intelligence, Lt. Gen. William G. “Jerry” Boykin, had on numerous occasions referred to the “war on terrorism” as a “spiritual battle” and made negative comments on Islam. It was also reported that the Department of Defence announced an investigation of Lt. Gen. Boykin but that the report following the investigation had not been released.

295. On 9 February 2004, Congressman Peter T. King reportedly declared on the Sean Hannity nationally syndicated radio programme that “85 per cent” of American Muslim community leaders are “an enemy living amongst us” and that “no [American] Muslims” cooperate in the struggle against terrorism.

296. On 4 March 2004, in an article that was published in a number of on-line magazines including Human Events Online and FrontPageMagazine.com, Ann Coulter allegedly remarked that “[b]eing nice to people is, in fact, one of the incidental tenets of Christianity (as opposed to other religions whose tenets are more along the lines of ‘kill everyone who doesn’t smell bad and doesn’t answer to the name Mohammed).” In the same article, a reference was also made to “[The Prophet] Muhammad’s many specific instructions to kill non-believers whenever possible.” It was reported that Ms. Coulter had made a number of similar comments regarding Islam and Muslims in the past.

297. On 1 April 2004, 630 WMAL-AM radio talk show host Michael Graham in Washington D. reportedly said: “I don’t wanna say we should kill ‘em all [Muslims], but unless there’s reform [within Islam], there aren’t a lot of other solutions that work in the ground struggle for survival.”

298. On 22 April 2004, radio host Jay Severin reportedly said during his talk show on 96.9 FM Talk – WTKK that he “believe[s] that Muslims in this country are a fifth column.... The vast majority of Muslims in this country are very obviously loyal, not to the United States, but to their religion. And I’m worried that when the time comes for them to stand up and be counted, the reason they are here is to take over our culture and eventually take over our country.” Mr. Severin allegedly further declared, in reply to a caller speaking of Muslims in the United States, “[y]ou think we should befriend them; I think we should kill them.”

299. On 14 June 2004, the Editor-In-Chief of U.S. News & World Report, Mortimer B. Zuckerman, reportedly stated in an editorial in that week’s issue that “Wherever there is violence, there are Muslim radicals” and that “Islam is the core reason the terrorists give for their killing. Murder is their religion.” Furthermore, Mr. Zuckerman remarked that “Europe is threatened by mass migration from neighbouring Islamic lands, young men bringing with them their radical faith and not much else.”

300. By letter dated 3 August 2004, the Government of the United States of America responded that the First Amendment of the United States Constitution provides that “Congress shall make no law abridging the freedom of speech”. This principle, which for more than 200 years has been

a cornerstone of democracy in the United States, also finds expression in article 19 of the Universal Declaration of Human Rights. It finds further expression, inter alia, in article 18 (1) and article 19 of the International Covenant on Civil and Political Rights (ICCPR).

301. The United States stressed that no nation can develop politically or economically without the ability of its citizens to openly and freely express their opinions without a free print and broadcast media.

302. With respect to article 20 of the ICCPR, the Government noted that the language was susceptible to an expansive interpretation that could run contrary to the vigorous protection of the freedom of expression under the First Amendment of the Constitution. For this reason, the United States had made the following formal reservation to article 20 at the time it became party to the ICCPR: "That Article 20 does not authorize or require legislation or other action by the United States that would restrict the right of free speech and association protected by the Constitution and laws of the United States."

303. According to the Government's response, statements allegedly made by individuals criticizing Islam, such as those statements referred to by the Special Rapporteur, are not illegal under United States law. Even where the United States Government finds the content of such expression to be misguided and repugnant, the Constitution mandates that the Government neither prohibit nor regulate speech merely as a result of disapproval of the ideas expressed. The criminal justice system penalizes specific unlawful actions (which might or might not be inspired by hate, xenophobia, or racism), as opposed to punishing speech itself. The Government's preferred approach to addressing hate speech is to confront it openly, to denounce it, and to promote tolerance, equality, and similar ideals through competing speech.

304. With regard to the negative comments on Islam allegedly made by Lieutenant General William G. Boykin, Deputy Under-Secretary of Defence for Intelligence, while speaking to private groups, the Government informed the Special Rapporteur that the office of the Inspector General at the Department of Defence had opened an investigation into this matter and that this investigation was still ongoing. Responding to a question about General Boykin's remarks at a press conference on 28 October 2003, President Bush reportedly said that "He doesn't reflect my point of view or the view of this administration".

305. According to the Government's response, there were numerous examples that illustrated the commitment of the United States to free speech and religious tolerance, including: (a) President Bush had hosted Iftaar dinners at the White House in 2001, 2002 and 2003 to celebrate Eid al-Fitr. During his remarks at the 2003 dinner, President Bush observed: "As we defend liberty and justice abroad, we must always honour those values here at home. America rejects all forms of ethnic and religious bigotry. We welcome the values of every responsible citizen, no matter the land of their birth. And we will always protect the most basic human freedom the freedom to worship God without fear."; (b) President Bush had visited the Islamic Center of Washington, DC and had made numerous public statements in support of Islam and its adherents; (c) On 20 February 2003, a jury found Charles Franklin of Florida guilty of damaging religious real property. He was sentenced to a term of 27 months' imprisonment for driving his vehicle into the entryway of the Islamic Center of Tallahassee in Tallahassee, Florida; (d) On 3 April 2003, Robert Goldstein pleaded guilty to a charge of conspiracy to violate civil rights, attempting to

damage religious property, obstruction of persons in the free exercise of religious beliefs, and possession of firearms not registered to him. He had planned to detonate an explosive device at the Islamic Society of Pinellas County, Florida, an Islamic education and cultural centre. In June 2003, he was sentenced to 12 years and 7 months' imprisonment. Then Assistant Attorney-General for Civil Rights, Ralph Boyd, Jr., stated: "Today's guilty plea is a reminder that acts of violence targeted at individuals because of their race, religion, or national origin will not be permitted in the United States--they will be aggressively investigated, swiftly prosecuted and firmly punished. The Department of Justice is committed to fighting hate and intolerance, as they tear at the very fabric of our great nation."

### **A/58/296**

## **II. Report on communications sent by the Special Rapporteur and replies received from States**

### **Egypt**

38. The Special Rapporteur, recalling the observations made in his previous report to the General Assembly (A/57/274) concerning action taken by the Egyptian authorities to contain and prevent displays of intolerance and discrimination based on religion or belief, urges that this positive approach should not incidentally lead to discrimination against certain religious minorities. Moreover, while recalling the need to respect freedom of the press, he wishes to draw the attention of the Egyptian authorities to the necessity of combating any call for religious hatred that incites discrimination, hostility or violence and which therefore must be prohibited by law. [...]

## **V. Conclusions and recommendations**

[...] 137. Second, terrorist acts together with security measures taken by States have strengthened many people's isolationism, which focuses on religion and promotes distrust, intolerance and even rejection of others and is expressed through religion-based discrimination at all levels. Advocacy of or incitement to hatred in violation of article 20 of the International Covenant on Civil and Political Rights and acts of violence against members of religious minorities have also become increasingly common. In this regard, it should be noted that many States have not met their human rights obligations. These are not limited to the negative obligation to refrain from violating the right to freedom of religion or belief; they also include the positive obligation to protect persons in their territory from violations of their right to freedom of religion or belief committed by non-State actors or entities by prosecuting those who commit such violations and providing compensation to the victims.

138. Stressing that women and children are still too often the victims of acts of discrimination and religious violence, the Special Rapporteur is particularly concerned at the sometimes negative role played by the press in the spread of religious intolerance. The media continue to promote an often incorrect, negative image of certain religious groups and have sometimes incited hatred of many such groups, including Muslims.

## **E/CN.4/1999/58/Add.2**

### **Visit to Viet Nam**

27. In this connection, it should be recalled that in the report on its mission to Viet Nam (E/CN.4/1995/31/Add.4 of 18 January 1995), the Working Group on Arbitrary Detention stated that "... the characterizations of offences as crimes against national security, as defined in article 73 of the Penal Code, draw no distinction on the grounds of the use or non-use of violence or of incitement or non-incitement to violence [...] the present wording of article 73 is so vague that it could result in penalties being imposed not only on persons using violence for political ends, but also on persons who have merely exercised their legitimate right to freedom of opinion or expression" (para. 58).

## **E/CN.4/2002/73/Add.1**

### **Visit to Argentina**

#### **I. LEGAL ASPECTS OF FREEDOM OF RELIGION AND BELIEF**

[...] 36. Anti-Discrimination Act No. 23592 (1998) provides for criminal penalties for discriminatory acts and omissions on grounds of religion, race or sex. Article 2 of the Act reads: "The most lenient penalty on the scale of criminal penalties for offences punishable by the Penal Code and supplementary laws shall be increased by one third and the harshest penalty by one half when the offence was committed by means of persecution or out of hatred of a race or religion or for the purpose of destroying all or part of a national, ethnic, racial or religious group". Article 3 reads: "Anyone who takes part in an organization or produces propaganda based on ideas or theories of the superiority of one race or group of persons of a particular religion, ethnic origin or colour for the purpose of justifying or advocating racial or religious discrimination in any form shall be liable to one month to three years' imprisonment. The same penalty shall apply to anyone who by any means encourages or incites persecution or hatred against any person or group of persons because of their race, religion ...".

## **E/CN.4/2004/63/Add.1**

### **Visit to Georgia**

#### **[...] IX. RECOMMENDATIONS [...]**

120. The Special Rapporteur also stresses that freedom of speech does not authorize the press to broadcast messages which might constitute incitement to religious hatred. Incorrectly used and/or used to illegal ends, the press can be a potent vector of intolerance, religious and otherwise; the Special Rapporteur advises the competent authorities to be strict in applying the principle laid down in article 20 of the International Covenant on Civil and Political Rights and to take appropriate steps for the swift prosecution of anyone who commits a criminal offence of this kind. [...]

122. The Special Rapporteur is still more concerned, however, over messages in schoolbooks produced under the direct responsibility of the Government which clearly run counter to

religious tolerance and urge their intended readers to reject anyone who claims to be part of one of the non-“traditional” religious minorities which the books in question label “sects”. He calls on the Georgian authorities to take action to have such passages removed from schoolbooks as swiftly as possible or, if this is infeasible, to withdraw the books and substitute others that do not contain incitements to religious intolerance.

### **E/CN.4/2004/63/Add.2**

#### **Visit to Romania**

### **III. LEGAL STATUS OF FREEDOM OF RELIGION OR BELIEF**

[...] 25. It should also be noted that article 30 [of the Constitution], paragraph 7, in accordance with article 20 of the International Covenant on Civil and Political Rights, prohibits, among other things, incitement to hatred or discrimination, including religious hatred or discrimination. [...]

### **V. SITUATION OF RELIGIOUS MINORITIES**

#### **A. Violence and other acts of religious intolerance**

[...] 51. Some minorities from both recognized and non-recognized religions complained about being described in the media in erroneous and slanderous terms. In an article by a journalist from Cluj, for example, the Baha’i community, which is often described as a sect, was linked with the Unification Church (followers of the Rev. Sun Myung Moon) or the Church of Scientology. Jehovah’s Witnesses, Baptists and Seventh-Day Adventists have found themselves in similar situations. Some religious minorities also denounced certain publications that incite racial or religious hatred, such as the România Mare magazine. Such behaviour is rarely prosecuted effectively by the Romanian authorities.

## *5. Conference room paper by Frank La Rue*

### **Special Rapporteur on freedom of opinion and expression – References to “incitement to racial and religious hatred”**

#### **A/HRC/7/14**

#### **Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, Ambeyi Ligabo**

[...]

#### **II. ISSUES**

#### **D. Freedom of opinion and expression and the realization of other human rights**

[...]

#### **Freedom of opinion and expression and freedom of religion**

63. In recent years, and with increased frequency, particularly due to events that dominated international politics recently, an alleged dichotomy between the right to freedom of opinion and expression and the right to freedom of religion or belief has been purported. In particular, it has been argued that the dogmatic use of freedom of expression as a fundamental human right has undermined people’s ability to fully enjoy other human rights, in particular freedom of religion. The Special Rapporteur strongly rejects such a view, as it contradicts the clearly established notion and widely accepted principle that human rights are indivisible rather than rival principles. In particular, the ensemble of human rights can only be fully enjoyed in an environment that guarantees freedom and pluralism.

64. Practices such as stereotyping and insulting ethnic, national, social or religious groups have serious and damaging consequences for the promotion of dialogue and living together among different communities. To fight intolerance and discrimination and to create a solid basis for the strengthening of democracy, broad-based and long-lasting programmes and actions need to be developed to promote respect for diversity, multiculturalism and human rights education.

65. The Special Rapporteur also emphasizes that existing international instruments establish a clear limit on freedom of expression. In particular, the International Covenant on Civil and Political Rights provides that “any propaganda for war” and “any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law”. The main problem thus lies in identifying at which point exactly these thresholds are reached. The Special Rapporteur underscores that this decision, which is ultimately a subjective one, should meet a number of requirements. In particular, it should not justify any type of prior censorship, it should be clearly and narrowly defined, it should be the least intrusive means in what concerns limitations to freedom of expression and it should be applied by an independent judiciary. The Special Rapporteur reiterates that these limitations are

designed to protect individuals rather than belief systems, guaranteeing that every person will have all of his or her human rights protected.

66. The Special Rapporteur notes that a broader interpretation of these limitations, which has been recently suggested in international forums, is not in line with existing international instruments and would ultimately jeopardize the full enjoyment of human rights. Limitations to the right to freedom of opinion and expression have more often than not been used by Governments as a means to restrict criticism and silent dissent. Furthermore, as regional human rights courts have already recognized, the right to freedom of expression is applicable not only to comfortable, inoffensive or politically correct opinions, but also to ideas that “offend, shock and disturb”. The constant confrontation of ideas, even controversial ones, is a stepping stone to vibrant democratic societies.

[...]

### **III. CONCLUSIONS AND RECOMMENDATIONS**

#### **On freedom of expression and freedom of religion**

84. The Special Rapporteur urges media professionals, as well as the public at large, to be conscious of the potential impact that the ideas they express may have in raising cultural and religious sensitivities. The dissemination of intolerant and discriminatory opinions ultimately promotes discord and conflict and is not conducive to the promotion of human rights. Media corporations and journalists’ associations, in cooperation with national and international organizations, should organize regular human rights training programmes in order to enhance professional ethics and sensitivity to cultural diversity of media professionals.

85. The Special Rapporteur further emphasizes that, although limitations to the right to freedom of opinion and expression are foreseen in international instruments to prevent war propaganda and incitement of national, racial or religious hatred, these limitations were designed in order to protect individuals against direct violations of their rights. These limitations are not intended to suppress the expression of critical views, controversial opinions or politically incorrect statements. Finally, they are not designed to protect belief systems from external or internal criticism.

#### **A/HRC/4/27**

#### **Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, Ambeyi Ligabo**

10. The third noteworthy feature of the Special Rapporteur’s mandate is the identification of new trends concerning the implementation of the right to freedom of opinion and expression. Owing to the advent of new technologies and the resulting increase of the request for information, the notion of freedom of opinion and expression has quickly taken new directions, while legislation on new technologies appears to be linked to obsolete concepts that prevent the full enjoyment of the right to freedom of expression, even in traditionally favourable environments. Internet



governance and its boundaries have also revived the debate between the extent of the right to access to information and the right to privacy.

11. Regrettably, repressive machineries are speedily adapting to new technologies, which are often used as tools for political propaganda and a conduit for racial discrimination and hate speech. Together with a constant trend towards the polarization of ideas and ethnic tension, the systematic oppression of the most active supporters of the free circulation of information and opinions - journalists, trade unionists, social workers, students and teachers, writers and artists - continues to remain an issue of concern throughout the entire world. [...]

## II. ISSUES

### A. The Special Rapporteur's visit to Denmark

22. At the invitation of the Danish Human Rights Institute, the Special Rapporteur went to Denmark in April 2006 to participate in a number of meetings, including with Government officials, in which he gathered significant information regarding the "Danish Cartoons Affaire".

23. On September 2005, the publication in the newspaper *Jylland Posten*, of a series of cartoons depicting Prophet Muhammad as, inter alia, a terrorist, provoked anger within the Muslim community in Denmark. This event followed the broadcasting in August 2005 by the Danish *Radio Holger* of a controversial programme in which the radio-speaker delivered a hate speech calling for the deportation of all Muslims back to their countries of origin, or alternatively, for their physical elimination from European soil. Shortly after the broadcasting of that programme, the Danish National Radio and TV Commission withdrew *Radio Holger's* licence for three months.

24. In spite of significant efforts to defuse the tension caused by the publication of the drawings, the quarrel spread beyond Danish borders. The Arab League's Ministers Council, at a Conference held in Cairo in December 2005, issued a statement expressing surprise and discontent at the failure of the Danish Government to act against the newspaper. The Prime Minister of Denmark, in his 2006 New Year's address, condemned attempts to demonize groups of people based on their religion without explicitly referring to the *Jyllands Posten* case. The Prime Minister had earlier reiterated that, in Denmark, the press and media are completely independent from the political power and that his Government has no intention of breaking this long-established tradition.

25. On 30 January 2006, *Jyllands Posten* issued a press statement apologizing to the Muslim world stressing that it had not been their intention to be offensive. The newspaper's statement was followed by a press statement of the Danish Prime Minister on 31 January in which, while emphasizing that Denmark attaches fundamental importance to the freedom of expression, he stressed that the Danish Government condemns any expression that attempts to discriminate against people on the basis of their religion or ethnic background.

26. In early February, Ministers from several Arab countries urged the Government of Denmark to act against *Jyllands Posten* for offences to Islam. In the following wave of protests that spread throughout the Muslim world, around 200 people lost their lives. In addition, Danish embassies and other Western offices were attacked by the mob, Danish goods and products banned in Muslim countries' markets, and some Westerners briefly kidnapped by extremist organizations. Reportedly, several death threats were issued against the cartoon illustrators and the newspaper.

### **Special Rapporteur's findings**

27. In Denmark, article 77 of the Constitution prohibits censorship and preventive measures. The Danish Media Liability Act (6 June 1991) established the Danish Press Council (*Pressenævnet*) in 1992, an independent public body entrusted with the verification of the existence of two core conditions: (a) whether a publication is made contrary to media ethics; and (b) whether a mass medium is obliged to publish a reply (rectification) including the contents, form and placement of such reply. The Council receives and examines written complaints submitted - by individuals or groups with a direct or indirect link with the matter - within four weeks from its publication. Each year the Council examines approximately 145 complaints. The Council may also act *ex officio*, a move that it took only once, in 1997. With regard to the "cartoons", the Council rejected the two complaints it received on the basis that they were submitted after the four-week deadline.

28. The Danish Newspaper Publishers' Association has adopted guidelines on media ethics, which are also used by the Press Council together with its own jurisprudence.

29. The Danish Broadcasting Corporation endorses total editorial freedom within the respect of other fundamental rights. Its philosophy is that a journalist should have a strong case to infringe other rights, acting for investigative purposes and on subjects of public interest.

30. As reported by the Union of Journalists, the press is satisfied with the present level of freedom of expression and it is not favourable to the introduction of new rules and laws, especially international mechanisms that could jeopardize their freedom. Nonetheless, the "Cartoons Affair" has provoked a very animated debate within the media: while everybody defends the present status of freedom of expression, it was felt that the press should be more responsible and conscious that in the global information society, opinions and views are recorded and noted all around the world. The concepts of self-censorship and self-criticism have been re-examined through the developments brought by the "Cartoons Affair" and the supremacy of the right to freedom of expression is now seen in a new light.

31. It was emphasized that drawings and caricatures are significant part of the iconic culture used in Denmark to criticize personalities and lobbies, with the aim at highlighting a case that can be of general interest and preoccupation for the citizens.

32. It was also acknowledged that, within the exercise of freedom of expression, part of the press does not hesitate to support discriminatory views and drastic measures that could limit the phenomenon of migration. In addition, migrants and minorities are frequently targeted through labelling in the media.

33. Freedom of religion is thoroughly respected in Denmark, but it was evident that expressions of religion and belief were generally not popular with a large part of the media and other sections of society. Another element has to be taken into consideration: migration policies are, like in several other countries, at the core of the political debate and certain political parties have vigorously campaigned to convince a large part of the population that migrants are one of the greatest emergencies nowadays in Denmark. As a result, laws on migration are presently very strict. Nonetheless, Denmark has maintained its traditionally active approach to human rights and humanitarian cooperation, and a significant part of the population appreciates and promotes values like tolerance and solidarity.

34. Within this framework, media representatives felt that, from their side, there was no conspiracy, no plot behind the publication of the drawings, which was generally seen as an effort, though indeed questionable, to address in a frank, direct manner, the problem of self-censorship while dealing with the Muslim community and with the relations between native Danes and migrants.

35. According to Muslim sources, with whom the Special Rapporteur met while in Denmark, the drawings were part of incessant provocations against them and their religion. This strategy could have been seen as a systematic denigration of Muslims with the view of reaffirming the supremacy of Danish values and of contrasting integration efforts. As a result, Muslims in Denmark reportedly decided to adopt a very low profile in public life, an attitude that was defined as self-censorship, as they thought that they could easily have become target of harsh criticism even without any specific reason.

36. Taking into account the general orientation of the opinions gathered, the Special Rapporteur felt that the unmitigated reaction, in many Muslim countries, to the contents of the drawings apparently took Denmark, the Danish people, the editors and the artists involved, by total surprise: in their opinion, the reaction was overwhelmingly disproportionate to the damage inflicted. A renewed, intense debate on the issue of the “Danish Cartoons” commenced between the media and religious groups as well as among ordinary citizens. This debate, in a country with a very long democratic tradition and in which freedom of speech is almost a dogma, was very articulate and polarized but - the Special Rapporteur wishes to underline this point - did not lead to physical violence.

37. The outcomes of this heated debate were of various nature and significance: Danes felt an increased sense of unity around the constituent values of the nation and, in the first place, freedom of expression. Nevertheless, they also felt that the country has so far been living in a sort of isolation, which guarantees reasonable wealth and freedom to all its citizens, but does not promote understanding of the increasing interdependence among peoples and cultures. Time will

tell if the “Danish Cartoons Affair” has brought some benefit to the Danish society in reinforcing the concepts of respect and tolerance through a non-violent confrontation of ideas and opinions

[...]

72. Legislation on new technologies appears to be a major preoccupation even in environments traditionally favourable to freedom of expression. Regrettably, new and old technologies are increasingly used as more or less sophisticated tools for political propaganda, which may include racial discrimination and hate speech, thus contributing to spreading the polarization of ideas and ethnic tension. Nonetheless, the universal availability of new tools for communication and information may give a great impetus to social advancement and to the dissemination of education and knowledge, thus widening the scope of the right to freedom of opinion and expression. New communication technologies have also opened a large debate on the limit between the right to access to information and the right to privacy.

73. Internet governance and human rights is one of the themes that would animate the debate of the international community in the near future. Internet governance should solidly be anchored to a human rights vision: guaranteeing freedom of opinion and expression on the Internet and other new communication tools is a strategic component of the struggle against poverty worldwide. Making new technologies available globally will contribute to reduce the social and economic gap between developed and developing countries.

[...]

77. The Special Rapporteur invites the Human Rights Council to address, in an open debate, the recommendations included in the joint report submitted at its second session by the Special Rapporteur on freedom of religion or belief and the Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance on the question of defamation of religion and incitement to religious hatred (A/HRC/2/3). This report contains a comprehensive set of recommendations and conclusions for further action from the Council, with a view to promoting a balanced approach to the search for peaceful coexistence among peoples of different religions and cultures.

78. The Special Rapporteur urges existing independent media authorities and media associations to be vigilant about the use of forms of expression characterized by defamation of religions and discriminatory connotations of ethnic and other vulnerable groups. The indiscriminate use of labelling of women, minorities and other groups, especially migrants and asylum-seekers, endangers the public debate and fuels self-censorship and a sense of fear. These forms of expression also have a negative impact on the quality and the dignity of journalism, and ultimately jeopardize media integrity. In this connection, media associations should systematically organize human rights training, if necessary with the assistance of relevant United Nations bodies and other expert organizations, for their members in order to enhance professional ethics and human rights awareness. Media associations should also ensure that most sensitive societal issues are constantly debated in professional forums.

**E/CN.4/2005/64**

**Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, Ambeyi Ligabo**

58. The Special Rapporteur is particularly alarmed by the increasing use of forms of expression having discriminatory connotations for ethnic and other vulnerable groups. Hate speech and similar forms of expression can contribute substantially to the deterioration of a precarious stability and drive a country to armed confrontation. In post conflict societies, biased reporting could rekindle violence and destroy laborious efforts for peace and reconciliation. Respect for human rights, professionalism and a sense of personal responsibility are indispensable elements for independent journalism, and they should be carefully preserved and developed.

**A/HRC/7/14/Add.2**

**Mission to Ukraine (2007)**

**[...] V. CONCLUSIONS**

69. The Special Rapporteur believes that some State institutions, particularly law enforcement agencies, have been downplaying the relevance of racist crimes in Ukraine. While noting that the ratification of the International Convention on Migrant Workers is under consideration, the Special Rapporteur remains convinced that the issue of racism is not adequately addressed by public institutions. The Special Rapporteur further underlines that many extremist groups, particularly neo-Nazi organizations, have used their prerogative of freedom of expression to convey messages of racism and racial hatred. International instruments, particularly the International Covenant on Civil and Political Rights, establish clear limitations on free speech when incitement to racial, ethnic or religious hatred is in question. The Special Rapporteur calls on public authorities to implement these provisions as an essential step to curb the spread of racism and intolerance in Ukraine.

**E/CN.4/2005/64/Add.4**

**Mission to the State Union of Serbia and Montenegro (2005)**

[...]

**D. Hate speech**

38. The Minister of Foreign Affairs of the State Union, in his meeting with the Special Rapporteur, affirmed that the grave incidents, in which 19 people lost their lives, of March 2004 in Kosovo were an example of the pernicious consequences of hate speech and the media's lack of responsibility. In this regard, it was noted that, in Serbia, several media treated the killers of Prime Minister Djindjic like heroes. There is no culture of tolerance and mutual understanding in the country because of the former dictatorship; large parts of the population as well as media

professionals are not educated to respect others' freedom of expression. His ministry was willing to work on the improvement of this dire situation with the help of international organizations.

39. A participant in the meeting with the human rights contact group in Belgrade raised the question whether the exercise of the right to freedom of expression should entail some limitations dealing with minorities and hate speech. For example, in a classic case of hate speech, a media outlet recently defined the killing of Roma peoples as a recreational activity. The border between freedom of expression and hate speech seems to be a grey area in which personal sensitiveness and professional responsibility are more important than sound legislation.

40. Hate speech targeting several public personalities increased in the media after suspension of a state of emergency, in the second part of 2002 and during the pre-election campaign. Hate speech was manifest in tabloids and even reputable weeklies where commentators regularly attack prominent personalities using questionable arguments.

41. Formally, almost all media oppose the use of hate speech and, in general, avoid the use of sensationalism. However, an analysis of this phenomenon should necessarily be linked to the recent history of the country and of the former Federal Republic of Yugoslavia. For example, young people, including media professionals, know little about ethnic Albanians; they are unable to analyse the recent past because of the ongoing atmosphere of suspicion and hatred. To this picture, one should add the economic crisis and a sense of emptiness created by the dissolution of Yugoslavia. Bearing in mind these elements, the persistence of hate speech, even among youth, should not come as a surprise: this is the price to pay for the lack of any serious and comprehensive effort in the field of reconciliation and truth. Furthermore, on the one hand, the use of hate speech from certain media seems to be linked more to marketing considerations than to an editorial strategy; on the other hand, hate speech and discriminatory statements are often quoted from politicians' speeches.

## **E/CN.4/2005/64/Add.2**

### **Mission to Côte d'Ivoire**

#### **A. The link between the independence of the media and the increase in professionalism**

37. Freedom of opinion and expression, and sensitive matters like hate speech, seemed to have been a major concern in recent years. The Prime Minister, Seidiou Diarra, stated that he appreciated the visit of the Special Rapporteur because it was giving him the possibility to reiterate to the Government of Reconciliation the importance of the independence of the media for the future of the country. The Minister for Human Rights affirmed that, in spite of accusations aired from abroad, the Government was trying to implement the provisions of the Linas-Marcoussis Agreement in this field: reinforcement of the role of the self-ruling organs; guaranteeing the neutrality and impartiality of the State media; facilitating the independence of

the media. The improvement of the economic conditions, especially with regard to the salaries of journalists, may be one of the keys to increasing professionalism and independence.

38. The Special Rapporteur noted the link between hate speech and the need to improve the professionalism of the press. After the death of Houphouët-Boigny there was a liberalization of the media without any parallel development of journalists' professionalism: the campaign of hatred in the press, the Minister of Communication noted, was rooted in the past of the country. However, the press seemed to have commenced a self-critical debate on journalists' ethics and professionalism, a step welcomed by the Government, which was actively discussing the possibilities of adopting a number of laws for an overall reform of the media and a new Press Code. The Minister also referred to the dire situation of the majority of journalists whose salaries were absolutely incompatible with the importance of their work. This created the conditions for a subordinate relation between the journalist and the owner of the media.

[...]

67. The Special Rapporteur urges 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.

#### **E/CN.4/2004/62/Add.2**

### **Mission to the Islamic Republic of Iran**

#### **B. Legal framework**

94. With respect to the legal framework, the Special Rapporteur deems it necessary to underline that, according to article 19, paragraph 3, of ICCPR, restrictions on the exercise of the right to freedom of opinion and expression are permissible only when they are necessary for respect of the reputations of others and for the protection of national security or of public order, or of public health or morals. Article 19, paragraph 3, also requires that such restrictions shall be provided by law, in particular to provide a clearly delimited frame of precisely identified and defined limitations to the freedom of expression.

95. The Special Rapporteur considers that many of the limitations provided for, in particular, in the Press Law and the Penal Code, do not conform to the permissible restrictions listed in article 19, paragraph 3, of ICCPR, firstly because many go beyond the clauses listed in this article, and secondly because in most cases the grounds for these limitations ("disturbing the security of the country"; "insult against Islam"; "criticism"; "propaganda" against the State; "issues prejudicial to Islamic codes"; "matters against Islamic standards"; "deviant press, parties and groups"; "anti-revolutionary forces"; "anti-establishment activities") lack any objective criteria and clear definition, and are therefore open to subjective and arbitrary interpretation by judges implementing them. In this respect, the Special Rapporteur wishes to recall that Commission on Human Rights resolution 2003/42 stresses the "need to ensure that unjustified invocation of national security ... to restrict the right to freedom of expression and information does not take".

**Joint Declaration by the UN Special Rapporteur on Freedom of Opinion and Expression, the OSCE Representative on Freedom of the Media, the OAS Special Rapporteur on Freedom of Expression and the ACHPR (African Commission on Human and Peoples' Rights) Special Rapporteur on Freedom of Expression**

[...]

**Freedom of Expression and Cultural/Religious Tensions**

- The exercise of freedom of expression and a free and diverse media play a very important role in promoting tolerance, diffusing tensions and providing a forum for the peaceful resolution of differences. High profile instances of the media and others exacerbating social tensions tend to obscure this fact.
- Governments should refrain from introducing legislation which makes it an offence simply to exacerbate social tensions. Although it is legitimate to sanction advocacy that constitutes incitement to hatred, it is not legitimate to prohibit merely offensive speech. Most countries already have excessive or at least sufficient 'hate speech' legislation. In many countries, overbroad rules in this area are abused by the powerful to limit non-traditional, dissenting, critical, or minority voices, or discussion about challenging social issues. Furthermore, resolution of tensions based on genuine cultural or religious differences cannot be achieved by suppressing the expression of differences but rather by debating them openly. Free speech is therefore a requirement for, and not an impediment to, tolerance.
- Professional and self-regulatory bodies have played an important role in fostering greater awareness about how to report on diversity and to address difficult and sometimes controversial subjects, including intercultural dialogue and contentious issues of a moral, artistic, religious or other nature. An enabling environment should be provided to facilitate the voluntary development of self-regulatory mechanisms such as press councils, professional ethical associations and media ombudspersons.
- The mandates of public service broadcasters should explicitly require them to treat matters of controversy in a sensitive and balanced fashion, and to carry programming which is aimed at promoting tolerance and understanding of difference.



## *6. Conference room paper by Natan Lerner*

### **Freedom of expression and advocacy of group hatred** *Incitement to hate crimes and religious hatred*

#### **Introduction**

The subject of this meeting is “Freedom of expression and advocacy of religious hatred that constitutes incitement to discrimination, hostility or violence.” This paper will concentrate on the analogies and parallels to be drawn from situations where the State or the international community limit freedom of expression to provide protection against incitement to, or advocacy of, some hate crimes and the applicability of such limitations to advocacy of religious hatred. The links between, and balancing of, articles 19 and 20 of the ICCPR in general will not be discussed here. For the purposes of this paper, the notions of religion and freedom of religion have the reach and meaning established in article 18 of the Universal Declaration of Human Rights, article 18 of the ICCPR and relevant articles of the 1981 Declaration on the Elimination of all Forms of Intolerance and Discrimination on Religion or Belief.

Freedom of expression is not an absolute right, and does not belong to the list of rights that cannot be derogated according to article 4 of the ICCPR. States may legitimately limit that freedom when it is abused by the advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence. The victims of that incitement are national, ethnic or religious groups, or their members. The nature of the group exposed to incitement – national, ethnic, or religious- should not justify differences in the treatment of those groups. This is particularly valid with regard to racial and religion-related groups. Racial and religious hatred involve similar motivations and produce similar consequences. Parallels can thus be drawn from limitations imposed upon freedom of expression in documents referring to one of those evils.

This approach is supported by the historical context, as well as by the developing notion that there exists an international public order encompassing treaty law and norms described as “soft law”, emanating from non-mandatory instruments. Originally, when the United Nations’ attention was drawn to a series of anti-Semitic outbursts in 1959-1960, the General Assembly, following resolutions of the relevant bodies, condemned “all manifestations and practices of racial, religious and national hatred...”, Resolution 1510 (XV). In the discussion as to how to implement the resolution there were different opinions. Some States proposed to prepare a convention on racial discrimination; other States preferred to adopt only a declaration, while some favored an instrument dealing with racial as well as religious discrimination. Finally, the General Assembly adopted similar Resolutions 1780 (XVII) and 1781 (XVII), asking to prepare declarations and draft conventions dealing separately with race and with religion. Concerning race, a Declaration was adopted in 1963 and the Convention was completed in 1965. As to religion, only a Declaration was adopted, in 1981. A draft convention is pending, *sine die*.

For obvious methodological reasons, the Convention on Race does not refer to religion, but it seems reasonable to apply, by analogy, relevant provisions to religion-related discrimination or intolerance. The Convention was concluded with large support in December 1965. A year later, the two Covenants on Human Rights were adopted, and article 20 of the ICCPR deals with advocacy to both racial or religious (or national) hatred. The preparation of a draft declaration and a draft convention on religion or belief made very slow progress, and in 1972 the General Assembly decided to give priority to the draft declaration. This meant in practice postponing indefinitely the work on a mandatory treaty. It took nine more years to reach agreement on the Declaration.

Several articles of the Declaration show the clear influence of the instruments on racial discrimination. The definition of the terms *intolerance* and *discrimination* also follows the model of the definition in the Racial Convention. This should be kept in mind when considering its applicability, by analogy, to advocacy of religious hatred. The relevance of other developments in international law should also be considered to that effect. Such are the instruments dealing with genocide, its denial, defamation of collectivities, and, in general, legislation restricting freedom of expression when it affects fundamental liberties.

### **Striking a balance between rights**

The possibility of clashes between different human rights has been frequently discussed in several contexts. The matter is thus not new. However, in recent years, it has become acute with regard to religious groups. In principle, no difference should be made between religious groups and other groups defined by race, nationality, language, culture, color or any other characteristic pertaining to groups that deserve the protection of international and human rights law. Still, the emotions usually accompanying religious convictions increase sensitivity in the case of incitement to religious hatred, and this may cause, as has already occurred, acts of violence at the national and international levels. Therefore it was argued that advocacy of religious hatred may justify a more severe limitation of freedom of expression. This would mean however underestimating the impact of that hate speech which affects ethnic or cultural communities, and their members. Freedom of expression also protects speech that may offend, hurt or shock, and can equally harm racial, religious or national groups and their members. The fact that its abuse can produce different reactions does not justify differences as to the limits of freedom of speech. Hate speech violates equally the rights and freedoms of the mentioned groups and individuals. Equality of social or psychological damage requires equality in the limitation on speech causing that result.

Until World War II, classic international law paid little attention to the right of collectivities to be protected from incitement to hostility. After World War II, the 1948 Convention on the Prevention and Punishment of the Crime of Genocide, which aimed at protecting the physical existence of *religious, racial* and *cultural* groups, was a major exception to this trend. A decade later, the already mentioned Resolution 1510 (XV), on Manifestations of Racial Prejudice and National and Religious Intolerance, started international legislative work to protect racial, religious and national groups. Major results of that work were the Declaration and the Convention on Racial Discrimination and the Declaration on Religious Intolerance, but the

change in the tendency also influenced other human rights issues such as those concerning minorities, indigenous populations, migrations, group defamation, anti-Semitism, and related phenomena. Despite the traditional reluctance of international law to deal with non-State entities and the resistance of human rights law to transcend the area of individual liberties, the necessity of curbing prejudice, incitement, persecution and violence against certain groups, and their members because of membership, became essential.

A distinction must here be made between the clear-cut prohibition of *discrimination* on racial or religious grounds and the less precise approach to *hatred* and *intolerance*, notions involving difficulties as to their strict legal meaning. The definition of discrimination contained in article 1 of the Convention on Racial Discrimination has been followed by similar definitions referring to other protected rights. It is with regard to hatred and intolerance that a clash may more easily evolve between basic rights such as freedom of expression or association, on the one hand, and, on the other, the right of collective entities and their members to be protected from defamation, hostility, hatred, intolerance, and incitement to such evils.

Articles 19 and 20 of the ICCPR are the basis for any discussion of this matter. The major instruments concerning race and religion, particularly the Conventions on Genocide and on the Elimination of Racial Discrimination and specially its article 4, are equally relevant. So are other international instruments, such as the 1981 Declaration on Religious Intolerance and the 1978 UNESCO Declaration on Race and Racial Prejudice, as well as various regional treaties. The European Convention on Human Rights deals with the matter in articles 9 and 10, and the European Court of Human Rights produced important and well known pertinent decisions. To mention one case, in *Otto-Preminger-Institut v. Austria* (1994 ECHR 26) the Court stated that “as a matter of principle it may be considered necessary in certain democratic societies to sanction or even prevent improper attacks on objects of religious veneration.”

It should be noted that three Special Rapporteurs of the United Nations, on freedom of religion or belief, on freedom of opinion and expression, and on racial discrimination, felt the need to issue, in 2006, a joint statement urging all parties “to refrain from any form of violence and to avoid fuelling hatred” and stressing the need of respect for freedom of expression, while avoiding “the use of stereotypes and labeling that insult deep-rooted religious feelings...”

The issue is, of course, how to strike the balance between the two aims. Article 19 of the ICCPR permits limitations on freedom of expression to protect the rights and reputation of “others” Article 20 forbids advocacy of national, racial, or religious hatred when it constitutes incitement to discrimination, hostility, or violence. Article III of the Genocide Convention declares punishable “direct and public incitement to commit genocide.” The European Convention on Human Rights restricts freedom of expression, assembly and association “when necessary in a democratic society in the interests of the ‘prevention of disorder’ and ‘protection of the reputation or rights of others’.” The American Convention on Human Rights affirms everyone’s right to his honor and dignity, aims at ensuring the protection of the “reputation of others”, and penalizes advocacy of national, racial or religious hatred that constitute incitement to lawless violence... on any grounds including those of race, color, religion, language, or national origin.” The 1981 Declaration on Intolerance and Discrimination Based on Religion or Belief refers to

“appropriate measures to combat intolerance on grounds of religion or other belief.” The 1978 UNESCO Declaration on Race and Racial Prejudice urges taking steps “to prohibit and eradicate racism [and] racist propaganda” and to “combat racial prejudice.” The 1990 Paris Charter for a New Europe, adopted by the Conference on Security and Cooperation in Europe, stresses the need “to combat all forms of racial and ethnic hatred, anti-Semitism, xenophobia, and discrimination against anyone, as well as persecution on religious and ideological grounds.” Statements of international organizations and conferences in recent years used similar language.

### **Relevance of Article 4 of the Convention on Race**

Far-reaching positive provisions related to incitement against groups, communities or collective entities have been incorporated into the Convention on the Elimination of **all** Forms of Racial Discrimination, specially its article 4. This article, as the whole issue of freedom of expression versus other basic rights, engendered controversy and was subjected to criticism. Formal reservations or declarations were submitted. Notwithstanding, it became a clear guideline for the international community, and several States enacted domestic legislation in its spirit.

As already indicated, for methodological reasons, the Convention on Racial Discrimination avoided references to religion. It is however also reasonable to interpret article 4 as applicable, by analogy, to manifestations of incitement on grounds of religion or belief. This approach is supported by the historical link between the instruments on race and those on religion, as well as by the view expressed by the judiciaries of several countries that. More important than the specific nature of a group, or the identifiable elements that define that group, is the basic fact of the undisputed existence of the group, its self-perception and its perception by the surrounding world. In some cases, race, religion and culture overlap, and those who wish to hurt the group or incite against it are not overly worried by the character of the object of their hostility or hatred. Moreover, the argument that members of a group defined by the offenders as a religious group cannot invoke an anti-racist act was rejected in several occasions.

Article 4 of the Racial Convention is far-reaching. It imposes upon State parties to the Convention the duty to adopt immediate and positive measures designed to eradicate incitement to, or acts of, discrimination. States 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 color or ethnic origin”. If only one instrument on both race and religion would have been adopted, there is little room to doubt that “a group of persons of another religion or belief” would also have been listed. The same assumption would be valid if identical, separate instruments would have been adopted. To leave out groups based on religion or belief from the protection that international law provides to groups based on race, ethnic origin or color seems unfair and illogical.

Article 4 was the result of a compromise between those who saw it as the “key article” of the Convention and those who considered it a threat to freedom of speech and association. As every compromise, the text may be not entirely satisfactory. But, as argued elsewhere by this writer, it

may be seen “as a guideline to interpret in a similar spirit the provisions on incitement in the instruments on religious rights.” Regretfully, no mandatory treaty was adopted in the area of religion or belief, and the reasons for that absence may be weighty enough and reflect political realities. Analogical interpretation of instruments with different degrees of obligatory force may be difficult. The issue of a hierarchy of norms in the field of international law, as well as the fascinating but inconclusive discussion on the existence of an international public order containing norms included in non-binding instruments, cannot be discussed here. Neither is this short comment the place to examine the crucial subject of *jus cogens* and provisions *erga omnes*. But, in the case of race and religion as grounds of hostility or hatred, the parallelism seems reasonable.

The difficulties of some States in ratifying the Convention because they consider that there is a clash between rights should not be underestimated. The “due regard” clause was not seen as sufficient by some States and several submitted reservations or interpretations in order to make sure that article 4 would not jeopardize freedom of opinion and expression. But CERD, following recommendations of Special Rapporteur Jose D. Ingles in his *Study on the Implementation of Article 4*, stated in its General Recommendation 1, of 1972, that implementation by States of the provisions of article 4 is obligatory and, since the article is not self-executing, if domestic legislation is not sufficient, it should be supplemented by adequate additional measures. The rights of free expression and association are not absolute, and are subject to the limitations of Article 29 of the Universal Declaration and Articles 19 and 20 of the ICCPR. The mandatory character of article 4 was reiterated by CERD in its General Recommendation VII. It may also be pertinent to mention the decision of the International Court of Justice in *Dem. Rep. Congo v. Rwanda* and its approach to the prohibition of racial discrimination.

In 1993, in General Recommendation XV (42), CERD referred to “evidence of organized violence based on ethnic origin” and stated that the prohibition of the dissemination of ideas based upon racial superiority or hatred is compatible with freedom of opinion and expression. In the same paragraph of its Recommendation, the Committee draws the attention of States parties to article 20 of the ICCPR, which refers, of course, explicitly to “religious hatred.”

In the same spirit, the Human Rights Committee, in its General Comment 22 (48), adopted in 1993, declared that article 20 of the ICCPR, applicable to racial and religious hatred, was fully compatible with freedom of expression. In a former General Comment, 11(19), the Committee declared that State parties are obliged to enact laws prohibiting advocacy of national, racial or religious hatred. The Committee emphasized that the prohibition of incitement to religious hatred is fully compatible with other basic freedoms.

### **Other parallelisms**

It seems thus reasonable, for historical as well as for reasons of legal hermeneutics, to see analogies and parallelism between the prohibition of incitement in the racial sphere and the approach with regard to advocacy of hatred based on religion or belief, in accordance with article 20 of the ICCPR. It may be more complicated to find a similar parallelism in other situations in which the State limits freedom of expression. In the case of laws against blasphemy, there are

difficulties with regard to the definition of blasphemy, and these laws deal in general with expressions against one dominant church or religion. Denial of the existence of God would be blasphemy in some countries, but not in others where it would be seen as a manifestation of freedom of thought and expression. Apostasy and obscenity laws are in a similar situation. They are the product of certain legal systems but unacceptable to others, and are not regulated in international texts. The margin of appreciation that decisions of the European Court of Human Rights reserve to each State in those and similar issues underscores the differences between them and cases in which fundamental rights are involved.

As to defamation, the European and the American Conventions on Human Rights refer to the “reputation” of others. National legislation in this respect differs with regard to substance as well as procedure, including the issue of *locus standi* demanding that a plaintiff be *personally* included in the defamation statement. The borderline between defamation and incitement is difficult to determine. Article 20 of the ICCPR refers to incitement as the outcome of advocacy of national, racial or religious hatred. The incitement should lead to discrimination, hostility or violence. Defamation that does not involve *advocacy* and *incitement* may thus not be covered by article 20, although it may be sanctioned by domestic legislation.

Particularly difficult are the areas related to religion. The difference between permissible criticism of a given religion by describing its dogmas as wrong, absurd or false, on the one hand, and incitement against the same religion as stated in article 20 of the ICCPR, on the other, is not merely an issue of degree or a quantitative one. A basic issue is when does criticism become defamation and when does defamation become incitement to discrimination, hostility or violence. This may lead to the question of intent or intention.

In the case of incitement to genocide, there is no doubt that it means incitement to violence, in the most extreme meaning of that term. But since genocide is such a massive crime that generally it can only be committed by States or by non-State collective actors, the issue of the proof of intention is crucial. The controversial decision of the ICJ in February 2007 (*Bosnia v. Serbia*) reflects the difficulties involved. Even when the Court concluded that there was genocide, as in Srebrenica, it could not reach consensus regarding intention on the part of Serbia, namely its government or authorities.

The question is to what extent can ridiculing a religious dogma, or portraying an entire religious group in terms that imply contempt, become incitement in the sense of article 20. Believers in a given religion may be profoundly offended by shocking critical statements, but when do such expressions become contrary to public order and when do they become incitement in the terms of article 20?

The problems created by some utterances and the reaction of religious groups that feel themselves hurt, offended and even threatened cannot be ignored, and the General Assembly expressed its concern and alarm with regard to such developments. The three major religions were involved in such incidents. Even at the time of drafting this paper such clashes have been occurring: a major American publishing house announced, on the day when it was supposed to

appear in print, the withdrawal of a novel concerning the prophet Muhammad because it was likely to engender acts of violence; the French press was occupied with the firing of a satirical caricaturist because of a provocative article seen by many as offending an ethnic-religious community. These recent cases did not acquire the public impact of former ones such as the Danish cartoons concerning Islam or certain movies offending Christians or Jews. They show however the extent to which the issue repeats itself, threatening in different degrees public peace and inter-group coexistence.

The laws that exist in some countries incriminating denial of genocides, such as those committed against the European Jews or the Armenians, as well as international decisions urging the outlaw of such denials, are related to this problem. The issue is if denying a case of genocide, or its magnitude, can be construed as implying incitement against the victim group. A positive reply is the basis of the philosophy behind the legislation penalizing those denials. It is relevant in this connection to point out the distinction between denying established facts, recognized in judicial pronouncements, on the one hand and, on the other, disputing the validity or veracity of dogmas, or value judgments, considered absolute truth by some and mythical, unreal or impossible by others.

Merely offensive or insulting expressions against religious dogmas do not necessarily involve incitement. When offensive words may be seen as *fighting words* in the sense used in some countries to exclude them from the protection of freedom of expression is not easy to determine. But developments in this sphere have caused and are causing conflictive situations. The analysis of the analogies and parallels that can be drawn from remedies already provided in international life may be useful to confront the severe dangers resulting from advocacy of religious-related hatred, without losing sight of the need to respect freedom of speech.

## Conclusions

1. Freedom of expression is a fundamental right that may be subject to the limitations determined by law. It is not an absolute right.
2. Article 19 of the ICCPR, that permits certain restrictions, should be read in conjunction with Article 20 of the Covenant, prohibiting advocacy of hatred that constitutes incitement to discrimination, hostility or violence.
3. In principle, there should not be a difference in the treatment of incitement to national, racial or religious hatred. International realities, as well as eventual consequences of incitement to hatred against religious groups or symbols, may however require a particularly cautious approach, fully respecting freedom of speech as a fundamental human right that can be restricted only according to law.
4. Limitations on freedom of expression regarding other liberties may in some cases be useful to draw analogies. This is particularly possible with regard to article 4 of CERD because of the legislative history of the UN approach to racial and religious incitement, as well as because of the broad interpretation of article 4 by CERD and Special Rapporteurs. Equally relevant is article III of the Convention on Genocide. The

discussion on the hierarchy of norms in international law and the existence of an international public order incorporating rules of soft law has to be considered as well.

5. In the case of genocide, the 1948 Convention deals equally with incitement against racial and religious groups. Existent denial legislation was applied to groups in which ethnicity and religion overlap, but nothing precludes their application to groups strictly defined by religion if they were victims of genocide.
6. It seems reasonable, because of the historical context and trends prevailing in human rights law, to apply to incitement to religious hatred analogies drawn from article 4 of CERD and article III of the Genocide Convention. This is compatible with respect for freedom of expression, a fundamental freedom that may be restricted only in accordance with human rights law.



### *7. Conference room paper by Vitit Muntarbhorn*

#### **“Religion” and “Expression” in the Human Rights Framework: Walking the Middle Path.....**

The notions of “religion” and “expression”, and their interrelationship, pose one of the most important challenges facing human rights today. They are organically linked in the sense that the freedom to have and to believe in a religion, and its manifestation, very much depends upon freedom of expression. The latter is also part and parcel of religion and related practices in the sense that elements of “expression” are externalized by the manifestation of a religion, and it is such expression which provides space for a multitude of groups professing the same belief, although not necessarily the same interpretation of the belief.

Another angle to the two notions and their interrelationship is their internalization in the human setting: both are intensely personal affairs, private matters which are intrinsic to the human person and originating in the human mind/spirit/soul. They are, more often than not, best left to the person, the individual – “the inner sanctum” - to enjoy without interference from the public realm. A major danger facing the human rights framework linked with the two notions is that in some situations, outside forces wish to co-opt them for other purposes. While both notions are inspired by the spirit and creativity of the human person, others seek to instrumentalize them for ulterior ends, at times steeped in polarization and violence.

Walking the middle path between the two notions invites us to reflect upon various key factors as part of a common and shared destiny advocating respectful dialogue and peaceful means of change. First, both religion and expression depend on a sense of pluralism and its acceptance (or at least a degree of tolerance or mutual respect) in human society. There is a multitude of religions and forms of expression, and this diversity is inherent in human existence. Freedom to have a religion or a belief also implies avenues for those who do not believe. Thus human rights law provides space for not only the freedom to have a religion but also the freedom not to have a religion. Likewise the heart of the notion of “expression” advocates respect for a variety of different opinions and the ways through which they are communicated. Any attempt to dilute such plurality not only counters the universal tide of human rights but also decelerates the evolution of human existence which needs to be re-energized by new ideas as part of the natural process of development.

Second, there is the challenge of history and historiography (including on religion and expression), the latter implying an understanding of “who writes history and for whom?” Here again there should be no monopoly of sources, but a range of sources and information, so as to enable us to reflect analytically on the path until now and lessons learned for the future.

Third, it is possible that the originator of a religion or belief was very comprehensive and broadminded in his/her approach, but subsequent interpretation of the religion or belief has been less so. Take Buddhism, for example. At the time of the Buddha, some 2,500 years ago, there were both male and female monks, with almost the same status, as the followers and disciples of

the religion. Yet, today, in some settings, it is not permitted for women to become monks unless they fulfill more conditions than those stipulated two millennia ago. Thus the evolution of those settings has shaped or conditioned the interpretation of the religion, and vice versa, which may not be as broadminded as the original source. It is thus the interpretation or interpretations of religions and ideas, rather than religion itself, which is testing, at the seams, the relationship between religion and expression today; and these are inevitably influenced by various power bases in the national and international contexts.

Fourth, in human rights law, while the freedom to have a religion, belief and opinion is absolute, its manifestation can be constrained by considerations of public policy in the framework of international law – with key parameters discussed below. Meanwhile, freedom of expression can be subjected to various limitations such as to prevent injury to the reputation of other persons and considerations of public policy, again in the framework of international law. This balance is well encapsulated in a major human rights treaty, the Covenant on Civil and Political Rights 1966. The powers of the State in regard to limits to be imposed as above are permissive in the sense that the State has the discretion whether or not to impose the constraint(s) under the ambit of international law and universal human rights standards. On a more prescriptive front, there is an obligation on States Parties to the Covenant to prohibit the incitement of hatred, violence and discrimination. Countries which are not yet parties to such Covenant should accede expeditiously thereto, and there should be a key emphasis on effective and balanced implementation on the part of all parties.

Fifth, in this scenario, there has arisen today the debate on “defamation of religion” and the question to what extent freedom of expression should be constrained in such context. At the national level, the commonly used term for such concept is blasphemy, and many countries in both the developing and developed world – of different denominations - have had laws prohibiting blasphemy for centuries. Interestingly, the way that such laws has been evolved in recent years in some countries indicates that such laws have either not been used or they have been reformed/abrogated. Meanwhile, other countries have continued to use such laws and even expanded their scope as part of a particular unifying public terrain whereby the State and religion are closely interwoven, the one increasingly controlling or being controlled by the other. The preferred direction is that all developments should be tested in accordance with the sense of objectivity offered by the international human rights framework and a spirit of mutual understanding and liberality.

Sixth, international guidance for balancing the considerations of religion and of expression is already found in the international human rights framework. Most pertinent is the Declaration on the Elimination of All Forms of Intolerance and of Discrimination based on Religion and Belief 1981, adopted by consensus in the United Nations (UN) General Assembly, whose message includes:

- Everyone has the right to freedom of thought, conscience and religion.
- “Article 1(3): Freedom to manifest one’s religion or belief may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health or morals or the fundamental rights and freedoms of others”.

- No one shall be subject to discrimination by any entities on the grounds of religion or other belief.
- States must take effective measures to prevent and eliminate discrimination on the grounds of religion or belief.

These are advanced by Articles 18, 19 and 20 of the Covenant mentioned below. It is also important to read the various provisions on human rights together rather than in a segmented form, with the transversal message of equality and non-discrimination.

Seventh, whatever limitations are imposed on the manifestation of religion and expression, it is important to take stock of various criteria/parameters for such limitations so that “the exception does not become the rule”. These are illustrated by Articles 18 and 19 of the Covenant as follows:

- Everyone has the right to freedom of thought, conscience or religion.
- This can be constrained by Article 18 (3) as follows: “Freedom to manifest one’s religion or beliefs may be subject only such limitations as are prescribed by law and are necessary to protect public safety, order, health or morals or the fundamental rights and freedoms of others.”
- Everyone has the right to freedom of opinion and expression.
- The right to freedom of expression can be constrained as follows: per Article 19: “(it) carries with it special duties and responsibilities...It may ... be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:
  - (a) for respect of the rights and reputation of others;
  - (b) for the protection of national security or of public order (ordre public), or of public health and morals.”

While States have the discretion to impose such constraints in the framework of international law, they are not obliged to do so. However, Article 20 imposes an obligation to address a violation of a high threshold as follows:

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

Eighth, there is the truism that prevention is better than cure. And prevention depends on building the mind-cum-behaviour for human rights. The preferred way to nurture cross-cultural understanding of religions and beliefs is to promote multi-cultural, inter-cultural education from a young age so that a mind set is concretized for mutual respect and tolerance, to discuss issues rationally and with critical analysis, while shunning violence. Even if the debate on some aspects of religion and expression is polarized today, there is good common ground to be advanced and capitalized upon in promoting such education, particularly to democratize the mind and pacify heated passions.

Ninth, in the UN context, one can welcome the possibility of clarifying the interrelationship between religion and expression by means of General Comment(s) from the Human Rights

Committee under the Covenant mentioned as guidance to help our understanding of how to construe and implement the rights in question. A new Comment should particularly give guidance to the relationship between rights and their limitations, especially on the link between religion and expression in the framework of international law. The parameters for the imposition of constraints should be guided by the objectivity offered by international law/rules (rather than subjectivity of interpretation at the national level), the configurations of what measures are necessary and proportionate to the risks and dangers, and the need to have legitimate aims based upon what is permissible in a democratic society in relation to public order and security, with due regard to the rights and duties of all parties. The threshold for limiting such rights should be well balanced and this can already be derived from the Declaration and Covenant mentioned on the premise that no one, no entity should incite hatred, hostility, violence or discrimination while advocating religion and or expression.

Tenth, there is also a conundrum, testing and needing exemplary leadership and reasoned community mobilization globally and locally, to appease emotions and sentiments: even if there is a right to do something, is it the right time to exercise such a right in such a way, given the sensibilities involved? This invites a choice based on risk management and policy-based prudence in their interface with the rights advocated, with preparedness for the varied consequences.

Yet, even if one party feels that it has been negatively affected by the actions of another party, there is another bridge already constructed by the plurality of religions and beliefs which expresses a sense of humanity to all those allegedly in a position of enmity. It is the challenge of adopting a reasoned approach, with a touch of self-restraint, moderation....and even forgiveness. "By setting a peaceful example".

And one can be inspired by the originator of a religion mentioned above who once paved the stone for the Middle Path by advising: "Reflect/Think before you believe". All in the Spirit of Non-violence.

## *8. Conference room paper by Mogens Schmidt*

### **Limits to the restrictions to freedom of expression – Criteria and Application**

As we celebrate the 60<sup>th</sup> Anniversary of The Universal Declaration of Human Rights (UDHR), adopted by the UN General Assembly in 1948, we observe an achievement that is generally considered the flagship statement of international human rights and the foundation of international human rights law.

Among its areas of concentration, in the fields of education, sciences, culture and communication, UNESCO has a specific mandate, enshrined in its constitution, to foster “the free exchange of ideas and knowledge” and “the free flow of ideas by word and image.” Thus UNESCO is the only UN agency with a special mandate to defend press freedom and the organisation recognizes that press freedom is central to building strong democracies promoting civic participation and the rule of law, and encouraging human development and security. As such, UNESCO is committed to mobilizing efforts to promote freedom of expression and press freedom as a basic right indispensable to the exercise of democratic citizenship.

This point is specifically drawn to the language of Article 19 of the UDHR, which guarantees the right to freedom of expression and information in the following terms:

*Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers.*

As such, one may argue that freedom of opinion and of expression constitute the cornerstone of any democratic society and a solid and fundamental basis for development. Indeed, the right that guarantees freedom of expression is widely seen as underpinning all other human rights and democratic freedoms. If the individual does not have the right to freely seek, receive and impart her ideas and opinions, she will also not be able to benefit from her other human rights. This also has consequences for the right to freedom of thought, conscience and religion as laid down in Article 18, for without freedom of expression, as a fundamental principle, this right cannot be practiced.

The right to freedom of expression and opinion also has a corollary, namely freedom of the press, which is normally perceived as the individual’s right to freedom of expression extended to the media.

It is more and more generally accepted that freedom of expression and freedom of the press are of importance for the “three D’s”: Development, Democracy and Dialogue. In many studies researchers have documented the correlations between a free press and the three D’s. Without an open space for the marketplace of ideas to flourish, societies fail to progress by any measure on the human, social, and economic development scale.

Participatory democracy requires citizens to reflect and debate in order to distill public opinion into a clear will of the people that enable the political leadership to absorb these values and translate them into policy. Democracy is also about accountability and good governance. The public not only has a right, but is obliged by the very definition of a democracy, to scrutinize the

actions of their elected leaders and to engage in full and open debate about their priorities and actions. One of the most effective ways of addressing poor governance is through open and informed debate. This open and informed debate can take many forms and one should not ignore that in the light of day, well documented criticism can increase both knowledge and understanding, even though it might be both harsh and controversial.

From this point of view, any restrictions to Article 19, and especially straight forward censorship, would undermine the fundamentals of a democracy, doing harm to the public good. It is vital that political, national, and religious themes are discussed without being subjected to knee-jerk criticisms that are designed to stifle debate. It is not the rights of a particular political party, conviction or religion which are protected in such open and frank debate but the rights of the individual citizens or believers.

Human rights are universal, inalienable and indivisible. Their universality and indivisibility embolden and protect these rights. Their inalienability is their guarantee to every citizen of the world upon birth. These basic human rights, which are non-discriminatory and non-flexible, are the same for all, and give us dignity as individuals. There is no hierarchy between these rights. They exist in a nexus-relationship. Equal respect and adherence to these rights rests with the political, social and religious leadership from the most local level to the heads of state. Therefore, there cannot be any cultural, historic, religious or political qualification for which rights to respect and apply. The UN must refuse attempts to subordinate one right in favor another as this is clearly against the core principles, which imply the non-hierarchical status of the various rights. If we start subordinating Article 19, for example, to Article 18, as has been argued by some representatives from the large monotheistic religions, what would be the consequences for all the other 28 articles of the UDHR? Would we need to tailor them as well, and in doing so obliterate universality, inalienability and the indivisibility of all human rights?

For UNESCO, respect for freedom of expression and respect for religious beliefs and symbols are two inseparable principles and go hand in hand in combating ignorance and lack of understanding with a view to building peace and establishing dialogue among cultures, civilizations, religions and peoples. All societies must comply with international standards advocating human dignity and human rights, including freedom of expression and respect for religious and cultural beliefs and values. Any conflict between the two must be expressed peacefully and constructively and must give precedence to seeking collective, lasting solutions. Given the importance of religion to peoples and to their sense of dignity and their way of life, respect for different religious beliefs is essential to international peace and security and to humanity's progress.

This is also the background for the Executive Board of UNESCO's unanimous decision at its 174 Meeting in 2005, in which it among other reads:

4. *Reaffirming the international instruments that uphold freedom of expression and freedom of thought, conscience and religion,*
5. *Also reaffirming UNESCO's commitment to respect for freedom of expression and respect for religious beliefs and religious symbols,*

6. *Emphasizing that the media can have an important role to play in promoting tolerance, respect for and freedom of religion and belief,*
7. *Upholding the exercise of freedom of expression in a spirit of mutual respect and mutual understanding, urges mutual respect for cultural diversity, religious beliefs and religious symbols;*
8. *Requests the Director-General to strengthen UNESCO's programmes and actions, in its fields of competence, to fulfil its commitment towards mutual understanding and respect for all peoples' religious and cultural values, and freedom of expression;*
9. *Also requests the Director-General to accelerate the implementation of the plan of action for the dialogue among civilizations, cultures and peoples with a view to creating a culture of peace and of living together;*

While universality, indivisibility and inalienability are sacrosanct, The International Covenant on Civil and Political Rights lays out the general principles for their implementation.

For Article 18, the Covenant says:

*"3. Freedom to manifest one's religion or beliefs may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others. 4. The States Parties to the present Covenant undertake to have respect for the liberty of parents and, when applicable, legal guardians to ensure the religious and moral education of their children in conformity with their own convictions."*

And for Article 19, the Covenant says:

*3. The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:*

*(a) For respect of the rights or reputations of others;*

*(b) For the protection of national security or of public order (ordre public), or of public health or morals.*

Permissible restrictions on freedom of the press will have to be derived from the implementation guidelines for Article 19 as well as from civil and criminal law in any given country. It is important to note that the permissible restrictions in the Covenant for these two articles both refer to a double condition: the limitations must be provided by law AND should be necessary to protect a number of public areas as well as the rights of others. It is also important to underline that "necessary" here means that there must be exceptional reasons for such restrictions.

In general, these exceptional reasons must comply with the following principles: they must be clearly and narrowly defined; they must be applied by a body which is independent of political, commercial or other unwarranted influences, and in a manner which is neither arbitrary nor discriminatory, and which is subject to adequate safeguards against abuse, including the right of access to an independent court or tribunal.

Furthermore, restrictions must respect the principle that no one should be penalized for statements which are true; neither should they be criminally penalized for the dissemination of

hate speech, unless it has been proven they did so with the intention of inciting discrimination, hostility or violence. As for the media, the right of journalists to decide how best to communicate information and ideas to the public should be respected, particularly when they are reporting on racism and intolerance, and prior censorship should not be used as a tool to restrict the space for debate and discussion.

When sanctions are imposed they also have to be applied respecting some general principles. Care should be taken to apply the least intrusive and restrictive measures in order to minimize the chilling effect on freedom of expression; and any imposition of sanctions should be in strict conformity with the principle of proportionality. Offenses involving freedom of expression should never be considered under a penal code.

Finally, restrictions must be formulated in a way that makes clear that its sole purpose is to protect individuals holding specific beliefs or opinions, rather than to protect belief systems from criticism. The right to freedom of expression implies that it should be possible to scrutinize, openly debate, and criticize, even harshly and unreasonably, belief systems, opinions, and institutions, as long as this does not amount to advocating hatred against an individual. This does not mean that we should be “harsh” and “unreasonable”. That is not what good journalism is about. Good journalism will often be guaranteed through a whole set of self regulation practices, including ethical and professional standards, codes of ethics and media accountability mechanisms operated by the media themselves.

Article 20 states that

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

This is clear and should be left to the legal system to deal with. But the legal regulations can also facilitate the establishment of self- and co-regulatory accountability mechanisms that can play a very important role for the media and its efforts to exercise its functions according to established professional standards. Furthermore, the antidote to hate speech is professional journalism pure and simple. In fact, media professionals are the best arbiters of their profession because at a minimum their credibility is at stake, and without credibility, the economic viability of their enterprises.

In the era of knowledge and information society any effort at limiting the free flow of information is futile. For the UN system, and UNESCO in particular, the focus must remain on the promotion of ethical and professional standards that result from an ongoing dialogue with the media and its associations, and with civil society. This includes ensuring that self- and co-regulatory mechanisms are entrenched in media law and regulatory frameworks, and that internet governance is applied in a way that respects the fundamental principles for freedom of expression, access to and the free flow of information. This, too, must be done according to a multistakeholder approach, as it is presently being done through the Internet Governance Forum.



Finally, one should never forget the other side of the right to freedom of expression, namely the ability to use it. Providing capacity building for media professionals and ensuring media and information literacy skills for each and every citizen remains a core commitment for UNESCO.

## *9. Conference room paper by Patrick Thornberry*

### **Forms of Hate Speech and the Convention on the Elimination of All Forms of Racial Discrimination (ICERD)<sup>1</sup>**

In the concept paper informing the present seminar, issues are raised concerning freedom of expression and forms of hate speech including advocacy of religious hatred in light of proposals to combat defamation of religions. In particular, it is asked whether parallels can be drawn between freedom of expression and protection from forms of hate speech in the area of race and ethnicity, and expression and protection in the field of religion. The present paper offers a brief summary of relevant ICERD ('the Convention')<sup>2</sup> principles and practice. The sketch of principles revolves around key areas of the Convention: the concept of discrimination including the 'grounds' of prohibited discrimination and how they relate to religious groups; the Convention's stance on hate speech and rights to freedom of thought, conscience and religion<sup>3</sup> and freedom of opinion and expression.<sup>4</sup> The concluding section reflects on the concept of defamation of religions, the boundaries of ICERD in its current interpretation, and the idea of ICERD as a model for wider exercises in standard setting. The Committee on the Elimination of Discrimination (CERD) has the longest practice of any treaty body in the fields within its mandate and has developed a distinctive discourse in key areas. 'Hate speech' in the present paper is used as shorthand for a range of international provisions protecting individuals and groups from discrimination and other assaults on their dignity and does not imply a special definition beyond the examples cited.

#### **The Convention in context: standards and mechanisms on racial discrimination and religious freedom**

Human rights principles have been conditioned in the era of the UN Charter<sup>5</sup> by the notion of enjoyment of rights without distinction as to race, sex, language or religion, a mantra subsumed into the human rights canon from the Universal Declaration of Human Rights 1948 (UDHR)<sup>6</sup> onwards. An underlying emphasis in this canon is the recognition that human beings come into the world with a distinctive inheritance, genetic, cultural, social and religious, which informs the lists of 'grounds' in various human rights instruments on which discrimination is not to be

<sup>1</sup> The opinions expressed in the present paper are personal to the author in his academic capacity and do not purport to 'represent' the viewpoint of the Committee on the Elimination of Racial Discrimination

<sup>2</sup> Adopted by General Assembly resolution 2106 A (XX) of 21 December 1965.

<sup>3</sup> Article 5(d)(vii).

<sup>4</sup> Article 5(d)(viii). The provisions of Article 4 are considered in some detail below. It may be added immediately that the provisions of the article relate not only to freedom of speech and religion among the Article 5 rights but also to 'freedom of peaceful assembly and association': Article 5(d)(ix).

<sup>5</sup> UN Charter, Articles 1(3), 13(1)(b), 55(c) and 76(c). In terms of pre-UN Charter principles, the proscription of discrimination on grounds of birth, nationality, language, race and religion, was a feature of the system for the protection of minorities under the League of Nations. For this and other early examples, see P. Thornberry, *International Law and the Rights of Minorities* (Oxford: Clarendon Press, 1991)

<sup>6</sup> GA Res. 217A (III), 10 December 1948, A/810 at 71. For a full spectrum of standards – global and regional - on discrimination, see the note prepared by the Office of the High Commission for Human Rights, *Compendium of International and Regional Standards Against Racism, Racial Discrimination, Xenophobia and Related Intolerance*, 13 January 2003, E/CN.4/WG.21/5 (Compendium of standards).

permitted. The International Convention on the Elimination of All Forms of Racial Discrimination<sup>7</sup> is still foremost among global instruments in its field, and its essential principle of non-discrimination has a strong claim to the status of a peremptory norm of international law.<sup>8</sup> The Convention was adopted by the General Assembly in 1965,<sup>9</sup> following a Declaration on the same subject in 1963.<sup>10</sup> There are now 173 States Parties to the Convention from all regions and continents. The Committee on the Elimination of Racial Discrimination was established under article 8 of the Convention and has held 73 sessions to date. While the Convention was conceived and drafted in the context of discrimination as a concern of foreign policy in relation to colonialism and Apartheid, CERD has played a distinctive role in alerting governments to the global dimensions of racial discrimination and the persistence of racist phenomena. CERD is not the only ‘player’ in the field of combating racial discrimination: there is an armoury of ‘mechanisms’ complementing the range of standards including, at the UN level, the Special Rapporteur on Contemporary forms of racism, racial discrimination, xenophobia and related intolerance; the Ad Hoc Committee on the elaboration of complementary standards, the Group of Independent Eminent Experts, the Intergovernmental Working Group on the effective implementation of the Durban Declaration and Programme of Action;<sup>11</sup> and the Working Group of Experts on People of African Descent. In the complex aetiology of racial discrimination, the transmission of racist ideas and attitudes through multiple forms and occasions of hate speech plays an indispensable role. Although issues relating to religion are addressed in a broad range of texts, including ICERD, there is no global convention on religious freedom. The principal convergence points for religious freedom are Article 18 of both the UDHR and the International Covenant on Civil and Political Rights (ICCPR),<sup>12</sup> and the 1981 Declaration on the Elimination of All Forms of intolerance and of Discrimination based on Religion or Belief.<sup>13</sup> Additional protection from discrimination on grounds of religion is factored into a multitude of texts, and religious minorities are also included in texts on minority rights.<sup>14</sup>

### **Context: Freedom of Expression and Hate Speech**

The interrelated issues of hate speech, including ‘racialized’ hate speech, and freedom of expression, have also produced a raft of provisions in international human rights law. The general references are well known, and include, besides Article 19 of the UDHR and Articles 19 and 20 of the ICCPR, Article 13 of the International Convention on the Protection of the Rights of All Migrant Workers and members of their Families, Article 9.2. of the African Charter on

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<sup>7</sup> 660 UNTS 195.

<sup>8</sup> In its 2002 Statement on Racial Discrimination and Measures to Combat Terrorism, the Committee on the Elimination of Racial Discrimination recalled, *inter alia*, that ‘the prohibition of racial discrimination is a peremptory norm of international law from which no derogation is permitted’: A/57/18 Chapter XI C.

<sup>9</sup> GA Res. 2106 (XX), 21 December 1965.

<sup>10</sup> UN Declaration on the Elimination of Racial Discrimination, proclaimed by GA Res. 1904 (XVIII), 20 November 1963.

<sup>11</sup> In a regular paragraph in current practice, the Committee recommends that the reporting State Party takes into account the relevant parts of the Durban Declaration and Programme of Action and includes information on action plans to implement the Durban provisions at national level. See also CERD General Recommendation 28 on the follow-up to the World Conference Against Racism, A/57/18, Chapter XI E.

<sup>12</sup> Article 4.2. of the Convention lists Article 18 among the articles from which no derogation is permitted.

<sup>13</sup> Proclaimed by General Assembly resolution 36/55 of 25 November 1981.

<sup>14</sup> Including the UN Declaration on the Rights of Persons belonging to National or Ethnic, Religious and Linguistic Minorities, adopted by General Assembly resolution 47/135 of 18 December 1992.

Human and Peoples' Rights, Article IV of the American Declaration of the Rights and Duties of Man, Article 13 of the American Convention on Human Rights, and Article 10 of the European Convention on Human Rights. These broad expressions of principle usually interface with limitations which are either specific to the right in question or are of a general kind applicable to all the rights in the instrument in question and/or interface with provisions on hate speech. Article 13 of the Migrant Workers Convention is one example of a 'compound article' containing the principle of freedom of expression and a provision on hate speech. 15 Additional accounts of freedom of expression and hate speech are included in a range of 'soft law' texts in the narrower context of instruments on minority rights. 16 Examples include texts addressing acts of racial, ethnic or religious hatred, anti-Semitism, xenophobia and discrimination, and incitement to violence and hostility. Among the texts on indigenous peoples, the UN Declaration on the Rights of Indigenous Peoples notably combines freedom of expression with sundry hate speech-related protections. 17 Strong hate speech provisions are also found in a variety of texts besides the above, notably in the field of international criminal law, including the Genocide Convention which lists 'direct and public incitement to commit genocide' among the prohibited acts.<sup>18</sup> To the above may be added numerous exercises in domestic law proscribing hate speech in accordance with international norms and elaborating the proscriptions of Holocaust denial. The proscribing of Holocaust denial is taken a step further in Article 6 of the Additional Protocol to the Council of Europe's Convention on Cybercrime whereby:

Each Party shall adopt such legislative measures as may be necessary to establish the following conduct as criminal offences under its domestic law, when committed intentionally and without right: distributing or otherwise making available, through a computer system to the public, material which denies, grossly minimises, approves or justifies acts constituting genocide or crimes against humanity, as defined by international law and recognised as such by final and binding decisions of the International Military Tribunal, established by the London Agreement of 8 August 1945, or of any other international court established by relevant international instruments and whose jurisdiction is recognised by that Party.<sup>19</sup>

<sup>15</sup> Note also paragraph 5 of Article 13 of the American Convention on Human Rights, which, following a lengthy account of freedom of expression, includes a paragraph 5 in the following terms: 'Any propaganda for war and any advocacy of national, racial, or religious hatred that constitute incitements to lawless violence or to any other similar action against any person or group of persons on any grounds including those of race, colour, religion, language, or national origin shall be considered as offences punishable by law.'

<sup>16</sup> *National Minority Standards: A compilation of OSCE and Council of Europe texts* (Strasbourg: Council of Europe Publishing, 2007), *passim*; see in particular Article 9 of the Council of Europe Framework Convention for the Protection of National Minorities.

<sup>17</sup> Preamble, paragraph 4, and Articles 8(e), 15.2 and 16.2.

<sup>18</sup> Article 3. The prohibition is elaborated in *Prosecutor v Nahimana, Barayagwiza and Ngeze*, Case No. ICTR-99-52-T (ICTR Trial Chamber, 2003) – the 'Media Case'; the case was followed by a judgement of the Appeals Chamber of the same tribunal in 2007, *Nahimana et al. v The Prosecutor*, Case No. ICTR-99-52-A. The Appeals Chamber, with reference to the ICCPR and ICERD, elaborated, *ibid.*, paragraph 692, on the distinction between 'hate speech in general' (or inciting discrimination and violence) and direct and public incitement to commit genocide ... in most cases, direct and public incitement to commit genocide can be preceded or accompanied by hate speech, but only direct and public incitement to commit genocide is prohibited under ... the Statute [of the Tribunal]

<sup>19</sup> 2003, E.T.S. No. 189. See also the European Council Framework Decision (2007) on Combating Racism and Xenophobia which provides for the following to be treated as punishable acts: 'Publicly condoning, denying or grossly trivialising crimes of genocide, crimes against humanity and war crimes as defined in the Statute of the

## Racial Discrimination in the Convention

Paragraph 1 of Article 1 provides: ‘In this Convention, the term “racial discrimination” shall mean any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life.’ It will be noted that the prohibited discrimination is not confined to intentional discrimination but also includes discrimination in effect, sometimes equated with ‘indirect discrimination’, though the latter terminology is not that of the Convention.<sup>20</sup> The five ‘grounds’ of discrimination in Article 1 do not make explicit mention of religion. On the core notion of discrimination, CERD *General Recommendation 14* (42)<sup>21</sup> observed that ‘differentiation of treatment will not constitute discrimination if the criteria for such differentiation, judged against the objectives and purposes of the Convention, are legitimate’. *A contrario*, differential treatment will constitute discrimination ‘if the criteria for such differentiation, judged in the light of the objectives and purposes of the Convention, are not applied pursuant to a legitimate aim, and are not proportional to the achievement of this aim.’<sup>22</sup> The Committee has insisted that, in appraising discrimination, ‘the specific characteristics of ethnic, cultural and religious groups be taken into consideration’.<sup>23</sup>

The full account of racial discrimination in Article 1 is more complex than the above, incorporating a restriction in relation to some matters of citizenship, and a provision on ‘special measures’.<sup>24</sup> On citizenship, while Article 1.2. of the Convention provides that the Convention ‘shall not apply to distinctions, exclusions, restrictions or preferences between citizens and non-citizens’, *General Recommendation 11* (1993),<sup>25</sup> reminded States parties that Article 1.2. must not be interpreted to detract from rights and freedoms enunciated in other instruments. Convention principles for protection of non-citizens are greatly elaborated in *General Recommendation 30* (2004)<sup>26</sup> which addresses issues including hate speech and racial violence.

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International Criminal Court (Articles 6, 7 and 8) directed against a group of persons or a member of such a group defined by reference to race, colour, religion, descent or national or ethnic origin, and – crimes defined by the Tribunal of Nuremberg (Article 6 of the Charter of the International Military Tribunal, London Agreement of 1945) directed against a group of persons or a member of such a group defined by reference to race, colour, religion, descent or national or ethnic origin. ... The reference to religion is intended to cover, at least, conduct which is a pretext for directing acts against a group of persons or a member of such a group defined by reference to race, colour, descent, or national or ethnic origin.’

<sup>20</sup> See discussion in W. Vandenhoele, *Non-Discrimination and Equality in the View of the UN Treaty Bodies* (Antwerp: Intersentia, 2005), pp. 36-43. (*Non-Discrimination and Equality*)

<sup>21</sup> A/48/18, Chapter VIII B.

<sup>22</sup> CERD General Recommendation 30 on Discrimination against Non-Citizens, A/59/18, Chapter VIII, paragraph 4.

<sup>23</sup> Concluding observations on Lao People’s Democratic Republic, A/60/18, paragraph 169.

<sup>24</sup> Article 1.4: ‘Special measures taken for the sole purpose of securing adequate advancement of certain racial or ethnic groups or individuals requiring such protection as may be necessary in order to ensure such groups or individuals equal enjoyment or exercise of human rights and fundamental freedoms shall not be deemed racial discrimination, provided, however, that such measures do not, as a consequence, lead to the maintenance of separate rights for different racial groups and that they shall not be continued after the objectives for which they were taken have been achieved’; see also Article 2.2.

<sup>25</sup> A/48/18, Chapter VIII B.

<sup>26</sup> A/59/18, Annex VIII.

The recommendation emphasises that any limiting features of the Convention in Article 1 must not undermine human rights in general including the principle of equality.

The umbrella term in the Convention is not ‘race’ but ‘racial discrimination’. ‘Race’ was a specifically European way of addressing and subordinating those perceived to be different; the Convention adds the four other ‘grounds’ in *pari materia*. While the additions lessen the difficulty of deploying ‘race’ in the Convention,<sup>27</sup> the concept has prompted some States parties to explain the limits of its use.<sup>28</sup> The abstract ‘grounds’ of discrimination in Article 1 took time to translate themselves into the targeted communities recognised in CERD practice: minorities, indigenous peoples, descent-based groups,<sup>29</sup> non-citizens, and cases where CERD refers to an ‘intersectionality’ between the five listed grounds and other grounds of discrimination

### **CERD treatment of discrimination on the ground of religion**

According to one commentator, CERD tends to take it as read that national, ethnic, linguistic and religious minorities or cultural groups of various kinds come within the frame of Article 1.<sup>30</sup> There is however an important *caveat* in the case of religion, namely that the Committee searches for an ‘ethnic’ or other connection or element of intersectionality between racial and religious discrimination before it regards its mandate as engaged.<sup>31</sup> This situation arises from the peculiarity that, although the Convention is structured to address racial discrimination, freedom of thought, conscience and religion figures, as noted above, among the protected rights in Article 5. Thus, the Convention requires conceptualization of *racial* discrimination in the enjoyment of *religious* freedom. As an attempted resolution of this jumbling of categories, CERD has made it clear that: ‘Religious questions are of relevance to the Committee when they are linked with issues of ethnicity and racial discrimination’.<sup>32</sup> The Committee has made numerous references in its concluding observations to phenomena such as Islamophobia (including reports thereof following the attacks of 11 September 2001),<sup>33</sup> discrimination against Jews and Sikhs, discrimination against indigenous religions, and desecration of sacred sites, etc, etc. - cases where it has sensed an overlap between religion and ethnicity.<sup>34</sup>

<sup>27</sup> Tzvetan Todorov, ‘Race, writing and culture’, in Henry Louis Gates, Jr., *Race, Writing and Difference* (Chicago: University of Chicago Press, 1986), pp. 370-80.

<sup>28</sup> See for example the recent statement by Germany in its eighteenth periodic report: ‘The German government applies the term ‘racial discrimination’ as defined in the Convention. In no way does that mean that it supports theories or doctrines which claim that there are different human races. The German government thus makes reference to the declaration made on behalf of the European Union at the World Conference against Racism on 7 September 2001’: CERD/C/DEU/18, p. 7, footnote 1.

<sup>29</sup> For reasons that are not entirely clear from the *travaux préparatoires*, ‘descent’ is not listed as a ground of discrimination in Article 5, but only in Article 1.

<sup>30</sup> ‘CERD tends to treat discrimination against minorities as a distinct theme, regardless of which prohibited grounds are specified’: Wouter Vandenhoe, *Non-Discrimination and Equality*, p. 95.

<sup>31</sup> Recent concluding observations stressing intersectionality include A/58/18, paragraph 539 (United Kingdom); A/60/18, paragraph 142 (Ireland); *ibid.*, paragraph 246 (Georgia); *ibid.*, paragraph 295 (Nigeria); *ibid.*, paragraph 323 (Turkmenistan). Intersectionality is not confined to matters of religion; the most common case addressed by the Committee relates to intersectionality between racial discrimination and gender: see, *inter alia*, CERD General Recommendation 25 on gender related dimensions of racial discrimination, A/55/18, Annex V. A

<sup>32</sup> A/60/18, paragraph 246 (Georgia).

<sup>33</sup> A58/18, paragraph 540 (United Kingdom).

<sup>34</sup> In some cases the language used does not make the ‘intersection’ very clear: A61/18, paragraph 418, referring to reported ‘anti-Muslim’ statements in Ukraine.

The ‘intersection’ was further examined in two cases in 2007, both involving allegations of hate speech. *P.S.N. v Denmark*,<sup>35</sup> concerned alleged violations of Article 1(d), 4 and 6 of the Convention through statements published on a website by an MP against immigration and Muslims, under the headline ‘articles no one dares to publish’.<sup>36</sup> The opinions expressed were reiterated in an interview given to a newspaper, and some had been previously published in a book. The petitioner filed three complaints under the Danish Criminal Code, section 266b of which prohibits racial statements, on the grounds that the website statements targeted a specific group – Muslims, were degrading and propagandistic, and were published to a large audience; analogous complaints related to the book and the interview. The State party argued against admissibility in that the case fell outside the scope of Article 1 of the Convention in referring to Muslims, while acknowledging that ‘it is possible to argue to a certain extent that the statements refer to second-generation immigrants and set up a conflict between “the Danes” and them, thereby falling to some degree within the scope of the Convention.’<sup>37</sup> The petitioner on the other hand contended that ‘Islamophobia, just like attacks against Jews, has manifested itself as a form of racism in many European countries’.<sup>38</sup> Hatred, it was claimed, had been stirred up against peoples of Arab and Muslim background, and ‘culture and religion are connected in Islam.’<sup>39</sup> In its admissibility decision, CERD observed that ‘the impugned statements specifically refer to the Koran, to Islam and to Muslims in General’, without any reference to the five grounds set out in Article 1 of the Convention.<sup>40</sup> Further, while the elements in the case file did not allow the Committee to ascertain the intention of the statements, ‘it remains that no specific national or ethnic groups were directly targeted’, and that ‘Muslims currently living in the State party are of heterogeneous origin.’<sup>41</sup> The Committee recognised ‘the importance of the interface between race and religion’ and stated that ‘it would be competent to consider a claim of “double” discrimination on the basis of religion and another ground specifically provided for in Article 1’, which was not the case with the current petition.<sup>42</sup> The petition according to the Committee was based on religion alone, and ‘Islam is not a religion practised solely by a particular group.’<sup>43</sup> The communication was therefore declared inadmissible. In *A.W.R.A.P. v Denmark*,<sup>44</sup> the Committee declared inadmissible a communication on similar grounds to its decision in *P.S.N.* It may be suggested that in future cases likely to arise more could be made of the concepts of ‘discrimination in effect’ or ‘indirect discrimination’ and heavier reliance placed the self-perception of communities. Cases can arise where the hate speech discourse is careful to avoid direct racial or ethnic insult, and may have ‘switched’ its language from the racial/ethnic to the religious in relation to the same targeted community. The Committee is, it is submitted, eminently capable of addressing such re-phrasing of hate speech from within its present interpretative resources.

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<sup>35</sup> Communication No. 36/2006, A/62/18, Annex V.

<sup>36</sup> *P.S.N. v Denmark*, paragraph 1.1.

<sup>37</sup> *Ibid.*, paragraph 4.1. The State party also contended (*ibid.*, paragraph 4.12) that ‘the right to freedom of expression is particularly imperative for an elected representative of the people.’

<sup>38</sup> *Ibid.*, paragraph 5.3.

<sup>39</sup> *Ibid.*, paragraph 5.3. The petitioner cited (*ibid.*, paragraph 5.3.) the Committee’s concluding observations of 2002 and 2006 on Denmark linking people of ‘Arab and Muslim’ background.

<sup>40</sup> *Ibid.*, paragraph 6.2.

<sup>41</sup> *Ibid.*, paragraph 6.2.

<sup>42</sup> *Ibid.*, paragraph 6.3.

<sup>43</sup> *Ibid.*, paragraph 6.3.

<sup>44</sup> Communication No. 37/2006, A/62/18, Annex V.

## Article 4 of ICERD

The fundamental ICERD provision on hate speech is the extensive Article 4, reinforced by preambular provisions expressing the conviction that ‘any doctrine of racial superiority based on differentiation is scientifically false, morally condemnable, socially unjust and dangerous’,<sup>45</sup> and decrying policies based on racial superiority:<sup>46</sup>

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.

While the elements in this article may be linked in a common ethos of preventing racial discrimination, its ambition strays beyond the strict confines of hate speech to interface with freedom of assembly and association as well as freedom of speech. The drafting of what became article 4 produced some of the most contentious moments in the history of the process. *Inter alia*, strong opposition was expressed to the provision on ‘dissemination of ideas’ in Article 4(a), despite the fact that the Declaration on Racial Discrimination had already (1963) ‘severely condemned’ all ‘propaganda and organizations based on ideas of the superiority of one race or group of persons ... with a view to justifying or promoting racial discrimination in any form’.<sup>47</sup> Views also differed on whether invoking criminal law prohibitions in the discrimination and hate speech context was the best way forward compared to a focus on education.<sup>48</sup> Lively discussions also followed the introduction of the ‘due regard’ clause, and the question of banning racist organizations. Some of the doubts expressed in the passage of the Convention surfaced in the form of reservations, declarations and interpretations made by States parties, many of which

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<sup>45</sup> Sixth preambular paragraph.

<sup>46</sup> Eighth preambular paragraph.

<sup>47</sup> Article 9.1.

<sup>48</sup> Article 7 is the anti-racist education provision in the Convention; there is also reference to Article 5(e)(v) to ‘the right to education and training’.



subsist despite constant urging by CERD to remove them or narrow their scope.<sup>49</sup> Many such reservations refer to the principles of freedom of expression which in relation to Article 4. The statements repeatedly refer to the Universal Declaration of Human Rights, Articles 19 and 20,<sup>50</sup> the rights in Article 5 of the Convention – notably freedom of expression and freedom of association, and Articles 19 and 21 of the ICCPR.<sup>51</sup> The essence of these reservations is that measures to implement Article 4 will only be adopted to the extent they are compatible with principles of freedom of expression, assembly and association, a stance articulated by one State party: the ‘freedom provisions’ are to be interpreted as ‘releasing States parties from the obligation to promulgate repressive laws’ incompatible with them.<sup>52</sup> The situation raises questions as to whether the prohibition of hate speech as expressed in ICERD is simply a rule of treaty law or represents customary international law on the basis of its intrinsic relationship to the norm of non-discrimination.<sup>53</sup>

#### **CERD practice on Article 4**

The provisions of Article 4 were elaborated in a series of general recommendations adopted by the Committee, including its first such recommendation. In *General Recommendation 1* (1972), the Committee noted, on the basis of consideration of reports at its fifth session, that the legislation of a number of States parties did not include the provisions of Article 4(a) and 4(b) of the Convention ‘the implementation of which, (with due regard for the principles embodied in the Universal Declaration of Human Rights and the rights expressly set out in Article 5 of the Convention) is obligatory under the Convention for all States parties.’ Accordingly the Committee recommended that States parties should consider supplementing such ‘deficient’ legislation with provisions conforming to article 4(a) and 4(b).<sup>54</sup> The Committee returned to the issue in *General Recommendation 7* (1985),<sup>55</sup> the preamble of which recalls its earlier general recommendation and complaint concerning legislation while noting with satisfaction that some States had included information on Article 4 cases; it further recalls the obligation to adopt immediate and positive measures in the chapeau of Article 4 and the due regard clause. The newer text added a point on ‘the preventive aspects of article 4 to deter racism and racial discrimination as well as activities aimed at their promotion or incitement,’<sup>56</sup> recommending that,

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<sup>49</sup> International Convention on the Elimination of All Forms of Racial Discrimination, Ratifications and reservations, <http://www.ohchr.org/english/countries/ratification/2.htm>.

<sup>50</sup> Italy, *ibid.*, p. 9, made reference to Article 29 (2) of the UDHR.

<sup>51</sup> Belgium added a reference to Articles 10 and 11 of the European Convention on Human Rights, *ibid.*, pp. 5-6.

<sup>52</sup> Monaco.

<sup>53</sup> The ICTR Trial Chamber in the *Nahimana et al.* case, paragraph 1076, held that ‘hate speech that expresses ethnic and other forms of discrimination violates the norm of customary international law prohibiting discrimination.’ In paragraph 5 of his partly dissenting opinion in the ICTR Appeals Chamber, the trial judgement statement is disputed by Judge Meron on the basis that ICCPR and ICERD ‘require signatory states to prohibit certain forms of hate speech in their domestic laws, but do not criminalize hate speech in international law.’ He uses the reservations, etc., to ICERD to make his point that ‘profound disagreement persists in the international community as to whether mere hate speech is or should be prohibited, indicating that Article 4 of ... [ICERD] ... and Article 20 of the ICCPR do not reflect a settled principle. Since a consensus among States has not crystallized, there is clearly no norm under customary international law criminalizing mere hate speech.’

<sup>54</sup> A/8718, Chapter IX, section A.

<sup>55</sup> A/40/18, Chapter VII, section B.

<sup>56</sup> Final preambular paragraph of the recommendation.

*inter alia*, necessary steps be taken with a view to ‘satisfying the mandatory requirements of that article.’<sup>57</sup>

*General Recommendation 15* (1993),<sup>58</sup> provides the lengthiest analysis of the exigencies of the article, coupled with an explanatory justification. The recommendation reads the *travaux* of the Convention to the effect that the drafters regarded article 4 as central to the struggle against racial discrimination in view of ‘a widespread fear of the revival of authoritarian ideologies’.<sup>59</sup> Further, organized violence based on ethnic origin and the political exploitation of ethnic differences have only enhanced the relevance of Article 4.<sup>60</sup> The description of the article as ‘central’ and ‘crucial’ in the struggle against racial discrimination was preferred to its description as the ‘key article’, possibly because this might give rise to misunderstanding concerning the force of other articles.<sup>61</sup> The ‘mandatory character’ of the article is recalled, and its implementation requires not only the enactment of appropriate legislation but the effective enforcement of such.<sup>62</sup>

The provisions of article 4(a) are analytically broken down into four penalizable categories:<sup>63</sup> ‘(i) dissemination of ideas based upon racial superiority or hatred; (ii) incitement to racial hatred; (iii) acts of violence against any race or group of persons of another colour or ethnic origin; and (iv) incitement to such acts.’<sup>64</sup> It may be noted that this structure departs from the literal wording of 4(a) which does not refer to incitement to *racial hatred* but to incitement to *racial discrimination*. On the other hand, the chapeau of the article couples ‘racial hatred and discrimination’ and then refers to the undertaking to adopt measures to eradicate all incitement to ‘such discrimination’ - which could conceivably be read to include both hatred and discrimination. The longest paragraph in the recommendation strenuously defends the proposition that the prohibition of ideas based on racial superiority or hatred is compatible with freedom of expression,<sup>65</sup> praying in aid the text of Article 4 as such, Articles 19 and 29.2. of the Universal Declaration of Human Rights,<sup>66</sup> and Article 20 of the ICCPR. The recommendation also comments on Article 4(b) in light of State claims that it is inappropriate to declare an organization illegal ‘before its members have promoted or incited racial discrimination’, responding that the paragraph ‘places a greater burden upon such States to be vigilant in proceeding against such organizations at the earliest moment.’<sup>67</sup> One commentator describes General Recommendation 15 as the ‘most strident’ in

<sup>57</sup> General Recommendation VII, paragraph 1.

<sup>58</sup> A/48/18, Chapter VIII, section B.

<sup>59</sup> General Recommendation 15, paragraph 1.

<sup>60</sup> *Ibid.*

<sup>61</sup> Discussions of the draft in CERD/C/SR.980, paragraphs 77-98. See also CERD/C/SR.981, paragraph 79 on the deletion of the term.

<sup>62</sup> General Recommendation 15, paragraph 1.

<sup>63</sup> The 4(a) reference to financing of assistance to racist organizations is referred to in paragraph 5 of the recommendation.

<sup>64</sup> *Ibid.*, paragraph 3.

<sup>65</sup> ‘Compatible’ was preferred to ‘fully compatible’: see comments by Rechetov, CERD/C/SR/980, paragraphs 84 and 85.

<sup>66</sup> Paragraph 4 of the recommendation states that the citizen’s exercise of this right (freedom of expression) ‘carries special duties and responsibilities, specified in article 29, paragraph 2, of the Universal Declaration, among which the obligation not to disseminate racist ideas is of particular importance.’

<sup>67</sup> *Ibid.*, paragraph 6, adding that these organizations ‘as well as organized and other propaganda activities, have to be declared illegal and prohibited. Participation in these organizations is, of itself, to be punished.’

its calls for the protection of ethnic groups from racist speech and notes the lack of explicit reference to the ‘due regard’ clause compared with earlier recommendations.<sup>68</sup>

Thus, in the field of speech, the language of Article 4 encompasses condemnation of propaganda for ideas of racial superiority as well as justification or promotion of racial hatred, and centres in 4(a) on the concepts of dissemination and incitement. CERD also has an extensive practice through its concluding observations. On dissemination, the recommendations on which are normally linked with recommendations on Article 4 as a whole, including 4(b) on the prohibition of racist organizations, the Committee frequently recalls General Recommendation 15, affirming its compatibility thesis, recommends remedying the absence of laws against dissemination of racist propaganda, and addresses questions as to the scope of national legislation – for example by intimating concern on legal provisions concerning ‘dissemination’ that confine the prohibition to dissemination among the public.<sup>69</sup> CERD also draws into its general discourse on Article 4 cases where racial groups are subject to targeting, stigmatization, stereotyping or racial profiling. On incitement, the Committee typically recommends remedying gaps in legislation, preferring specific legislation on this issue, and notes the absence or limitation in the number of cases alleging incitement in the face of significant numbers of allegations. It also reminds States of obligations to prohibit all organizations including mass media which promote and incite racial discrimination, and also generally welcomes changes in penal law that recognise the serious nature of incitement to racial discrimination. In one instance, CERD recommended that consideration be given to extending the crime of incitement to cover offences motivated by religious hatred against immigrant communities.<sup>70</sup> The Committee also recommends the introduction of provisions designating racist motivations in crime as aggravating circumstances, and has linked this with religious hatred as an aggravating circumstance in recent concluding observations.<sup>71</sup> Beyond this range of practice, CERD has pointed in its ‘early warning’ procedure<sup>72</sup> and in key decisions to the critical contribution of hate speech to racial violence, and even to genocide.<sup>73</sup>

Further interpretative questions may be asked on how strict is the requirement to declare as an offence the dissemination of racist ideas in terms of the conventions of criminal law relating to

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<sup>68</sup> D. Keane, *Caste-Based Discrimination in International Human Rights Law* (Aldershot: Ashgate, 2007), p. 195.

<sup>69</sup> CERD/C/63CO/8, paragraph 11. Or limiting the possibility of addressing hate speech to cases of *crimen iniuria* (deliberate injury of dignity): CERD/C/NAM/CO/12, paragraph 14.

<sup>70</sup> Concluding observations on the United Kingdom, A/58/18, paragraph 540: ‘The Committee recommends that the State party give early consideration to the extension of the crime of incitement to racial hatred to cover offences motivated by religious hatred against immigrant communities’. The UK has since passed the Racial and Religious Hatred Act 2006.

<sup>71</sup> ‘The Committee recommends that the State party continue its efforts to include in its domestic criminal legislation a specific provision to ensure that the motive of *ethnic, racial or religious hatred* is taken into account as an aggravating circumstance in proceedings under the criminal law’: concluding observations on Germany, CERD/C/DEU/CO/18, paragraph 26 (present author’s emphasis).

<sup>72</sup> Guidelines for the early warning and urgent action procedure, A/62/18, Annex III.

<sup>73</sup> *Inter alia*, see ‘Decision on follow-up to the declaration on the prevention of genocide: indicators of patterns of systematic and massive racial discrimination’, A/60/18, paragraph 20: indicators include ‘systematic and widespread use and acceptance of speech or propaganda promoting hatred and/or inciting violence against minority groups, particularly in the media’, and ‘grave statements by political leaders/prominent people that express support for affirmation of superiority of a race or an ethnic group, dehumanize and demonize minorities, or condone or justify violence against a minority.’

the mental element in crime. A CERD study of 1983 stated baldly that ‘the mere act of dissemination is penalized, despite lack of intention to commit an offence and irrespective of the consequences of the dissemination’.<sup>74</sup> Such a stance approaches the domain of strict or absolute liability, and the total absence of culpability elements beyond the act of dissemination would do violence to basic principles of criminal liability in many if not most jurisdictions.<sup>75</sup> On the definition of incitement in Article 4(a), the same paper concluded that ‘what is penalized ... is the mere act of incitement, without reference to any intention on the part of the offender or the result of such incitement, if any.’<sup>76</sup> Whatever comment might be made concerning a causal link between ‘dissemination’ of a racist tract and awareness of criminality,<sup>77</sup> the element of striving to bring about a particular result is commonly built into the notion of incitement, whether or not the desired result is achieved. While the Committee has in a recent instance urged a State party to consider relaxing the strict requirement of intent in incitement to racial discrimination,<sup>78</sup> it is not unreasonable to read the Convention to the effect that the local application of these provisions will be embedded in criminal law principles. The obligations under the article may therefore be understood as obligations respecting the division of responsibility between States parties and the Committee.<sup>79</sup> Another way of phrasing the distinction is to recall the notion of the margin of appreciation and the non-self-executing nature of Article 4; the margin for State party application of the Convention would cover the *actus reus* and *mens rea* for the offence and the appropriate penalty.<sup>80</sup>

<sup>74</sup> *Positive measures designed to eradicate all incitement to, or acts of, racial discrimination: implementation of the International Convention on the Elimination of All Forms of Racial Discrimination, Article 4* (New York, United Nations, 1986), paragraph 83 (*CERD study*). The study was prepared for the Second World Conference on Racism in 1983 as A/CONF.119/10.

<sup>75</sup> In the *Jewish Community* case, paragraph 8.5., the State party submitted information that ‘Racist statements made negligently are ... proscribed – intent need not be proved.’ In *P.S.N. v Denmark*, a reference in paragraph 2.7. to a requirement of ‘intent to disseminate’ offending articles was made by the State party. The Committee did not deal with this point in its admissibility decision. See also T. Meron, ‘The meaning and reach of the International Convention on the Elimination of All Forms of Racial Discrimination’, 79 *American Journal of International Law* (1985), 283-318, M. Banton, *International Action against Racial Discrimination* (Oxford: Clarendon Press, 1996), pp. 202-09 (*International Action*), and S. Farrow, ‘Moulding the matrix: the historical and theoretical foundations of international law concerning hate speech’, 14 *Berkeley Journal of International Law* (1996), 1-98, for samples of Committee practice.

<sup>76</sup> *CERD study*, paragraph 96. Re dissemination and incitement together, see, *ibid.*, paragraph 235: ‘The legislation of some States parties subjects ... [dissemination and incitement] ... to certain conditions, for example that the dissemination or incitement must be intentional, or must have certain objectives such as “to stir up hatred”, or that they be “threatening, abusive or insulting” ... these conditions are restrictive and ignore the fact that article 4(a) of the Convention declares punishable the mere act of dissemination or incitement, without any conditions.’

<sup>77</sup> ‘Laws against incitement to racial discrimination or hatred are ... necessary to protect public order and the rights of others. The majority of the Committee is convinced that the same applies without distinction to the dissemination of ideas based on racial superiority’: *CERD Study*, paragraph 231 - this formulation indicates that even in 1983 the Committee was not unanimous on this question.

<sup>78</sup> Ukraine, A/61/18, paragraph 419.

<sup>79</sup> The *travaux* are not outstandingly clear on this question. Referring to the prohibition in Article 4(b), the report of the Commission on Human Rights summarised a discussion on the distinction between ‘incite’ and ‘promote’ in terms of incitement being ‘a conscious and motivated act’, while promotion might occur ‘without any real intention or endeavour to incite’: E/3873; E/CN.4/874, paragraph 169. This suggests that the standard criminal law character of incitement was well understood.

<sup>80</sup> I am grateful to my CERD colleague Sicilianos for this last point; see L.-A. Sicilianos, ‘L’actualité et les potentialités de la Convention sur l’élimination de la discrimination raciale’, 16 *Revue Trimestrielle des droits de l’homme* (2005), 869-921, at p. 893.

In the context of ICERD as a whole, other interpretative questions concerning Article 4 include its relationship to Article 2(1)(d) whereby each State party ‘shall prohibit and bring to an end, by all appropriate means, including legislation as required by circumstances, racial discrimination by any persons, group or organization’. Suggestions of a ‘softer’ approach deriving from this provision have been met with insistence by CERD that Article 4 functioned as a *lex specialis* in relation to Article 2 and must prevail.<sup>81</sup> The requirement of banning racist organizations in line with Article 4(b) has produced many exchanges between the Committee and States parties. If the reluctance of some States to ban racist groups has not significantly abated, neither has the Committee’s resolve in continuing to press for such action to be taken.

### ***Freedom of expression and hate speech in ICERD: reading the relationship***

On the relationship between Article 4 and the freedoms of Article 5 in light of the ‘due regard’ clause, the 1983 CERD study<sup>82</sup> made the observation that:

Another factor hindering the full application of article 4 ... is the interpretation that implementation of the article might impair or jeopardize freedom of opinion and expression and freedom of ... assembly and association. This is the extreme position. Midway lies the proposition that a ‘balance’ has to be struck between article 4(a) and freedom of speech, and between article 4(b) and freedom of expression. The weight of opinion inclines to the view that the rights of free speech and of free association are not absolute, but subject to limitations.<sup>83</sup>

It is instructive to note that ‘the extreme position’ in this reading is that which allows the least intrusion into freedom of expression, etc. The paragraph can ostensibly be read to support the middle position: that of striking a balance between the freedoms and the proscriptions, though Banton reads the study as defending the view that ‘States may not invoke the protection of civil rights as a reason to avoid implementation of the Convention.’<sup>84</sup> A study by Partsch, a former member of the Committee, outlined three different views on the effect of the ‘due regard’ clause, the first being that States are not authorized to take action that would impair the ‘freedoms’, the second being that a balance must be struck between the freedoms and the duties under the Convention, and the third being the above-cited reading ascribed to the CERD study by Banton.<sup>85</sup> It is not however clear that the practice can be reduced to simple categories including the emollient metaphor of ‘balancing’ rights and restrictions;<sup>86</sup> there is also the element of the

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<sup>81</sup> Banton, *International Action*, pp. 204-06.

<sup>82</sup> *CERD study*, paragraph 83.

<sup>83</sup> *CERD Study*, paragraph 225.

<sup>84</sup> Banton, *International Action*, p. 203.

<sup>85</sup> *Ibid.*, citing K. J. Partsch, ‘Racial speech and human rights: Article 4 of the Convention on the Elimination of All Forms of Racial Discrimination’, in S. Coliver (ed.), *Striking a Balance: Hate Speech, Freedom of Expression and Non-Discrimination* (London: Article 19, 1992), pp. 21-28. Partsch favoured the ‘balance’ position between freedoms and State obligations.

<sup>86</sup> It is not inherently clear how the protection of vulnerable groups and the promotion of equality is to be ‘balanced’ in an abstract manner against free speech to the mutual advantage of both as opposed to one value trumping another. For an attempt to recast the debate as a conflict of liberties, based on the notion that protection from hate speech is a methodology to promote participation in public discussion and a liberty rather than a restriction, see O. Fiss, *The Irony of Free Speech* (Harvard University Press, 1996).

Committee responding to situations under review through a form of situation or context-dependent interpretation, and interpretations that respect the differing responsibilities of States parties and the Committee.<sup>87</sup> In some cases, the statement of freedom of expression has been uppermost in the Committee's observations. Thus, the Committee has reminded a State party of the 'obligation to respect the right to freedom of opinion and expression when implementing Article 4',<sup>88</sup> and recommended another that it 'guarantee respect for the freedoms of expression and association in its implementation of Article 4 (a) and (b)'.<sup>89</sup> In other cases, CERD addressed the situation with a different emphasis, expressing concern at impending litigation challenging the prohibition of hate speech as a violation of freedom of expression,<sup>90</sup> or taking note of the State party's recognition that freedom of expression and opinion is not an absolute right.<sup>91</sup>

While it is true that 'the compatibility thesis' adumbrated in General Recommendation 15 and frequently reiterated by CERD can be taken as a reasonable summary of Committee practice,<sup>92</sup> this does not imply lack of continuing attention to the exigencies of the due regard clause, though the Committee reads the clause according to its own lights. The decision of the Committee in the *Jewish Community* case captures the style of much current practice.<sup>93</sup> In this case, which concerned public anti-Jewish statements by a leader of the 'Bootboys', the Committee took the opportunity to clarify some points, observing initially that while 'the content of the speech is objectively absurd, the lack of logic of particular remarks is not relevant to the assessment of whether or not they violate Article 4.'<sup>94</sup> On the 'due regard' clause, it noted that 'the principle of freedom of speech has been afforded a lower level of protection in cases of racist and hate speech dealt with by other international bodies, and ... general recommendation 15 clearly states that the prohibition of all ideas based on racial superiority or hatred is compatible with the right of freedom of opinion and expression.'<sup>95</sup> Further, the Committee noted that

the 'due regard' clause relates generally to all principles embodied in the Universal Declaration of Human Rights, not only freedom of speech. Thus, to give the right to freedom of speech a more limited role in the context of Article 4 does not deprive the 'due regard' clause of significant meaning, all the more so since all international instruments that

<sup>87</sup> See for example the remarks of Wolfrum in discussions on the 8<sup>th</sup> and 9<sup>th</sup> periodic reports of Denmark, CERD/C/SR.864, paragraph 64: 'Article 4 could not be invoked to assert that protection against racial discrimination took precedence over freedom of opinion. It emerged from that article that it was for the State and not the Committee to determine whether respect for freedom of opinion and ... information ... should take precedence over the prohibition of incitement to racial discrimination.' Compare remarks of Aboul-Nasr, CERD/C/SR.865, paragraph 8, and Lamptey, *ibid.*, paragraph 9. The discussions are summarised in A/45/18, paragraph 56.

<sup>88</sup> Belarus, A/59/18, paragraph 264.

<sup>89</sup> Mauritania, *ibid.*, paragraph 340.

<sup>90</sup> CERD/C/BEL/CO/15, paragraph 11.

<sup>91</sup> A/58/18, paragraph 531.

<sup>92</sup> '[T]he Committee wishes to reiterate that the prohibition of all ideas based on racial superiority or hatred is compatible with the right to freedom of opinion and expression, given that the exercise of this right carries special duties and responsibilities, including the obligation not to disseminate racist ideas': CERD/C/USA/CO/6, paragraph 18.

<sup>93</sup> A/60/18, Annex III B.

<sup>94</sup> *Jewish Community*, paragraph 10.4.

<sup>95</sup> *Ibid.*, paragraph 10.5.

guarantee freedom of expression provide for the possibility, under certain circumstances, of limiting the exercise of this right.<sup>96</sup>

The role of the freedoms is thus reduced in the racist context through an extrapolation from the texts of international law which restrict their exercise, including the text of the UDHR. While the Committee finds meaning and utility in the due regard clause, the invocation of the UDHR in its fullness and not only in relation to freedom of expression tilts the argument towards greater permissibility of restrictions on hate speech in the racist context. Although the invocation of the UDHR in Article 4 is explicit, it may be suggested that, as elsewhere in CERD practice, the full extent of any restriction can only be gauged through accounting for the proscriptions in the text measured against wider international standards and practice.<sup>97</sup> The Convention is a living instrument to be interpreted in the light of contemporary circumstances, so that the manner in which it is read will be responsive to changes in the currents of opinion in the wider world of human rights which impinge on racist speech.<sup>98</sup>

### **Tentative Conclusions: defamation of religions and the Convention on Racial Discrimination**

*‘Let your speech be better than silence, or be silent’* (Dionysius of Halicarnassus)

Human Rights Council resolution 7/19<sup>99</sup> is the latest in a line of pronouncements on the subject of defamation of religions by the UN General Assembly, the former Commission on Human Rights and the Council, as well as by special rapporteurs, conferences of States, etc., many of which are recalled in its preamble, along with instruments including the UN Declaration on the Elimination of Religious Intolerance. The resolution is headed ‘Combating defamation of religions’. No definition of the phrase is attempted, but the text puts forward examples relevant to our understanding of the phenomena – perhaps falling short of a ‘stipulative’ definition. The facets of defamation of religions include negative stereotyping of religions, their adherents and sacred persons, the identification of Islam with terrorism and the profiling of Muslims after 11 September 2001, laws controlling and stigmatizing Muslim minorities, and attacks on businesses, cultural centres and places of worship. The resolution urges State action to prohibit ‘the dissemination ... of racist and xenophobic ideas and material aimed at any religion or its followers that constitute incitement to racial and religious hatred, hostility and violence,’<sup>100</sup> and provide protection against ‘acts of hatred, discrimination, intimidation and coercion resulting from the defamation of any religion’,<sup>101</sup> as well as taking measures to promote tolerance, etc. On the relation between ‘defamation’ and freedom of expression, the resolution takes a robust stance: ‘respect of religions and protection from contempt is an essential element conducive for

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<sup>96</sup> *Ibid.*, paragraph 10.5.

<sup>97</sup> In the fields of minority and indigenous rights, CERD draws heavily on specific instruments related to these groups, even if not explicitly acknowledged; similarly with observations and general recommendations on gender and the rights of non-citizens. See also *Jersild v Denmark*, Application No. 15890/89, Judgment of the European Court of Human Rights 23.09.1994.

<sup>98</sup> *Hagan v Australia*, No. 26/2002, A/58/18, Annex III A, paragraph 7.3.

<sup>99</sup> Adopted at the 40<sup>th</sup> meeting of the Council on 27 April 2008 by 21 votes to 10, with 14 abstentions.

<sup>100</sup> Resolution 7/19, paragraph 8.

<sup>101</sup> *Ibid.*, paragraph 9.

the exercise by all of the right to freedom of expression',<sup>102</sup> emphasising the limitations on the freedom in international human rights law. *Inter alia*, the resolution also recalls CERD General Recommendation 15, declaring it to be 'equally applicable to the question of incitement of religious hatred.'<sup>103</sup> Islam and Muslims are the only named religion and community in the resolution, though the scope of the resolution is ostensibly wider. 'Religion' is not defined.

### Racial and religious discrimination

If the resolution is focused on religion, ICERD is focused on racial discrimination. The caution of CERD against overstepping a boundary has been noted, particularly in the *P.S.N.* and *A.W.R.A.C.* cases, though CERD has also taken a wider view particularly in its concluding observations and will continue to do so. It is not always possible or appropriate to draw sharp distinctions between racial discrimination and discrimination on grounds of religion: as a former Special Rapporteur on Religious Intolerance put it, 'religion shares something of the definition of ethnicity, just as ethnicity is basic to religious identity'.<sup>104</sup> For many communities addressed by CERD, there are no clear lines between culture or tradition and religion, and efforts to separate out culture from religion could result in grafting a 'structure' on to a community which is artificial and inadequately responsive to community self-perception. Further, since the bases of racism may be ethnic and cultural hostility as much as 'race' or colour, the norms and spiritual practices integral to group identity are likely to be subjected to the same discrimination as other facets of culture. The caution reflected in some CERD practice is perhaps understandable in light of the limited mandate of the Committee, the product of institutional design, bearing in mind the observation cited in both the last mentioned cases that the *travaux préparatoires* of the Convention

reveal that the ... General Assembly rejected the proposal to include racial discrimination and religious intolerance in a single instrument, and decided in the ICERD to focus exclusively on racial discrimination.<sup>105</sup> It is unquestionable therefore that discrimination based exclusively on religious grounds was not intended to fall within the purview of the Convention.<sup>106</sup>

The further question arises, beyond the race discrimination mandate in ICERD, as to whether the exigencies of proscribing religious discrimination are equal to the exigencies of proscribing racial discrimination. This appears to be the case even if we only take into account the intrinsic inter-relationships of race, ethnicity and religion, and the evidence from the standards of international law. Many instruments link racial with religious and other grounds of discrimination, and both are included for example in the Genocide Convention which defines the crime as acts committed 'with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such.'<sup>107</sup> It is not an adequate distinction to say that race and other

<sup>102</sup> *Ibid.*, paragraph 10.

<sup>103</sup> *Ibid.*, paragraph 13.

<sup>104</sup> Report by Abdelfattah Amor for the Durban World Conference on Racism, A/CONF.189/PC.1/7, 13 April 2000, paragraph 122.

<sup>105</sup> M. Banton, *International Action against Racial Discrimination* (Oxford: Clarendon Press, 1996), Chapter 4.

<sup>106</sup> *P.S.N. v Denmark, A.W.R.A.P. v Denmark*, paragraph 6.3.

<sup>107</sup> Convention on the Prevention and Punishment of the Crime of Genocide, approved by General Assembly resolution 260 A (III) of 9 December 1948, Article II. See also the Durban Declaration and Programme of Action of



inheritances are ‘natural’ whilst religion is a choice.<sup>108</sup> Religion can be a belief system, an identity, a way of life; only in some cases is it the product of deliberate choice:<sup>109</sup> the voluntarist paradigm does not always fit the material of everyday life.

### ***On hate speech protection in ICERD***

The phenomena outlined in the defamation resolution include actions which are more aggressive than ‘defamation’ in the commonly understood sense of a civil law ‘tort’<sup>110</sup> defined as inaccurate statements, written or oral, which damage a person’s reputation. The description of hostile acts in the resolution appears different from any simple notion of defamation, but aligns with the language of ICERD and includes it. Dissemination, incitement, stereotyping, profiling, stigmatization, and legitimization of discrimination, are all included. And, while other elements such as contempt are found infrequently in the observations of CERD,<sup>111</sup> the Committee has not picked its way through a full vocabulary of hate speech and ‘normal’ speech. It should also be recalled that ICERD prohibits ‘dissemination of ideas based on racial superiority or hatred’ which could be interpreted to go as far as the resolution in terms of what is to be condemned. The principal difference from CERD practice is the description of an object of protection in the resolution as the religion and not simply the *community* or the minority *communities* and individuals ‘representing’ those communities,<sup>112</sup> which are the staple concerns of CERD. What is protected by ICERD is the group, usually a vulnerable group, rather than norms or practices. CERD recognises the distinction between the norms and the community as such; if it did not, a critical account of the practices of a certain group would not be possible without a critique of the group that harbours them. If CERD maintains this stance in terms of critique, it should be constrained to make an equivalent distinction in the context of protection.

Nonetheless, the distinction between addressing the community and addressing its practices can be a fine one – by analogy with the field of protection of languages, there is a thin line between protection of the language and protection of language-speakers.<sup>113</sup> Attacks on group customs and traditions expressed in vicious language can seriously damage the self-esteem of groups and represent an attempt to silence them. Incitement to racial or religious hatred can incorporate demeaning accounts of cultural practices and beliefs, ranking them as inferior to those of the racists. The context of speech and the meanings distilled from it represent another factor, sensitivity to which is not inconsistent with adherence to general norms. Context may include for example, in terms of the 2007 criteria for its early warning procedure, ‘the ‘presence of a pattern of escalating racial hatred and violence, or racist propaganda or appeals to racial intolerance by

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the World Conference on Racism, etc., including paragraphs 59, 60 and 61 of the Declaration; paragraph 67 of the Declaration recites the recognition by the Conference ‘that members of certain groups with a distinct cultural identity face barriers arising from a complex interplay of ethnic, religious and other factors, as well as their traditions and customs’.

<sup>108</sup> N. Meer, ‘The politics of voluntary and involuntary identities: are Muslims in Britain an ethnic, racial or religious minority?’, *42 Patterns of Prejudice* (2008), 61-81.

<sup>109</sup> M.J. Gunn, ‘The complexity of religion and the definition of religion in international law’, *16 Harvard Human Rights Journal* (2003), 189-217.

<sup>110</sup> A criminal law offence of defamation exists in a number of countries.

<sup>111</sup> For one example criticising media ‘contempt’ in the context of indigenous peoples, see A/61/18, paragraph 123.

<sup>112</sup> In the sense that discrimination is directed against the individuals that ‘stand for’ or ‘represent’ targeted groups.

<sup>113</sup> See for example the European Charter for Regional or Minority Languages, E.T.S. No. 148 (1992)

persons, groups or organizations, notably by elected or other State officials’, as a factor to be assessed along with others ‘in light of the gravity and scale of the situation’.<sup>114</sup> ICERD centres on protection of the individual and collective ability of human beings to sustain the codes and beliefs they regard as integral to their identity. Insofar as the Convention tilts to a pro-minority stance, there are good reasons within its ethos for doing so.

Those who would argue in favour of using ICERD as a model for combating defamation of religions should bear in mind that, even allowing for the penumbra of uncertainty on race/religion intersectionality, many elements in the concept of defamation of religions are already accounted for in CERD practice and that the practice is capable of further development through stretching of interpretative boundaries. As observed, ICERD goes beyond the notion of incitement to hatred and discrimination<sup>115</sup> and mandates the penalization of dissemination of ideas. This is a draconian posture in the field of international human rights, almost approaching realization of the dictum of Wendell Holmes that ‘every idea is an incitement’. ICERD’s stern approach to the banning of racist organizations and the criminalization of assistance to racist activities, are also noteworthy. Article 4 is cast in strongly preventive or pro-active mode. The rationale may be understood by reflecting on such phenomena as the discourses of dehumanisation that are characteristic elements of genocidal processes, or, less dramatically, on the climate of oppression that can flourish if unchecked against vulnerable minorities through normalization or banalization of discourses of racial inferiority and superiority. Vulnerable groups well appreciate that the lines between thought, public discourse and oppressive action can be very thin. Debate and critique, including scientific critique,<sup>116</sup> satire, etc., are not generally understood as being within the prohibitions of Article 4,<sup>117</sup> and ‘technical’ questions such as the details of the appropriate criminal law standards to be applied to dissemination and incitement, including the definition of those terms, are not fully resolved. It may also be argued in the defamation context that use of the criminal law is not always the best way forward. Article 7 of the Convention with its focus on anti-racist education tends to be neglected in appraisals of how the Convention addresses hate speech. There is still a major role for education in combating racism, as well as utilisation of other branches of law besides the criminal law. To the extent that education has been stressed to a lesser degree in CERD practice than prevention of hate speech, it is time to reinstate it with full force. The CERD ethos of promoting dialogue – inter and intra-

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<sup>114</sup> A/62/18, Annex III, paragraph 12.

<sup>115</sup> Difficulties also arise in legally proving hatred, described as ‘a feeling, a state of mind, and not a clearly established legal interest, as is the case of discrimination’: K. Boyle and A. Baldaccini, ‘A critical evaluation of international human rights approaches to racism’, in S. Fredman (ed.), *Discrimination and Human Rights: the Case of Racism* (Oxford University Press, 2001), Chapter 6, at p. 160, fn. 108 (Boyle and Baldaccini). In practice the weight of proof may tend to fall on the mental element: see for example the UK’s Racial and Religious Hatred Act 2006 and Explanatory Notes.

<sup>116</sup> With reference to the plenary sessions of the General Assembly prior to the adoption of the Convention, Lerner comments that in all the debates ‘it was made clear that the Convention should not be interpreted as objecting to the dissemination of scientific ideas that deal with the problem of race’, adding that it should not however be forgotten ‘that in the past many books and papers aimed at disseminating racial hatred adopted the external form of “scientific” books or studies’: N. Lerner, *The International Convention on the Elimination of All Forms of Racial Discrimination* (Alphen aan den Rijn: Sijthoff and Noordoff, 1980), p. 49.

<sup>117</sup> In which case, one may note the reaction of CERD to the case of the ‘Danish Cartoons’: A/61/18, paragraph 248: there is a critical element in the Committee’s reference to refusal to initiate court proceedings ‘including the case of the publication of some cartoons associating Islam with terrorism.’

religious,<sup>118</sup> inter-cultural,<sup>119</sup> between governments and ethnic or indigenous groups,<sup>120</sup> and governments and religious groups<sup>121</sup> - is also worthy of emulation in the delicate context of defamation of religions.

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<sup>118</sup> Concluding observations on the Holy See, CERD/C/304/Add.89, paragraph 6.

<sup>119</sup> CERD/C/GUY/CO/14, paragraph 22.

<sup>120</sup> Including for example in New Zealand, CERD/C/DEC/NZL/1, paragraph 7, and Canada, CERD/C/CAN/CO/18, paragraph 6.

<sup>121</sup> In concluding observations on Belgium, the Committee welcomed the election of a body representing Muslim communities with a view to maintaining and developing dialogue with public authorities, A/57/18, paragraph 46. In its observations on Germany, CERD/C/DEU/CO/18, paragraph 13, the Committee welcomed ‘the establishment of the Islam Conference, as a forum in which representatives of ... Muslim communities living in Germany meet with representatives of German authorities with the aim of establishing continuous dialogue to address Islamophobic tendencies and discuss relevant policy responses.’

### *10. Document de conférence par Abdelfattah Amor*

#### **Considérations sur le paragraphe 3 de l'article 19 du Pacte international relatif aux droits civils et politiques**

Après avoir énoncé dans son paragraphe 2 que :

"Toute personne a droit à la liberté d'expression" et que "ce droit comprend la liberté de rechercher, de recevoir et de répandre des informations et des idées de toute espèce, sans considération de frontières, sous une forme orale, écrite, imprimée ou artistique, ou par tout autre moyen de son choix"

l'article 19 du pacte international relatif aux droits civils et politiques dispose dans son paragraphe 3 que :

"L'exercice des libertés prévues au paragraphe 2 du présent article comporte des devoirs spéciaux et des responsabilités spéciales. Il peut, en conséquence, être soumis à certaines restrictions qui doivent, toutefois, être expressément fixées par la loi et qui sont nécessaires :

- a) au respect des droits et de la réputation d'autrui
- b) à la sauvegarde de la sécurité nationale, de l'ordre public, de la santé ou de la moralité publiques"

L'importance de ce paragraphe 3 de l'article 19 est indiscutable, tellement elle détermine le sens et la portée des libertés énoncées à son paragraphe 2. La question n'a pas échappé aux auteurs du Pacte. Les débats furent serrés à cet égard. Au-delà des termes de ce débat, c'était la conception même des libertés prévues au paragraphe 2 qui était en jeu. La question cardinale était celle de savoir si la liberté d'expression pouvait être absolue et à défaut quelles restrictions pourrait elle subir sans que sa substance en soit altérée. Ce type d'interrogations n'est pas nouveau. Depuis bien longtemps les législations internes qui reconnaissent la liberté d'expression l'encadrent par des garde-fous et lui apportent des restrictions et des limitations. En droit international la variété et l'étendue des formules traduisent les mêmes préoccupations de manière manifeste on la tente. La charte africaine des droits de l'homme et des peuples renvoie l'exercice de la liberté d'expression au cadre fixé par les lois et règlements (Art 10). Sans plus de précision. La situation se présente différemment dans la convention européenne de sauvegarde des droits de l'homme et dans la convention américaine de San José.

Dans le Pacte international relatif aux droits civils et politiques, les restrictions à certains droits et libertés sont prévues mais pas toujours exactement dans les mêmes termes. Le paragraphe 3 de l'article 12 relatif à la liberté de circulation prévoit la possibilité de restrictions à condition qu'elles soient prévues par la loi d'abord, qu'elles soient ensuite nécessaires pour protéger la sécurité nationale, l'ordre public, la santé et la moralité publiques ou les droits et libertés d'autrui et qu'elles soient, enfin, compatibles avec les autres droits reconnus dans le Pacte. Le paragraphe 3 de l'article 18 relatif à la liberté de religion ou de conviction procède de manière plus restrictive en mettant en relief le caractère exceptionnel des restrictions par l'emploi de la forme négative: "ne peut faire l'objet que des seules restrictions prévues...".

En ce qui concerne la liberté de réunion, la marge des restrictions est encore plus limitée. Aux termes de l'article 21, seules les restrictions imposées conformément à la loi sont

acceptables. Elles doivent être nécessaires dans une société démocratique. Elles doivent être imposées dans l'intérêt de la sécurité nationale.... Légalité, nécessité, intérêt se conjuguent, ainsi, avec le caractère démocratique de la société. Le paragraphe 2 de l'article 22 procède de la même manière. S'agissant de l'article 25 portant sur les questions électorales, il interdit de manière générale les restrictions déraisonnables. L'article 26 relatif à légalité et à la non discrimination, parce que procédant d'une logique parallèle, affirme que "la loi doit interdire toute discrimination".

En réalité la lecture de l'article 19 paragraphe 3 ne peut se faire abstraction faite des autres dispositions du Pacte. L'objet spécifique d'une disposition n'engendre pas une rupture par rapport à l'ensemble. A cet égard, les liens entre l'article 19 et l'article 20 ne peuvent raisonnablement être dissociés tellement il est vrai que la légitimité des mesures prises au titre de l'article 19 paragraphe 3 se trouve renforcée par l'article 20. Celui-ci tout en pouvant se suffire à lui-même, puisque la loi est appelée à procéder par interdiction et non par des restrictions, constitue le prolongement logique du paragraphe 3 de l'article 19 dont les termes, faut-il le préciser, restent par ailleurs, source d'incertitudes pouvant conduire à des interprétations insuffisamment concordantes et parfois même franchement contradictoires, fonctions des conjonctures et des contextes. C'est dire que tout ou presque peut être sujet à controverses : devoirs spéciaux, responsabilités spéciales ; possibilité de certaines restrictions, rôle de la loi, notion de nécessité, respect des droits et réputation d'autrui, sécurité nationale, ordre public, santé publique, moralité publique. Au total tout reste à interpréter et il ne semble pas y avoir d'interprétation générale ou absolue.

Le postulat de départ du paragraphe 3 de l'article 19 est que "l'exercice des libertés prévues au paragraphe 2 ... comporte des devoirs spéciaux et des responsabilités spéciales". Que peut-on entendre par devoirs spéciaux, responsabilités spéciales ? Devoirs et responsabilité de qui ? Définis par qui ?

La notion de devoir indique ce à quoi on est obligé par la loi, par la morale ou la conscience. Il arrive que des textes internationaux retiennent ce terme. C'est ainsi que le préambule du Pacte rappelle que l'individu a des devoirs envers autrui et envers la collectivité à laquelle il appartient. Le paragraphe 1er de l'article 29 de la déclaration universelle des droits de l'homme dispose que l'individu a des devoirs envers la communauté dans laquelle seul le libre et plein développement de sa personnalité est possible". L'on peut penser que la notion de devoir comporte une connotation plutôt méta-juridique et morale. La morale de Kant n'est-elle pas une morale du devoir et non du bonheur. Les auteurs du Pacte auraient pu recourir à la notion d'obligation dont la connotation juridique est plus affirmée. Mais rien ne permet d'affirmer que la notion de devoir exclut toute possibilité de contrainte juridique. C'est dire que les interprétations quant à la portée du devoir peuvent diverger sans que il y ait, pour autant, dénaturation. En réalité l'examen de la construction du paragraphe 3 de l'article 19 incite à reconnaître plutôt le caractère contraignant de la notion de devoir. Les restrictions auxquelles la liberté d'expression peut être soumise trouvent précisément leur fondement dans le devoir. Après avoir posé le postulat selon lequel l'exercice de la liberté d'expression comporte des devoirs, le paragraphe 3 de l'article 19 en tire les conséquences en disposant explicitement qu' "il peut, en conséquence, être soumis à certaines restrictions. On ne voit pas comment des conséquences juridiques pourraient être tirées de ce qui ne serait pas juridique. C'est dire, en définitive que les Etats peuvent difficilement se soustraire à la définition et à la portée d'une notion qui ne peut, à notre sens, être simplement renvoyée aux domaines de la morale, fût-elle effectivement collective ou à la conscience

individuelle fût-elle effectivement aigue. La notion de responsabilité peut appeler à des remarques proches de celles formulées au sujet de la notion de devoir.

Elle indique l'obligation générale de répondre de ses actes. En matière civile, elle signifie l'obligation qu'à une personne de réparer le préjudice qu'elle a causé à autrui par ses actes, soit qu'elle n'ait pas exécuté un contrat ou l'ait exécuté en retard, soit qu'elle ait causé un dommage par un acte fautif accompli avec ou sans intention de nuire. En matière pénale, il s'agit de l'obligation de répondre de ses actes délictueux et de subir la peine qui leur est attachée par la loi.

La responsabilité peut être individuelle ou collective. Le paragraphe 3 de l'article 19 vise l'exercice individuel de la liberté d'expression. Aucune interprétation logique ou utile se situant dans le cadre du Pacte ne peut aboutir à des conclusions contraires. Les devoirs et les responsabilités pèsent sur les individus exerçant leur liberté d'expression. La responsabilité dont le champ recouvre celui du devoir est une responsabilité d'ordre juridique même si certains pourraient être tentés de la réduire à une simple responsabilité morale. Bien des arguments en faveur de l'une ou de l'autre thèse peuvent être développés dans le cadre de l'interprétation. Il nous semble que les Etats ne peuvent se soustraire à l'obligation de définir les devoirs et d'établir les responsabilités en matière de liberté d'expression, compte dûment tenu des dispositions du paragraphe 2 de l'article 19.

Les devoirs et les responsabilités dont il s'agit sont de nature spéciale : des devoirs spéciaux, des responsabilités spéciales. On sort, ici, du domaine des devoirs généraux et des responsabilités générales pesant sur tous. Il y a à cet égard des devoirs spéciaux et des responsabilités spéciales qui viennent s'ajouter ou plutôt se superposer aux devoirs généraux et responsabilités générales. L'exercice de la liberté d'expression semble ainsi réaliser la notion de citoyenneté telle que la conçoit Jean Jacques Rousseau. Les devoirs spéciaux et les responsabilités spéciales n'ont pas à être supposées. Ils doivent être établis et définis ou en d'autres termes délimités par rapport à la normalité des situations. Ils doivent être appropriés à l'objet et au but qu'ils entendent servir, à savoir la liberté d'expression. On remarquera, enfin, que le Comité des droits de l'honneur n'a pas pris sur lui de définir le sens et la portée des devoirs spéciaux et des responsabilités spéciales tellement les interprétations peuvent être, à cet égard, réversibles. On comprendra dès lors, que son observation générale n° 10, portant sur l'article 19 adoptée en 1983, lors de la 19<sup>ème</sup> session, se limite à paraphraser l'article 19 sans s'aventurer dans les méandres des interprétations. Une prudence qui peut sembler, aujourd'hui, excessive.

Il y a lieu de souligner de nouveau que les restrictions prévues au paragraphe 3 de l'article 19 sont saisie en tant que conséquences de l'exercice de libertés énoncées au paragraphe 2 du même article. Le raisonnement est, ici, déductif. Il exprime la nécessité logique d'un jugement qui résulte d'un autre jugement.

L'énoncé conduit à une suite. Le raisonnement par de l'énoncé pour aboutir à ce qu'il implique logiquement, à sa conséquence logique. C'est dire que le niveau du raisonnement s'établit entre la cause –l'énoncé- et la conséquence. Cela revient à dire qu'il ne peut y avoir de conséquences juridiques –les restrictions- que dans la mesure où l'énoncé lui-même est considéré de nature juridique. Cela nous conduit à confirmer le caractère juridique des devoirs spéciaux et des responsabilités spéciales fondant les restrictions légales et naturellement juridiques. Dès lors il ne peut y avoir de restrictions si les devoirs et responsabilités étaient relégués à un niveau infra-juridique. Le paragraphe 3 de l'article 19 entretient à cet égard l'ambivalence puisqu'il se limite à établir une faculté de restriction et non une obligation de restriction.

Le paragraphe 3 de l'article 19 énonce, de manière explicite que l'exercice des libertés prévues au paragraphe 2 peut être soumis à certaines restrictions. A priori, il s'agit bien d'une possibilité, d'une faculté laissée aux Etats qui disposent, à cet égard d'une latitude de décision. La question ne se pose pas en termes de probabilité et encore moins d'éventualité. Les Etats sont en mesure, s'ils estiment cela approprié d'édicter des restrictions. C'est dire qu'un Etat qui décide de ne pas édicter de restrictions fait à priori un usage correct du paragraphe 3 de l'article 19. De ce point de vue il y a une différence radicale avec la formulation de l'article 20 qui impose aux Etats des obligations de faire, d'interdire. La propagande en faveur de la guerre est interdite par la loi. L'appel à la haine nationale..... est interdit par la loi.

L'interprétation, ainsi exposée, peut être discutée et confrontée à une autre interprétation dont les axes pourraient être les suivants :

- D'abord si l'on part de l'idée selon laquelle les devoirs spéciaux et les responsabilités spéciales prévues à l'article 19 paragraphe 3 ont un contenu juridique, cela devrait conduire à considérer que l'Etat est invité, conséquemment, à édicter des restrictions. Il ne s'agira plus alors d'une possibilité laissée à l'Etat mais d'une invitation à faire qui, sans pouvoir s'élever au niveau de l'obligation, n'en est pas moins une orientation voire même une directive engagement les Etats.
- Ensuite, si l'Etat, parce que disposant a priori d'une faculté n'est pas tenu d'édicter des restrictions de manière immédiate, il reste tenu, lorsque les droits d'autrui, l'ordre public ou d'autres considérations pertinentes sont en cause, de prendre les mesures restrictives nécessaires. Sans cela sa responsabilité pourrait être engagée sur le plan interne et au moins évoquée sur le plan international.
- Enfin, la pratique générale des Etats confirme l'idée selon laquelle la possibilité de restrictions prévues au paragraphe 3 de l'article 19 est plutôt considérée comme une obligation que le droit international engage et présuppose et que la pacification de la vie des sociétés impose.

Il reste que, sur le plan juridique, le débat reste ouvert, d'autant plus que les restrictions peuvent être passagères, ou non appliquées ou appliquées de manière épisodique ou même tombées en désuétude. Les conjonctures et les données propres à chaque Etat peuvent expliquer bien des choses et faire en sorte que la portée du paragraphe 3 de l'article 19 soit à géométrie variable. Décidément la flexibilité du droit n'est pas une vaine expression !

Quoiqu'il en soit les restrictions ne peuvent être générales ni nombreuses. Il doit s'agir non pas de restrictions, mais de certaines restrictions. C'est dire leur caractère exceptionnel. Elles doivent être spécifiques et proportionnées à l'objet qui a conduit à leur édicton et ne peuvent remettre en cause la liberté d'expression elle-même. Il s'agit de restrictions d'exercice, d'aménagement et non d'une réconceptualisation de la liberté d'expression et encore moins de sa mise en cause. Les restrictions doivent être prévues par la loi et expressément fixées par elle. Le renvoi que fait le paragraphe 3 de l'article 19 à la loi doit être analysé comme une garantie que celle-ci offrirait aux libertés prévues au paragraphe 2 du même article. La loi serait de ce point de vue l'expression de la volonté générale édictée par le peuple ou ses représentants élus. Elle ne saurait mal faire. Les règlements édictés par le pouvoir exécutif ne peuvent établir des restrictions ou renforcer les restrictions édictées par la loi. L'article 19 disqualifie, en matière, les règlements et se démarque de l'article 10 de la charte africaines des droits de l'homme et des peuples qui énonce que la liberté d'expression s'exerce dans le cadre des lois et des règlements

prévus à cet effet. Donc l'article 19 n'autorise que les restrictions législatives, sans se soucier, par ailleurs, du caractère organique ou ordinaire la loi. Mais la question qui pourrait se poser tiendrait au caractère civil ou pénal de la loi. Les divergences d'interprétation peuvent réapparaître, à cet égard, étant par ailleurs rappelé que la loi s'analyse en loi de contrainte.

Il semble évident que la responsabilité civile, dans le cadre du régime général de responsabilité ou dans le cadre du régime particulier de la liberté d'expression ne peut être écartée. La question cardinale tient au caractère pénal de la loi et il y a lieu de penser à cet égard qu'il ne peut pas y avoir des restrictions non assorties de sanctions pénales qui concernent au moins une partie des restrictions, celle concernant par exemple les droits d'autrui, la sécurité nationale ou l'ordre public.

La loi peut à cet égard édicter des sanctions spécifiques tout comme elle peut renvoyer au régime pénal général. En tout état de cause, l'Etat est tenu de justifier les restrictions et les conditions de son application, comme cela sera démontré ultérieurement.

Le paragraphe 3 de l'article 19 ne confie pas à la loi la mission de prévoir ou de déterminer les restrictions mais plutôt de les fixer expressément.

L'emploi du terme "fixées" peut étonner, à moins qu'il s'agisse d'une traduction approximative. Il évoque des questions d'ordre fiscal ou de prix et peut même rappeler la doctrine fixiste qui exclut la variabilité et l'évolution. Le verbe fixer indique ce qui est stable et permanent, constant. Bien qu'équivoque, la fixation dont il s'agit concerne des questions de droit qui ne peuvent être réglées de manière définitive au point d'exclure toute possibilité d'évolution.

Ce que les auteurs du paragraphe considéré semblent avoir voulu dire c'est plutôt établir et déterminer clairement, de manière formelle et d'ailleurs l'adverbe "expressément" le confirme. Il s'agit donc d'inviter la loi à être précise, claire et explicite de manière à éviter les malentendus, les équivoques et les approximations. C'est dire que la loi, tout en disposant de manière générale, doit procéder par identification et qualification précises des restrictions. Il doit en être notamment ainsi lorsqu'il s'agit de questions pénales, en application du principe de la légalité des peines et des infractions. Les lois de restrictions doivent en outre être motivées par la nécessité.

Les restrictions ne peuvent pas être édictées dans "l'intérêt de" ou "en vue de", mais plutôt sur la base de la nécessité. Le paragraphe 3 de l'article 19 vise les restrictions "qui sont nécessaires". Ce qui est nécessaire, c'est ce dont on a absolument besoin, ce qui est indispensable. On pourrait dire et sans verser dans le nécessarisme de Spinoza que ce qui est nécessaire, c'est finalement ce qui est inévitable. C'est dire, au total, qu'il ne peut y avoir de restrictions que celles imposées par la nécessité. L'article 19 paragraphe 3 n'accepte que les restrictions nécessaires d'une part au respect des droits et de la réputation d'autrui et d'autre part à la sauvegarde de la sécurité nationale, de l'ordre public, de la santé ou de la moralité publique. Force est de souligner que toutes ces notions justifiées par la nécessité ne sont pas d'interprétation aisée. Les droits d'autrui peuvent être conçus comme des droits collectifs ou plus précisément qui concernent des groupes voire l'ensemble de la communauté. Cependant une interprétation raisonnable devrait permettre de dire qu'il s'agit de droits individuels, d'individus concrets et identifiables qui entendent préserver des droits personnels, directs, certains et immédiats.

S'agissant de la réputation d'autrui, sa consistance peut être variable et ses contours flous. Elle est fonction de ce qui peut être ramené à la perception sociale, réelle ou supposée, dans un



contexte donné et à un moment déterminé de l'histoire d'une société. La subjectivité qui l'entoure la rend d'une sensibilité parfois extrême ou d'une insensibilité sans fin. Il est normal, dans ces conditions, que les droits internes, même lorsqu'ils entendent s'inscrire strictement dans le cadre du paragraphe 2 de l'article 19, ne s'expriment pas de la même manière, se dissociant parfois au point de s'opposer. Le respect de la réputation d'autrui peut ainsi conduire à des perceptions variables à portées variables.

S'agissant de la sécurité nationale à sauvegarder, elle aussi, pose des problèmes d'interprétation en relation avec l'histoire des Etats, leurs données propres, les menaces réelles ou supposées auxquelles ils sont confrontés. On ne s'étonnera pas, dès lors, de relever que les appréciations, à cet égard, changent en fonction de l'émetteur, du récepteur, de la victime ou de l'observateur. Prétendre saisir juridiquement et de manière uniforme la sécurité nationale relèverait d'une ambition excessive, d'un rêve ou même d'une certaine utopie.

En ce qui concerne d'ordre public les appréciations ne sont pas fondamentalement différentes. L'on peut, bien évidemment, retenir de l'ordre public une conception administrative qui le ramène à la sécurité publique, la tranquillité publique et la salubrité publique. Le problème d'interprétation n'est pas pour autant résolu parce qu'en définitive, on définit un concept difficilement saisissable par des concepts qui ne le sont pas moins. A vrai dire, la notion d'ordre public est une notion fonctionnelle qui n'a pas à proprement parler d'essence. On peut établir la liste des actes qui, dans chaque Etat sont considérés comme relevant de l'ordre public, mais on ne peut à coup sûr, de manière uniforme, dire ce qu'est l'ordre public. En conséquence, les listes des actes relevant de l'ordre public varient d'un Etat à un autre, en fonction de ses traditions propres, de ses données propres et des buts et objectifs dont il poursuit la réalisation à un moment donné de son histoire. Peut être qu'une recherche approfondie permettrait de saisir, pour l'ensemble des Etats, le noyau dur de l'ordre public, ses aspects reconnaissables partout. Mais cette tâche pourrait s'avérer téméraire, notamment à une période où les préoccupations tenant au terrorisme ou à ce qui est qualifié comme tel, ont tendance à prévaloir sur les considérations tenant aux droits de l'homme et ce malgré les efforts tentés par l'ONU et notamment par le Conseil de Sécurité avec le concours du Comité contre le terrorisme. Tout comme la sécurité nationale, l'ordre public comporte à cet égard bien des aléas susceptibles de lui donner de l'extension au secours de laquelle le paragraphe 3 de l'article 19 peut être mis à contribution. C'est dire au total que le droit est condamné à la flexibilité, à la multiplicité des interprétations y compris téléologiques.

Relativement à la santé publique, si le terrain juridique est plutôt solide, il n'empêche pas les glissements et ne met à l'abri des outrages. Il en est ainsi, notamment, lorsque la santé publique est conçue de manière extensive pouvant aller jusqu'à compromettre ou limiter certaines recherches ou expérimentations biomédicales. Malgré l'encadrement des politiques de santé publique par l'OMS et la conclusion de certaines conventions internationales, les restrictions à la liberté d'expression en matière de santé publique restent exposées à des dérives au secours desquelles le paragraphe 3 de l'article 19 peut être appelé à contribution. Pour ce qui est enfin de la moralité publique, c'est d'une véritable boîte de Pandore qu'il s'agit. L'histoire et l'actualité témoignent de la diversité des morales publiques tirées – ou imputées- aux coutumes et traditions, aux philosophes et religions, aux attitudes et aux comportements. Que ne limiterait-on pas au nom de la morale publique ! C'est, certainement, dans ce domaine que les appréciations des Etats, des sociétés et des individus sont les plus divergentes. Dès lors, restreindre les libertés prévues

au paragraphe 2 de l'article 19 peut aller trop loin en vertu de l'article 19 lui-même en son paragraphe 3, même si les conceptions de l'ordre moral n'ont plus tellement cours.

Cela revient à dire, au total, que le paragraphe 3 de l'article 19 n'est pas aussi restrictif qu'on le croit. Ce texte vaut moins par lui-même que par l'usage qu'on en fait. Or cet usage, ne peut être que variable et il appartient, notamment, au Comité des droits de l'homme de le contrôler, d'en juger de sa compatibilité avec le Pacte. Ce contrôle semble être plutôt rigoureux dans l'ensemble. Des illustrations, à cet égard, peuvent être utiles. Leur choix est nécessairement subjectif. Les illustrations n'en traduisent pas moins les grandes tendances qui ont marqué le travail du Comité tant au niveau de sa jurisprudence au titre du protocole facultatif qu'au niveau de ses observations finales et de ses observations générales.

La jurisprudence du Comité témoigne de nombreuses affaires où les questions de restrictions à la liberté d'expression sont posées.

Dans l'affaire n° 1487/2006 Ahmed et Abdol-Hamid contre Danemark portant sur le problème des caricatures du prophète Mohamed et de l'Islam, les auteurs se plaignaient de violations du Pacte du fait qu'ils n'avaient pas de recours utile contre les responsables de l'incitation à la haine contre les musulmans. De leur avis, cela donnait licence aux danois non musulmans d'exercer une discrimination et de tenir d'autres propos diffamatoires contre les musulmans et les arabes dans l'Etat partie. Le Comité n'a pas pu se prononcer sur le fond de l'affaire au motif que celle-ci était irrecevable pour non épuisement des recours internes.

Dans l'affaire n° 909/2000 Kankanamge contre Sri-Lanka, l'auteur, journaliste, avait été mis en accusation à plusieurs reprises au motif qu'il aurait diffamé les hauts responsables de l'Etat. Ces mises en accusation sont directement imputables à l'exercice du droit à la liberté d'expression. Le Comité, tenant compte de la profession de l'auteur et des circonstances de l'espèce qui ont fait que l'auteur se trouve placé dans une situation d'incertitude et d'intimidation lesquelles ont, un effet très dissuasif restreignant indûment l'exercice de son droit à la liberté d'expression, a conclu à une violation de l'article 19 du Pacte.

Dans une autre affaire - n° 920/2000 Lovell contre Australie- l'auteur a publié des documents auxquels il a été fait référence dans une procédure judiciaire en violation de la loi sur l'entrave à la justice. Il a été condamné à une amende. Il estime que cette condamnation constituait une violation de son droit à la liberté d'expression. Le Comité, après avoir relevé que l'entrave à la justice était prévue par la loi en vue de protéger le droit à la vie privée d'une partie à un procès, ou l'intégrité de la Cour ou l'ordre public et après avoir analysé les faits de l'espèce, avait conclu que la condamnation de l'auteur pour entrave à la justice a représenté une restriction à la liberté d'expression autorisée par le paragraphe 3 de l'article 19 du Pacte et qu'il y a pas eu violation du paragraphe 2 de cet article.

L'affaire n° 926/2000 Shin contre République de Corée est encore plus intéressante parce qu'elle rappelle clairement les obligations de l'Etat en matière de liberté d'expression et elle précise, notamment que l'Etat doit justifier les restrictions qu'il fixe à la liberté d'expression. Dans cette affaire le Comité note "que le tableau peint par l'auteur relève à l'évidence du champ d'application du droit à la liberté d'expression protégé par le paragraphe 2 de l'article 19" ; il rappelle que cette disposition mentionne spécifiquement les idées répandues "sous une forme ... artistique". Il ajoute que "même si l'atteinte portée au droit à la liberté d'expression de l'auteur par la confiscation de son tableau et sa condamnation pour un délit criminel a été effectuée d'une manière conforme à la loi, le Comité fait observer que l'Etat partie doit apporter la preuve de la

nécessité des mesures en question au regard de l'une des fins spécifiques du paragraphe 3 de l'article 19...".

"Le Comité note que, dans ses lettres, l'Etat partie ne cherche pas à préciser celles des fins en question qui sont applicables, sans parler de la nécessité d'y répondre en l'espèce ; on peut toutefois relever que les juridictions supérieures de l'Etat partie ont invoqué la sécurité nationale pour justifier la confiscation du tableau et la condamnation de l'auteur. Mais, comme le Comité l'a toujours demandé, l'Etat partie doit démontrer de manière spécifique la nature précise de la menace que la conduite de l'auteur représente pour l'une quelconque des fins spécifiques, ainsi que la raison pour laquelle la saisie du tableau et la condamnation de l'auteur étaient nécessaires. Faute d'une telle justification, le Comité conclura à une violation du paragraphe 2 de l'article 19... Par conséquent, en l'absence de justification spécifique démontrant pourquoi les mesures prises étaient nécessaires en l'espèce pour telle ou telle fin, le Comité conclut à une violation du droit de l'auteur à la liberté d'expression à la suite de la confiscation de son tableau et de sa condamnation".

Enfin dans l'affaire Svetik contre Belarus n°927/2000, les mêmes principes ont été rappelés. L'auteur a fait l'objet d'une sanction administrative au motif qu'il avait appelé à boycotter des élections au Belarus où le vote n'est pas obligatoire. Il estime la sanction injustifiée au motif qu'en lançant son appel au boycott il n'avait fait qu'exprimer son opinion. L'Etat partie s'était limité à indiquer que la condamnation était conforme à la loi. Le Comité a relevé que les lois du Belarus protègent contre les intimidations, et les coercitions s'agissant des élections, ce qui légitime les restrictions à la liberté d'expression afin d'assurer les droits d'autrui. Mais le Comité fait la distinction entre l'intimidation et la coercition d'une part et l'encouragement au boycott des élections d'autre part. "Le Comité note que le vote n'était pas obligatoire dans l'Etat partie concerné et que la déclaration signée par l'auteur était sans incidence sur la possibilité des électeurs de décider librement de prendre ou non part à l'élection en question. Le Comité conclut que, dans les circonstances de l'affaire, la restriction de la liberté d'expression ne serait pas légitimement un des motifs énumérés au paragraphe 3 de l'article 19 du Pacte et que les droits garantis à l'auteur par le paragraphe 2 de l'article 19 du Pacte ont été violés".

Dans les observations finales qu'il formule à la suite de l'examen des rapports des Etats, le Comité des droits de l'homme appelle souvent au respect de l'article 19. Dans ses observations finales sur le rapport de la Tunisie, il appelle, notamment à l'établissement d'un "juste équilibre entre la protection de la réputation d'une personne et la liberté d'expression" (CCPR/C/TUN/CO/5 du 23 avril 2008). Dans ses observations finales sur l'Algérie il indique que l'Etat partie devrait garantir l'exercice de la liberté de la presse et la protection des journalistes conformément à l'article 19 du Pacte "(CCPR/C/DZA/CO/3 du 12 décembre 2007). Relativement aux observations finales sur le Costa Rica, il est indiqué que le Comité est "préoccupé par les restrictions imposées, dans la loi, à l'exercice des activités de journalistes... telles que les dispositions qui protègent l'honneur des fonctionnaires et des personnalités publiques ainsi que les dispositions qui qualifient de délits de calomnies et d'injures commis par voie de presse même s'il note que ces délits sont punis d'une amende seulement". Le Comité estime, en conséquence, que l'Etat partie devrait prendre des mesures propres à garantir la liberté d'expression dans les conditions prévues à l'article 19 du Pacte" (CCPR/C/CRI/CO/5 du 16 novembre 2007).

Se basant explicitement sur les articles 18, 20 et 26 du pacte et implicitement sur l'article 19, le Comité a exprimé sa préoccupation, dans les observations finales sur l'Autriche, tenant à

"la persistance de propos racistes et xénophobes visant les musulmans, les juifs et les minorités ethniques dans les discours politiques et les médias ainsi que sur Internet". Il recommande, en conséquence, à l'Etat partie de "combattre vigoureusement toute apologie de la haine raciale ou religieuse, y compris les discours politiques appelant à la haine..." (CCPR/C/AUT/CO/4 du 15 novembre 2007).

Dans plusieurs de ses observations générales, le Comité traite directement ou indirectement de la liberté d'expression et des restrictions qu'elle peut subir. Il est vrai que l'observation générale n° 10, trop succincte et qui mérite d'être revue, ne procède pas à une analyse approfondie de l'article 19. L'observation n° 11 relative à l'article 20 estime que les interdictions prévues à l'article 20 "sont tout à fait compatibles avec le droit à la liberté d'expression prévu à l'article 19 dont l'exercice entraîne des responsabilités et des devoirs spéciaux".

Dans l'observation n° 22 portant sur l'article 18 le Comité souligne que "les restrictions ne doivent être appliquées qu'aux fins pour lesquelles elles ont été prescrites et doivent être en rapport direct avec l'objectif spécifique qui les inspire et proportionnelles à celui-ci".

Relativement à la question de la morale visée tant par les articles 18 et 19 que par d'autres articles du Pacte, le Comité fait observer que la conception de la morale découle de nombreuses traditions sociales, philosophiques ou religieuses. En conséquence "les restrictions...pour protéger la morale doivent être fondées sur des principes qui ne procèdent pas d'une tradition unique". Dans l'observation générale n°27, le Comité précise que "les mesures restrictives doivent être conformes au principe de la proportionnalité ; elles doivent constituer le moyen le moins perturbateur parmi ceux qui pourraient permettre d'obtenir le résultat recherché et elles doivent être proportionnées à l'intérêt à protéger".

## *11. Document de conférence par Doudou Diène*

### **LIBERTE D'EXPRESSION ET NON-INCITATION A LA HAINE RACIALE ET RELIGIEUSE**

L'enjeu central du Séminaire est double : à la fois promouvoir la liberté d'expression et explorer, dans le contexte politique et idéologique actuel, les voies et moyens juridiques pour en faire respecter la limitation principale : la non incitation à la haine nationale, raciale et religieuse.

Cet exercice requiert la prise en compte des tendances lourdes les plus significatives dans le contexte actuel qui s'articulent autour des questions suivantes.

#### **A. LA RESILIENCE ET LA RECRUESCENCE DU RACISME, DE LA DISCRIMINATION RACIALE, ET DE LA XENOPHOBIE**

L'analyse des principales plates-formes politiques qui incitent à la discrimination raciale ou l'encouragent, confirment l'existence des tendances lourdes suivantes: la banalisation du racisme, de la discrimination raciale et de la xénophobie par leur instrumentalisation politique; la prégnance de plates-formes politiques racistes de partis et mouvements d'extrême droite dans les programmes de partis démocratiques, notamment en ce qui concerne le traitement des questions relatives à l'immigration, à l'asile, à la question de l'étranger et au terrorisme non seulement comme un enjeu sécuritaire mais surtout comme une menace à l'identité nationale; et enfin la légitimation intellectuelle croissante de ces plates-formes, qui se traduit notamment par le nombre croissant de publications dites scientifiques ou littéraires qui, sous couvert de la défense de l'identité et de la sécurité nationales, développent des théories et des concepts explicatifs marqués par la lecture ethnique ou raciale des problèmes sociaux, économiques et politiques.

La «légitimation démocratique» croissante de ces plates-formes politiques est inextricablement liée à la résurgence d'actes qui incitent à la haine raciale, en dépit de l'existence, dans la plupart des législations nationales, de dispositions visant à réprimer de tels actes. De plus en plus souvent, ces plates-formes, qui explicitement propagent la haine par un discours d'exclusion et d'hostilité, dépeignent les restrictions imposées à l'incitation à la haine et à la discrimination raciales comme des violations de la liberté d'opinion et d'expression.

La prégnance de ces plates-formes dans les programmes politiques des partis démocratiques s'explique notamment par l'absence de l'expression d'une volonté politique forte pour les combattre. Elle s'explique également par la participation et la représentation limitées, parfois inexistantes, des minorités ethniques, culturelles et religieuses au processus décisionnel dans la vie politique, culturelle et économique de leurs sociétés, en perpétuant ainsi deux expressions centrales de la discrimination dont elles sont victimes: l'invisibilité et le silence. Il est donc particulièrement significatif, dans le cadre de la multiculturalisation de toutes les sociétés, de concevoir l'intégration non comme un refus de la diversité et une crispation identitaire mais comme un processus dialectique de connaissance réciproque et d'interactions entre les

différentes communautés. Dans cette optique, les responsables des partis politiques doivent promouvoir la participation au processus décisionnel des groupes qui sont exposés à la discrimination raciale, à la xénophobie et à l'intolérance ainsi que leur représentation au sein des gouvernements, des partis, des parlements et de la société civile dans son ensemble, eu égard au concours que ces groupes peuvent apporter à la lutte contre la discrimination dans la vie politique et sociale.

## **B. INCITATION A LA HAINE RACIALE ET RELIGIEUSE**

De nombreuses études et rapports, notamment d'organisations de défense des droits de l'homme et d'organes et mécanismes des Nations Unies soulignent une augmentation sans précédent des actes incitant à la haine raciale, ethnique ou religieuse. Ces actes constituent une importante barrière dans la promotion et la protection des droits de l'homme. Dans tous les continents, des communautés vulnérables – les minorités en particulier – ont été victimes des discours et écrits, diffusés dans le domaine public, appelant à l'intolérance et à la discrimination et aboutissant, dans certains cas, à la violence physique et psychologique. Malgré la prohibition claire et absolue de ce type d'actions par les instruments internationaux des droits de l'homme, plusieurs États membres n'ont pas encore élaboré de législation ni établi des institutions pour les combattre.

La recrudescence d'actes incitant à la haine raciale, ethnique ou religieuse est directement liée à trois facteurs de base. La banalisation du racisme et de la xénophobie, particulièrement par son instrumentalisation politique et prégnance dans les plates-formes de partis démocratiques, a créé un contexte profondément négatif, marqué par l'intolérance, l'indifférence, la connivence sinon l'acceptation du racisme, qui a créé les conditions éthiques, psychologiques et politiques qui ont directement contribué à la montée de l'incitation à la haine raciale et religieuse. En outre, le contexte idéologique est marqué par l'émergence d'une rhétorique basée sur la notion d'un conflit de civilisations et de religions, notamment reflétée dans la rhétorique de certaines élites politiques, intellectuelles et médiatiques. Sur le plan juridique, l'impact de ces tendances a favorisé l'apparition d'une lecture hiérarchisée, antagoniste et non dialectique des libertés fondamentales, la non-reconnaissance de la complémentarité, des équilibres et des limitations établis méticuleusement par les instruments internationaux pertinents, notamment le Pacte international relatif aux droits civils et politiques et la Convention internationale sur l'élimination de toutes les formes de discrimination raciale. Le principal défi se trouve actuellement dans la définition du seuil à partir duquel la liberté d'expression peut être légitimement limitée pour que l'intégrité des victimes soit protégée.

## **C. INTOLERANCE RELIGIEUSE**

La recrudescence du racisme et la montée de l'intolérance religieuse doivent être liées à un facteur majeur du contexte idéologique actuel : l'amalgame entre les facteurs de race, de culture et de religion. Sur le plan idéologique, le concept manichéen d'un choc des civilisations et des religions est de plus en plus présent dans le mode de pensée et la rhétorique des élites politiques, intellectuelles et médiatiques. Le concept de conflit de civilisations, constitue le nouveau front des théoriciens de la guerre froide. La rhétorique du conflit des civilisations s'appuie, dans tous

les travaux de ses théoriciens, sur l'amalgame délibéré des facteurs de race, de culture et de religion. Par sa prégnance et son influence insidieuse mais profonde, cette nouvelle idéologie est en train de devenir non seulement une grille de lecture du monde pour un nombre croissant d'hommes politiques et de dirigeants de médias influents mais également un nouveau paradigme pour le monde intellectuel et universitaire. Son efficacité idéologique s'articule autour de l'instrumentalisation intellectuelle de la défense de l'identité et de la sécurité nationales, et du combat contre le terrorisme.

Le traitement privilégié de ces questions, inspiré par le paradigme manichéen de la guerre froide légitime deux objectifs principaux: la promotion d'un libéralisme réduit à sa seule dimension matérialiste, l'hostilité et la suspicion du fait religieux et spirituel caricaturé comme antinomique au progrès et à la liberté, et la lecture idéologique, sélective et hiérarchique de droits de l'homme et de libertés fondamentales. C'est dans ce contexte que s'inscrivent certaines manifestations graves de la recrudescence du racisme et de la xénophobie: le succès électoral des plates-formes racistes et xénophobes marquées par l'amalgame entre race, culture et religion, et la stratégie d'entrisme des promoteurs de ces plates-formes dans les institutions démocratiques, la montée de la violence raciste, l'expression croissante du racisme des élites, le recyclage intellectuel et médiatique des concepts fondateurs des préjugés historiques, et la lecture ethnique de l'immigration et son traitement exclusivement sécuritaire et non sur la base du respect des droits de l'homme.

Dans ce contexte, la manifestation la plus grave à l'heure actuelle est constituée par la montée de l'islamophobie et l'aggravation de la situation des minorités arabes et musulmanes dans le monde, notamment à la suite des événements du 11 septembre 2001. Trois développements principaux attestent de cette gravité: l'association essentialiste de l'islam à la violence et au terrorisme association nourrie par des constructions intellectuelles, instrumentalisée par la rhétorique politique, amplifiée par l'image médiatique dominante et qui structure en profondeur l'imaginaire populaire –; la volonté d'imposer l'invisibilité à ses expressions extérieures et le silence à ses pratiquants notamment par les obstacles à la construction de mosquées ou de minarets et par la répression des expressions et des signes culturels et vestimentaires de l'islam; le traitement fondamentalement sécuritaire de contrôle et de surveillance des lieux de culte et de culture, voire de l'enseignement même de l'islam, et donc par la recrudescence de politiques et l'adoption de mesures législatives, administratives et policières stigmatisant ou criminalisant les minorités nationales ou étrangères de religion musulmane. La suspicion la plus emblématique à l'égard de l'islam s'exprime ainsi, en France, dans la politique de formation par l'Institut catholique de Paris d'imams agréés par la République.

L'antisémitisme, forme historique la plus ancienne de discrimination, non seulement reste profondément prégnant dans ses terres d'élection, notamment dans la nouvelle Europe, mais gagne insidieusement d'autres régions du monde tant par des déclarations d'hommes politiques que par des publications véhiculant ses stéréotypes traditionnels. La négation ou le doute sur la réalité de l'extermination des Juifs d'Europe et de l'Holocauste pendant la Seconde Guerre mondiale constitue le dernier avatar de cet antisémitisme des profondeurs. Il est important de souligner également la gravité d'un antisémitisme silencieux mais profond, dont l'expression est masquée et refoulée par des considérations et des stratégies d'image ou de pouvoir. La lecture

raciale et non politique du conflit israélo-palestinien et la situation particulièrement grave du peuple palestinien nourrissent dans certaines communautés des formes et des manifestations nouvelles d'antisémitisme. L'amalgame entre l'État d'Israël et les communautés juives de la Diaspora ou vivant en Israël, l'essentialisation du peuple juif et la non-reconnaissance de sa diversité culturelle, religieuse et politique sont des sources profondes de cette nouvelle forme d'antisémitisme.

La christianophobie se développe de manière inquiétante sous la double pulsion de l'association du christianisme à l'Occident, découlant tant de leur proximité historique aux époques de la colonisation européenne que de la rhétorique actuelle, politique et intellectuelle sur l'identité chrétienne de l'Europe, notamment manifestée contre l'entrée de la Turquie dans l'Union européenne, ainsi que du prosélytisme intolérant de certains mouvements évangéliques, notamment en Amérique du Sud, en Afrique et en Asie.

L'hindouisme et le sikhisme sont également victimes dans certaines régions du monde de discriminations historiques et du refus moderne de la diversité. Les traditions religieuses et spirituelles des peuples autochtones et des communautés de descendants d'Africains souffrent encore des discriminations et des diabolisations historiques émanant d'autres religions.

#### **D. RESISTANCE AU MULTICULTURALISME**

La résistance idéologique, culturelle et politique au multiculturalisme ethnique, culturel ou religieux constitue l'une des sources profondes de la recrudescence du racisme et de la xénophobie. La stratégie intellectuelle et culturelle contre le racisme doit s'articuler autour de l'acceptation et de la promotion d'un multiculturalisme démocratique, égalitaire et interactif.

Les sociétés multiculturelles sont le résultat des processus historiques de longue durée qui ont mis en contact des peuples, cultures et religions. Le mécanisme d'organisation de ces sociétés s'est, en général, articulé autour d'un facteur de reconnaissance, de rassemblement et d'unité: l'identité nationale. La corrélation entre les notions d'identité et de nation se traduit par une notion politique et juridique, l'État-nation, qui a structuré la plupart des sociétés modernes.

La problématique centrale de la plupart des sociétés modernes réside dans la contradiction profonde entre l'État-nation, expression d'une identité nationale exclusive, et le processus dynamique de multiculturalisation de ces sociétés.

La question de la discrimination s'articule dans le processus multiculturel autour de deux dimensions majeures. La dimension la plus visible – politique, économique et sociale – est caractérisée par l'adéquation entre la carte de la marginalisation politique, économique et sociale et la carte ethnique, raciale ou religieuse d'une société multiculturelle. Mais, en profondeur, l'enjeu identitaire du processus multiculturel est illustré par le combat contre la discrimination sur les terrains de la mémoire et du système de valeurs, où s'expriment les résistances les plus fortes au multiculturalisme. L'invisibilité et le silence, notamment par la répression culturelle ou politique de leur liberté d'expression, constituent les caractéristiques communes de groupes et communautés victimes de discrimination. Cette dimension, souvent ignorée par les responsables politiques, est révélatrice de la nécessité que la stratégie juridique pour combattre le racisme



s'accompagne d'une stratégie éthique et culturelle permettant d'identifier et combattre les sources profondes des manifestations anciennes et nouvelles de racisme et de xénophobie et de promouvoir le lien entre le combat contre le racisme avec la construction, dans la durée, d'un multiculturalisme égalitaire, démocratique et interactif dont l'exercice de la liberté d'expression et le respect de la diversité constituent la condition du vivre ensemble des communautés concernées.

En d'autres termes, pour combattre le racisme en profondeur et dans la durée, l'équation culturelle que toute société multiculturelle est appelée à résoudre est de promouvoir le lien entre la reconnaissance, la protection et le respect des spécificités ethniques, religieuses et culturelles avec la promotion et la reconnaissance de valeurs communes universelles qui résultent des interactions et des inter fécondations entre ces spécificités. Dans la perspective d'un multiculturalisme démocratique, égalitaire et interactif, l'universalité doit être une valeur de rencontre et l'expression ultime des interactions et des inter fécondations entre les identités singulières des différentes composantes d'une société multiculturelle et le produit de la dynamique de leur vivre ensemble. La tension identitaire, inhérente à la diversité culturelle, devient ainsi le principe moteur d'une unité nationale intégrant et préservant la diversité et la vitalité de ses composantes. L'universalité doit donc être repensée dans la dynamique d'une société multiculturelle. Le plein exercice de la liberté d'expression et la non incitation à la haine raciale et religieuse en sont les conditions nécessaires.

L'une des principales manifestations du refus de la diversité comme fondement du racisme et de la discrimination se trouve dans le traitement des questions liées aux réfugiés, demandeurs d'asile et migrants. Ces groupes se trouvent constamment dans une situation de vulnérabilité extrême qui s'est notamment détériorée après les événements du 11 septembre 2001. Du fait de la surdétermination du combat contre le terrorisme, le traitement de l'immigré, du réfugié et du demandeur d'asile est marqué par la suspicion de dangerosité potentielle, la méfiance et l'hostilité culturelle et religieuse. Ces sentiments donnent naissance à la généralisation de politiques qui tendent à restreindre les droits économiques et sociaux de ces catégories et mettent en évidence la régression du respect des droits de l'homme résultant de la primauté politique de la sécurité sur le droit.

La tendance dominante des politiques d'intégration s'articule autour de stratégies ou conditionnalités d'assimilation négatrices de la diversité ethnique, culturelle et religieuse de ces groupes. Ces politiques sont souvent le reflet de vieux préjugés historiques sur l'arriération culturelle et religieuse des sociétés d'origine de ces immigrants, demandeurs d'asile ou étrangers. Le refus de la diversité et le non respect des droits culturels de ces communautés s'appuient sur diverses restrictions de leur liberté d'expression et nourrissent par l'incitation à la haine raciale ou religieuse les plates-formes racistes et xénophobes.

## **E. DE LA DIFFAMATION DES RELIGIONS A LA NON INCITATION A LA HAINE RACIALE ET RELIGIEUSE**

La caractéristique fondamentale commune de toutes les manifestations de diffamation des religions et de toutes les phobies et discriminations religieuses est l'incitation à la haine raciale et religieuse. Il est donc essentiel de recentrer sur les normes les plus appropriées des instruments internationaux sur les droits de l'homme. En particulier, des provisions relatives à l'incitation à la haine nationale, raciale ou religieuse font déjà partie des principaux instruments internationaux dont la grande majorité de pays sont signataires. La non incitation à la haine raciale et religieuse est une norme d'ores et déjà intégrée dans la grande majorité de législations nationales de toutes les régions.

En vue de promouvoir ce changement de paradigme, permettant de traduire la diffamation des religions d'une notion sociologique à un concept juridique de droit de l'homme à savoir l'incitation à la haine raciale et religieuse, il est nécessaire de revisiter les dispositions contenues dans les instruments internationaux, régionaux et domestiques.

### **Instruments internationaux**

Les principaux instruments internationaux des droits de l'homme contiennent des dispositions spécifiques pour interdire l'incitation à la haine nationale, raciale ou religieuse. L'Article 7 de la Déclaration Universelle des Droits de l'Homme, d'une manière plus générale, fait référence aux « provocations contre la discrimination », en affirmant que « Tous ont droit à une protection égale contre toute discrimination qui violerait la présente Déclaration et contre toute provocation à une telle discrimination »

Le Pacte international relatif aux droits civils et politiques adresse de manière plus concrète l'interdépendance entre la liberté d'expression et d'autres droits fondamentaux. Des limitations au droit à la liberté d'expression sont introduites dans les Articles 19 et 20 du Pacte. L'Article 19 fait référence à « des devoirs spéciaux et des responsabilités spéciales » liées à l'exercice de la liberté d'expression, qui peut être soumise à certaines restrictions pour garantir le « respect des droits ou de la réputation d'autrui » et la « sauvegarde de la sécurité nationale, de l'ordre public, de la santé ou de la moralité publiques ». Cependant, selon la formulation du Pacte, ces restrictions ne sont pas obligatoires. En outre, pour éviter une application arbitraire des limitations, elles doivent être « expressément fixées par la loi ».

Il convient de faire référence à l'Observation Générale n° 10 du Comité des Droits de l'Homme relative à l'Article 19 du Pacte. Dans son observation, le Comité réitère expressément que « lorsqu'un État partie impose certaines restrictions à l'exercice de la liberté d'expression, celles-ci ne peuvent en aucun cas porter atteinte au droit lui-même. Le paragraphe 3 énonce certaines conditions, et c'est seulement à ces conditions que des restrictions peuvent être imposées: 1) elles doivent être 'fixées par la loi'; 2) elles ne peuvent être ordonnées qu'à l'une des fins précisées aux alinéas a et b du paragraphe 3; 3) l'Etat partie doit justifier qu'elles sont

nécessaires à la réalisation d'une de ces fins ». En affirmant que les restrictions à l'exercice de la liberté d'expression ne peuvent pas porter atteinte au droit lui-même, le Comité des droits de l'homme éclaircit la notion de complémentarité – et non pas de rivalité – entre les différents droits énumérés dans le Pacte.

La question de l'incitation à la haine nationale, raciale et religieuse est traitée de manière explicite dans l'Article 20 du Pacte, qui contient davantage de limitations au droit à la liberté d'expression. Les limitations établies par l'Article 20 du Pacte ne sont pas facultatives, mais obligatoires pour tous les signataires. Selon cet Article, « Toute appel à la haine nationale, raciale ou religieuse qui constitue une incitation à la discrimination, à l'hostilité ou à la violence est interdit par la loi ».

En ce qui concerne l'interprétation de l'Article 20 du Pacte, il convient de faire référence au rapport conjoint présenté par le Rapporteur Spécial sur les formes contemporaines de racisme avec la Rapporteuse spéciale sur la liberté de religion et conviction à la deuxième session du Conseil des droits de l'homme. Le rapport fait référence à la rareté de la jurisprudence relative à l'article 20 du Pacte, réitérant que l'interprétation de celui-ci, plus particulièrement la définition du seuil à partir duquel il s'applique, seraient particulièrement bienvenues et permettraient d'éviter toute confusion et toute conclusion simpliste quant à sa mise en œuvre. À cet égard, les deux Rapport spéciaux ont invité instamment le Comité des droits de l'homme à envisager d'adopter des règles complémentaires sur les relations réciproques entre liberté d'expression, liberté de religion et non-discrimination, notamment sous la forme d'une observation générale sur l'article 20.

Le Comité des droits de l'homme a indiqué dans sa réponse que même si des commentaires généraux sur d'autres dispositions du Pacte sont déjà programmés, le Comité examinera dès que possible la recommandation des Rapporteurs spéciaux.

En plus des limitations à l'exercice de la liberté d'expressions introduites dans le Pacte, il convient aussi de faire référence à la Convention international sur l'élimination de toutes les formes de discrimination raciale. Selon l'article 4 de la Convention, les Etats parties s'engagent « à déclarer délits punissables par la loi toute diffusion d'idées fondées sur la supériorité ou la haine raciale, toute incitation à la discrimination raciale, ainsi que tous actes de violence, ou provocation à de tels actes, dirigés contre toute race ou tout groupe de personnes d'une autre couleur ou d'une autre origine ethnique, de même que toute assistance apportée à des activités racistes, y compris leur financement ».

En ce qui concerne l'interprétation de l'article 4 de la Convention, il convient de rappeler l'observation générale n° 15 du Comité pour l'élimination de la discrimination raciale, dans laquelle le Comité a exprimé son avis que « l'interdiction de la diffusion de toute idée fondée sur la supériorité ou la haine raciale est compatible avec le droit à la liberté d'opinion et d'expression, tel qu'il est énoncé dans la Déclaration universelle des droits de l'homme (art. 19) et rappelé à l'alinéa viii) du paragraphe d) de l'article 5 de la Convention internationale sur l'élimination de toutes les formes de discrimination raciale. Le rapport entre ce droit et l'article 4 est indiqué dans

l'article lui-même. Son exercice comporte pour tout citoyen les devoirs et les responsabilités spéciales précisés au paragraphe 2 de l'article 29 de la Déclaration universelle, notamment l'interdiction de diffuser des idées racistes, qui revêt une importance particulière. Le Comité appelle en outre l'attention des États parties sur l'article 20 du Pacte international relatif aux droits civils et politiques, qui stipule que tout appel à la haine nationale, raciale ou religieuse qui constitue une incitation à la discrimination, à l'hostilité ou à la violence est interdit par la loi ».

### **Instruments régionaux**

Les systèmes régionaux de protection aux droits de l'homme ont aussi adopté des instruments qui établissent des limitations à l'exercice de la liberté d'expression.

La Convention Européenne des Droits de l'Homme, dans son article 10 sur la liberté d'expression, affirme qu'en vue des devoirs et des responsabilités qui comporte le droit à la liberté d'expression, celui-ci « peut être soumis à certaines formalités, conditions, restrictions ou sanctions prévues par la loi, qui constituent des mesures nécessaires, dans une société démocratique, [...] à la protection de la réputation ou des droits d'autrui [...] ». Cependant, la Convention Européenne ne contient pas de disposition équivalente à l'article 20 du Pacte international relatif aux droits civils et politiques à propos de l'incitation de la haine nationale, raciale ou religieuse. En outre, la Commission européenne contre le racisme et l'intolérance (ECRI), dans sa recommandation de politique générale n° 7 sur la législation nationale pour lutter contre le racisme et la discrimination raciale, recommande aux États-membres que la loi érige en infractions pénales

La Charte africaine des droits de l'homme et des peuples ne contient pas de référence directe à l'incitation à la haine nationale, raciale ou religieuse, mais affirme que « Les droits et les libertés de chaque personne s'exercent dans le respect du droit d'autrui, de la sécurité collective, de la morale et de l'intérêt commun. ». La Déclaration de Principes sur la Liberté d'Expression en Afrique, adopté par la Commission Africaines des Droits de l'Homme et des Peuples, ne fait référence qu'aux limitations de l'exercice de la liberté d'expression pour la protection de la réputation des autres.

En ce qui concerne le système interaméricain de protection aux droits de l'homme, la Convention Américaine relative aux droits de l'homme, reconnaît, dans son article 13, des limitations relatives au respect des droits ou à la réputation d'autrui. La Convention Américaine adresse directement la question de l'incitation à la haine dans le même article, en affirmant que « Sont interdits par la loi toute propagande en faveur de la guerre, tout appel à la haine nationale, raciale ou religieuse, qui constituent des incitations à la violence, ainsi que toute autre action illégale analogue contre toute personne ou tout groupe de personnes déterminées, fondée sur des considérations de race, de couleur, de religion, de langue ou d'origine nationale, ou sur tous autres motifs ».

## **Instruments domestiques**

En plus des instruments internationaux et régionaux mentionnés ci-dessus, il convient aussi de rappeler que la majorité des législations domestiques dans des pays de toutes les régions contiennent des dispositions qui protègent contre l'incitation à la haine nationale, raciale ou religieuse. Une analyse systématique des législations nationales, en particulier des Constitutions et des Codes Criminels, ne peut pas être entreprise dans les limites de la présente étude. Cependant, on peut noter que les dispositions domestiques relatives aux limitations à l'exercice de la liberté d'expression typifient plusieurs restrictions particulières. Dans le contexte européen, par exemple, la Commission de Venise a identifié cinq types de restrictions : blasphème, atteintes aux sentiments religieux et insultes aux doctrines ; trouble à l'exercice du culte et/ou de la liberté religieuse ; sacrilège envers un objet de culte ; incitation à la discrimination ou à la haine raciale. Des 47 pays européens analysés dans cette étude, 43 ont des dispositions relatives à l'incitation à la discrimination ou à la haine religieuse. Un grand nombre de pays dans d'autres régions du monde ont aussi des dispositions domestiques sur l'incitation à la haine nationale, raciale ou religieuse.

Une analyse plus profonde des législations nationales montrerait que, contrairement à la polarisation internationale à propos du phénomène de la diffamation des religions, il y a un grand consensus entre les Etats-membres sur l'acceptation de limitations à la liberté d'expression pour interdire l'incitation à la haine nationale, raciale et religieuse. En ramenant la discussion sur la diffamation des religions aux instruments des droits de l'homme, plus particulièrement aux provisions sur l'incitation à la haine nationale, raciale et religieuse, on trouvera une correspondance étroite avec des dispositions précises dans les systèmes juridiques domestiques de plusieurs Etats-membres

## **CONCLUSION**

La question de la liberté d'expression illustre un défi majeur des droits de l'homme : la vigilance juridique nécessaire pour éviter que la norme ne se transforme en dogme par une instrumentalisation politique visant à une hiérarchisation des droits fondamentaux selon le contexte idéologique. La réponse se trouve dans la capacité des organes et mécanismes collectifs compétents à précisément tenir compte du réel, du contexte politique et idéologique et apporter les clarifications, rappels et interprétations appropriés. La centralité de la liberté d'expression dans les débats politiques, idéologiques et religieux actuels, de nature à promouvoir ou handicaper la légitimité et le respect des droits de l'homme, souligne l'urgence de procéder aux trois exercices auxquelles toute norme doit être soumise : souligner sa signification profonde, rappeler sa complémentarité avec les autres droits fondamentaux, clarifier ses limites et restrictions.

## *12. Document de conférence par Patrice Meyer-Bisch*

### *Les obligations liées à l'exercice des libertés d'expression et de conviction au regard du respect de la diversité des ressources culturelles*

**Résumé.** Les obligations liées à l'exercice des libertés de pensée, de conscience et de religion peuvent aujourd'hui être interprétées à la lumière du respect de la diversité des ressources culturelles et des droits culturels, compris au sein de l'indivisibilité des droits de l'homme. Le respect mutuel entre les personnes, incluant la possibilité d'exercer une critique mutuelle, est le premier fondement de la paix : c'est aussi une condition essentielle de la coopération et donc du développement. Sous prétexte de défense d'une foi ou d'une religion, des incitations à la discrimination, à la haine et à la violence sont formulées, tantôt à l'égard des personnes appartenant à des communautés religieuses, tantôt à l'égard des personnes n'y appartenant pas. Face à ce constat, il est essentiel de définir le contenu culturel des libertés et de préciser les obligations de « respect critique » à l'égard de la diversité des religions et des convictions, patrimoine commun et ressources culturelles pour chacun.

**Abstract.** *The obligations concerning the exercise of the right to freedom of thought, conscience and religion are to be interpreted in the light of their due respect for cultural rights - according to the principle of Human Rights' indivisibility - and for the diversity of cultural resources. Mutual respect between individuals, including the possibility to exercise mutual criticism, is fundamental for peace; it is also an essential condition to achieve cooperation and, therefore, development. Under the pretence of defending a faith or an ideology, incitements to discrimination, hatred and violence are directed either at persons belonging to religious communities or at those not belonging to any. To confront them, it is essential to define the cultural content of fundamental freedoms and to specify the obligation of "critical respect" towards the diversity of religions and convictions that constitute human's common heritage and cultural resource.*

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## Enjeu

### 1. *Les dangers de l'anomie*

Tous les hommes ont besoin de se référer à des personnes, des œuvres et des traditions porteuses de savoirs qu'ils admirent et qui développent leur confiance. *L'admiration est la force de la paix* (« C'est dans l'esprit des hommes que naissent les défenses de la paix... » selon l'acte constitutif de l'UNESCO). Une société qui ne respecte pas la diversité des patrimoines et traditions est culturellement pauvre, car ses ressources culturelles sont faibles. Elle tend vers l'anomie, la perte de sens. Les patrimoines vivants, dans toute leur complexité sont des ressources culturelles, qui permettent aux personnes et aux peuples de construire le lien social et politique sur des valeurs. Aussi n'est-il pas légitime que la liberté d'expression serve à tout dénigrer sans que les responsabilités correspondantes ne soient définies. Une société relativiste ou anomique est exposée à la violence de ceux – acteurs étatiques et non étatiques - qui prétendent avoir le monopole du sens et de la vérité.

### 2. *Le tournant politique : la prise en compte de la diversité culturelle*

L'adoption en septembre 2001 de la *Déclaration universelle de l'UNESCO sur la diversité culturelle*, puis en 2005 de la *Convention sur la protection et la promotion de la diversité des expressions culturelles*, représente symboliquement le grand virage politique actuel. Alors que la diversité culturelle était considérée comme un frein au développement, un obstacle à la modernité et donc au progrès, à la science et à la démocratie, elle est aujourd'hui de plus en plus comprise comme une ressource dans chacun de ces domaines et pour la paix. Alors que le culturel arrivait en dernier dans les préoccupations internationales, force est de constater que le respect de la diversité culturelle, plus exactement de la « protection mutuelle » des droits de l'homme et de la diversité culturelle, est l'enjeu majeur de la paix, comme du développement.<sup>1</sup> Si la diversité culturelle est considérée comme un patrimoine mondial dont sont redevables tous les hommes et toutes les nations, cela signifie que son respect entre de plein droit dans la définition de l' « ordre public », et donc de la définition de la portée des libertés.

### 3. *Nul ne peut être protégé de la critique*

Le respect de la diversité culturelle permet de préciser que l'ordre public démocratique est garanti par l'acceptation de la critique mutuelle respectueuse. Toute personne, toute communauté, toute tradition, a besoin de critique pour développer sa propre excellence dans le respect de la diversité. C'est pourquoi l'exercice des libertés d'opinion et d'expression, de pensée, de conscience et de conviction, ne sont pas concurrentes les unes par rapport aux autres mais constituent en réalité une seule et même liberté déployée dans la diversité de ses facettes, pour autant que les obligations de respect soient définies et observées. La liberté de critique, en tant qu'expression à la fois de ces convictions et de la diversité des opinions, est précieuse et fondamentale, dans la mesure où elle comporte des exigences de respect des savoirs en jeu, autrement dit – et c'est ce qui est nouveau – dans la mesure où elle est interprétée avec l'exigence du respect des droits culturels et de la protection de la diversité culturelle. Lorsque l'exercice d'une liberté est facteur de trouble, c'est qu'elle est interprétée isolément et non selon

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<sup>1</sup> J'ai développé ce point, à l'occasion de la journée de débat général du Comité des DECS, consacrée à l'article 15, (1) (a), le 9 mai 2008 dans : *Le droit de participer à la vie culturelle. Contenu et importance pour la réalisation de tous les droits de l'homme*. E/C.12/40/8

le principe de l'indivisibilité et de l'interdépendance<sup>2</sup>. La sécurité démocratique repose sur l'exercice, par tous, des libertés qui, si elles sont comprises comme interdépendantes, se définissent mutuellement.

#### 4. *Les fausses questions*

Il ne s'agit donc pas d'opposer une liberté contre une autre, ni une civilisation laïque contre celles qui seraient religieuses, et encore moins de se focaliser sur la défense d'une seule religion. L'objectif est d'**assurer une hospitalité mutuelle exigeante** dans le respect de tous les droits de l'homme et du principe de sauvegarde de la diversité culturelle, comme patrimoine commun de l'humanité. L'objectif est de lutter contre toutes les sortes d'amalgames utilisés comme prétextes à la discrimination, à l'humiliation et à l'appel à la violence, aussi bien par des acteurs étatiques que non étatiques.

#### 5. *Une vraie question, fondamentale : protéger l'excellence dans la communication des valeurs et des savoirs*

Du point de vue du droit pénal, il ne semble pas possible de définir d'autres bornes à l'exercice de la liberté d'opinion et d'expression que l'interdit de porter atteinte expressément aux droits et libertés d'autrui. Mais il faut trouver d'autres systèmes pour favoriser « l'expression pacifique des opinions » et éviter « le recours à des stéréotypes et à des clichés qui heurtent des sentiments religieux profondément ancrés »<sup>3</sup>. Il ne s'agit pas que de politesse. L'exercice pacifique des libertés d'opinion, d'expression et de critique est orienté vers l'échange et l'amélioration des savoirs, qu'il s'agisse de vérité dans les sciences, d'esthétique dans les arts, ou d'authenticité de la foi dans les religions. *Le meilleur accès possible à la science pour réfléchir en conscience*. C'est cette recherche de l'excellence, à travers toutes les différences, qui fait que chaque domaine culturel est un facteur essentiel de la paix. Cette quête commune demande un effort permanent et des mesures de protection de la part de tous les acteurs de la société, contre les désinformations, volontaires ou passives, qui résultent de la lutte entre des pouvoirs hostiles de fait à la spécificité du culturel dans le progrès social.

#### 6. *Le religieux au sein du culturel : facteur de paix*

Le religieux n'est pas un domaine à part au sein du culturel. Le problème de la définition de la portée des libertés civiles, confrontée aux exigences liées à la protection de la diversité culturelle, traverse tous les domaines culturels, depuis les arts jusqu'aux sciences en passant par les modes de vie. Mais le domaine religieux est, au sein du culturel, le plus ambitieux, car il propose un sens qui oriente toutes les dimensions de l'existence. Il a été dans l'histoire, et est toujours, un des tout premiers facteurs de paix, car il permet une compréhension du monde hospitalière et fraternelle, en harmonie avec l'environnement. Les communautés religieuses ont souvent été les seules à accueillir les pauvres, les pourchassés et les dissidents. Les religions répandues dans le monde, y compris celles qui sont plus locales, celles qui sont portées par des peuples

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<sup>2</sup> Voir le Rapport conjoint de la Rapporteuse spéciale sur la liberté de religion ou de conviction, Mme Asma Jahangir, et du Rapporteur spécial sur les formes contemporaines de racisme, de discrimination raciale, de xénophobie et de l'intolérance qui y est associée, M. Doudou Diène, conformément à la décision 1/107 du Conseil des droits de l'homme intitulée « Incitation à la haine raciale et religieuse et promotion de la tolérance », A/HRC/2/3 [cité ci-après rapport conjoint], §6.

<sup>3</sup> Rapport de la Rapporteuse spéciale sur la liberté de religion ou de conviction, Mme Asma Jahangir : *Promotion et protection de tous les droits de l'homme, civils, politiques, économiques, sociaux et culturels, y compris le droit au développement*, A/HRC/6/5, 20 juillet 2007, §38.



autochtones, sont porteuses de ce patrimoine en faveur du bien commun. Sans une telle valeur, dont les droits de l'homme sont en principe les garants, les sociétés sont en proie à un individualisme destructeur.

### *7. Le religieux au sein du culturel : potentiel de violence*

Cette fonction globalisante des traditions religieuses explique aussi que les pratiques peuvent être porteuses du pire comme du meilleur. Les atteintes à la liberté de religion et de conviction violent la dignité humaine en son intimité la plus secrète – et c'est pourquoi ce droit est indérogeable et ne souffre aucune limitation (art.18 PDCP). Les atteintes à la foi religieuse et à ses modes de transmission touchent la personne en son cœur, dans ce qu'elle estime de plus sacré, son héritage reçu, à honorer et à transmettre. C'est pourquoi bien des pouvoirs instrumentalisent sans vergogne ce potentiel de dévouement et de solidarité. C'est pourquoi aussi le désespoir engendré par la peur de cette violation, peut provoquer des réactions elles-mêmes discriminatoires et extrêmement violentes. Leur instrumentalisation peut aller jusqu'au bombardement de civils, à la torture, au massacre ou à l'attentat suicide.

### *8. L'enjeu crucial : le mépris des ressources culturelles*

Le culturel peut être compris comme ce qui relie par le sens les personnes entre elles ainsi que leurs différentes œuvres et activités. C'est pourquoi, il me paraît essentiel en un premier de mettre à jour le contenu culturel des libertés en jeu (1), pour indiquer comment la protection mutuelle de la diversité et des droits culturels permet de clarifier les questions disputées concernant les droits individuels et collectifs, les seuils d'interdits et la notion de « respect critique » (2) avant d'aborder la définition des échelles de gravité de la diffamation à l'égard des personnes et du mépris à l'égard des traditions religieuses, avec une typologie sommaire des obligations et sanctions correspondantes (3).

## ***Le contenu culturel des libertés***

### *9. Un manque de définition des libertés civiles*

Au moment de l'élaboration du Pacte relatif aux droits civils et politiques (ci-après PDCP), les libertés civiles ont été interprétées comme des règles purement formelles impliquant des obligations négatives de la part des Etats. C'est pourquoi, les premières observations générales du Comité des droits de l'homme sont extrêmement brèves, se contentant de s'en référer au droit interne à chaque Etat, en demandant cependant à ceux-ci de fournir des explications complémentaires.

- L'article 20 PDCP est en forme négative et renvoie par conséquent à toutes les libertés, non seulement celles qui sont contenues dans le PDCP (principalement art. 18 à 22 et 27), mais aussi, et en particulier, au droit à l'éducation (art. 13 et 14 du Pacte relatif aux droits économiques, sociaux et culturels - PDESC), et par extension, selon mon estimation, au droit de participer à la vie culturelle (art.15 PDESC). L'article 20 mentionne le principe de l'interdiction de « tout appel à la haine nationale, raciale ou religieuse... », en se référant à l'obligation formelle des Etats de l'inscrire dans la loi, sans que soit abordée la question d'une définition internationale de ces atteintes à la paix garantie par le respect de tous les

droits de l'homme.<sup>4</sup> Il y a lieu aujourd'hui de donner toute sa force à cet « interdit fondateur » (développé ci-dessous en 2.2).

- L'article 19 par.3 PDCP prévoit que l'exercice des libertés (au pluriel) d'expression « comporte des devoirs spéciaux et des responsabilités spéciales ». L'Observation générale 10<sup>5</sup> se contente de poser la question de la définition concrète de la portée de ce droit. Tout est dans l'interprétation de cet adjectif « spécial » qui désigne, selon nous, une responsabilité délicate face à la sensibilité, c'est-à-dire à l'enjeu crucial pour la paix, des questions culturelles.
- L'article 18 PDCP consacré à la liberté de pensée, de conscience et de religion est plus explicite, car son contenu culturel est ici clairement désigné : il ne distingue pas entre la conviction religieuse ou non religieuse ; il établit une continuité, le droit s'exerçant « individuellement ou en commun, tant en public qu'en privé » (par.1) ; il explicite une distinction capitale : la liberté d'avoir et d'adopter, est non dérogeable (par. 2) alors que la liberté de manifester doit s'inscrire dans un tissu social (par. 3).<sup>6</sup> Enfin le lien avec la liberté d'éducation est explicite (par. 4).

#### *10. Les libertés civiles ont un contenu culturel*

Les libertés d'opinion, d'expression, de pensée, de conscience et de religion, portent toutes sur des savoirs, sur leur création ou construction et sur leur échange. Leur contenu est donc culturel. Cette analyse de leur contenu commun, à la fois propre à chacun et susceptible d'être partagé, voire de fonder des communautés épistémiques organisées en vue du développement de ces savoirs, met en valeur l'interdépendance de ces libertés, en même temps que l'insuffisance d'une analyse formelle et strictement limitée à la sphère individuelle. Dans le domaine religieux, la nécessité de comprendre le lien entre ces déploiements des libertés intellectuelles est particulièrement important et sensible car il établit le « fil rouge des libertés entre l'intime et le public », et touche ainsi aux valeurs éthiques et culturelles qui fondent chaque communauté humaine et chaque Etat national<sup>7</sup>.

#### *11. Le contenu culturel de la non-discrimination*

Alors que le principe de non-discrimination impliquait une approche neutre, indifférente aux spécificités culturelles, il s'agit aujourd'hui de l'interpréter avec les obligations liées au respect du libre choix de son identité. Il implique alors une valorisation des spécificités, sous condition du respect de l'égalité. Le contenu culturel signifie ici la possibilité réelle de se référer à des savoirs et d'y contribuer, comme condition d'accès à la jouissance des droits universels. La diversité culturelle, condition de réalisation des droits culturels, est un enjeu à la fois propre au sujet (il peut choisir des références diverses et en changer) et à la société dans son ensemble. La

<sup>4</sup> L'observation générale n° 11 concernant l'article 20, publiée en 1983

<sup>5</sup> L'observation générale n° 10 concernant l'article 19, publiée également en 1983.

<sup>6</sup> L'observation générale n° 22 concernant l'article 18, publiée 10 ans après est ainsi beaucoup plus détaillée et utile sur la matière culturelle de cette liberté.

<sup>7</sup> Nous avons analysé les différentes libertés qui composent la liberté religieuse, entre libertés du *forum internum* et libertés du *forum externum*, dans : J. B. Marie, P. Meyer-Bisch (éds.) *Un nœud de libertés. Les seuils de la liberté de conscience dans le domaine religieux*, Genève, Zurich, Bâle, Bruxelles, 2005, Schulthess, Bruylant. Voir aussi, ci-dessous § 23.

diversité n'est pas seulement tolérée, voire ignorée, elle est une valeur à protéger, un capital de paix.

### *12. Les références culturelles dans l'espace politique*

« *Les individus veulent être libres de prendre part à la société sans avoir à se détacher des biens culturels qu'ils ont choisis. C'est une idée simple, mais profondément perturbatrice.* »<sup>8</sup> Pourquoi le Rapport du PNUD déclare-t-il que cette idée est perturbatrice ? Elle bat en brèche la prétention à la neutralité culturelle de l'Etat – ou au monoculturalisme national, ce qui revient au même. Cela signifie que l'exercice de la citoyenneté ne se réduit pas aux droits civils et sociaux, il implique une considération du respect de la diversité culturelle, condition de la réalisation des droits culturels de chacun. La crainte face au désordre que l'exercice des libertés peut entraîner, ou face à l'anomie, doit faire place à la valorisation *des responsabilités partagées à l'égard des savoirs* qui sont à la base du tissu social et de la paix. Les modernités plurielles, les modernités mixées<sup>9</sup>, se définissent par une confiance dans les capacités de développement de chaque personne, seule ou en commun, pour autant qu'elle ait accès aux meilleures ressources de savoirs.

### *Une clé pour les questions disputées*

#### *13. Les droits culturels sont une clé dans les questions disputées*

Les droits culturels<sup>10</sup> ont une fonction spécifique dans ces questions disputées. Ils garantissent à la fois les droits individuels et la nécessité de protéger les ressources communes nécessaires à leur exercice<sup>11</sup> : Ils déclinent les libertés pour chacun d'orienter, de vivre et d'exprimer son identité culturelle, tout en comprenant que ces libertés n'ont de sens que dans la mesure où les réserves de savoirs, les œuvres culturelles sont entretenues et valorisées : toutes les formes de savoirs, à commencer par les langues, les formes de traditions, religieuses, artisanales, scientifiques, les modes de vie et de communication, les objets matériels qui en sont les supports et les témoins (2.1). Ils ne tentent pas de définir une morale mais le seuil de toute morale par des « interdits fondateurs » qui sont, dans l'histoire, largement empruntés aux traditions religieuses (2.2). Loin d'opposer liberté de critique et liberté de conviction, ils permettent de penser les deux faces d'une seule et même liberté, celle qui s'exerce par la pratique mutuelle du « respect critique » (2.3).

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<sup>8</sup> PNUD, 2004 : *Rapport mondial sur le développement humain. La liberté culturelle dans un monde diversifié*, Paris, Economica, p.1.

<sup>9</sup> A. Touraine, *Un nouveau paradigme pour comprendre le monde d'aujourd'hui*, Paris, 2005, Fayard, p. 253 : « mais le plus important aujourd'hui est de reconnaître la diversité des combinaisons entre modernité et héritage culturel ou système politique qui existent dans le monde entier. » Voir aussi Jean-Claude Guillebaud : *Le commencement d'un monde. Vers une modernité métisse*, Paris, 2008, Seuil.

<sup>10</sup> Pour une clarification de la nature des droits culturels au sein du système des droits de l'homme, voir la *Déclaration de Fribourg* : [www.droitsculturels.org](http://www.droitsculturels.org)

<sup>11</sup> *Les droits culturels désignent les droits, libertés et responsabilités pour une personne, seule ou en commun, avec et pour autrui, de choisir et d'exprimer son identité, et d'accéder aux références culturelles, comme à autant de ressources qui sont nécessaires à son processus d'identification.* (définition à paraître dans le commentaire, article par article de la Déclaration de Fribourg sur les droits culturels). Ce sont les droits qui autorisent chaque personne, seule ou en commun, à développer ses capacités d'identification, de communication et de création. *Les droits culturels constituent les capacités de lier le sujet à d'autres grâce aux savoirs portés par des personnes et déposés dans des œuvres (choses et institutions) au sein de milieux dans lesquels il évolue.*

### *L'individuel et le collectif : vers une articulation logique ?*

#### *14. Le respect des libertés individuelles implique une protection de leurs ressources culturelles communes*

Il est difficile d'exercer les libertés classiques si les accès aux savoirs ne sont pas effectifs. La définition a été largement faite pour le droit à l'éducation, elle doit encore être développée pour le droit à l'information. Ces deux droits assurant le principe de la circulation des savoirs dans toute la société.

- Le droit à l'éducation demande à être protégé contre les falsifications volontaires et les amalgames qui entraînent des comportements discriminatoires et des appels à la haine et à la violence.
- Le droit à l'information est dans la même logique : il est nécessaire de préciser les caractéristiques d'une information « adéquate », c'est-à-dire d'une information qui permette aux personnes d'exercer leurs libertés, d'être à l'abri d'une « désinformation » systématique répandant les amalgames, la discrimination et la haine

#### *15. Le droit de chacun à la protection des patrimoines*

Un troisième droit est encore directement concerné. Les droits à l'éducation et à l'information sont étroitement liés au droit de participer à la vie culturelle, et en particulier à la disposition du parag.2 de l'art.15 PDESC : « Les mesures que les Etats Parties au présent Pacte prendront en vue d'assurer le plein exercice de ce droit devront comprendre celles qui sont nécessaires pour assurer le maintien, le développement et la diffusion de la science et de la culture ». Il s'agit du droit individuel d'accéder aux patrimoines culturels et d'y participer. Un patrimoine culturel constitue un ensemble de références aux dimensions multiples, matérielles et spirituelles, économiques et sociales qui constitue une unité de signification, dans la mesure où le culturel signifie une intégration du sens à travers les multiples dimensions de la vie humaine<sup>12</sup>. Une tradition religieuse peut, en ce sens être considérée comme un patrimoine vivant à protéger, pour la réalisation de la liberté individuelle de conviction et de religion des personnes qui s'y réfèrent ou pourront s'y référer.<sup>13</sup>

#### *16. Le respect, la protection et la réalisation des droits individuels impliquent le respect, la protection et le développement de biens collectifs.*

Il n'est pas pertinent de continuer à opposer les droits individuels et les droits collectifs, et il n'est ni éclairant, ni satisfaisant de se contenter d'un compromis entre les deux. La prise en compte des références culturelles, que les personnes reconnaissent comme des liens à d'autres et à des patrimoines, permet de poser une double affirmation.

<sup>12</sup> Le droit de participer aux patrimoines est reconnu, dans ses multiples dimensions, en tant que droit individuel d'accès dans la Convention du Conseil de l'Europe, la *Convention-cadre sur la valeur du patrimoine culturel pour la société* (No199, 27.10.2005), dite « *Convention de Faro* » actuellement ouverte à la signature.

<sup>13</sup> Au sens que la *Convention pour la sauvegarde du patrimoine culturel immatériel* de l'UNESCO, donne à ce patrimoine dit « immatériel », mieux désigné comme « patrimoine vivant ». Il est dommageable que, hormis la convention de Faro précitée, les instruments de protection des patrimoines ne soient, en général, pas déclinés en termes de droits individuels à participer à des objets communs.

- Le **sujet** d'un droit de l'homme est toujours la personne, sans quoi chacun risque d'être écrasé par des droits collectifs, par des groupes ou institutions, y compris des Etats qui conditionnent le respect des droits de l'homme à un intérêt collectif.
- L'exercice d'un droit de l'homme se définit toujours comme une participation à un **objet social commun** ; il suppose par conséquent un respect et des mesures de protection de cet objet : un savoir, une institution, une communauté, un patrimoine vivant, un patrimoine matériel.

Le **sujet** est toujours la personne et l'exercice de ses droits, libertés et responsabilités se développe généralement « en commun », par le partage et la participation à un **objet commun** : chaque référence culturelle étant un lieu et un moyen de communication. C'est pourquoi le sujet, chaque personne dans son individualité, exerçant ses libertés seul ou en commun, nécessite le respect et la protection des objets communs.<sup>14</sup>

#### *17. Le principe de la protection mutuelle*

Le principe de la protection mutuelle de la diversité culturelle et des droits de l'homme signifie que droits individuels et richesse des milieux divers se protègent mutuellement. Pour les droits culturels, comme pour les autres droits de l'homme, la protection mutuelle signifie dans toute politique démocratique:

- le respect des personnes comme titulaires de droits et bénéficiaires de prestations, mais aussi en tant qu'acteurs libres et responsables dans leur participation à l'intérêt général ;
- le respect, l'entretien et le développement des patrimoines, milieux et systèmes sociaux, sans lesquels les droits individuels n'ont pas de sens.

#### *18. Les « cultures » ne dialoguent pas, ce sont les personnes*

Cette perspective, centrée sur le droit des personnes et sur la protection des biens communs, a l'avantage de ne plus considérer les cultures comme des entités au-delà des personnes et capables de les inclure. Ce sont les personnes qui sont considérées au sein de milieux culturels vivants, à formes variables, mixtes et changeantes. *Les « cultures », comprises comme totalités homogènes, sont les leurres sociaux les plus dangereux*, sources de toutes les discriminations, ingrédients indispensables des guerres et de la permanence des pauvretés. Les « cultures » n'ont pas assez de consistance pour être « personnalisées » au point de parler de « dialogue des cultures » : seules les personnes peuvent dialoguer, avec leurs cultures mixées et bricolées. Seuls existent des milieux culturels composites (comme le sont les milieux écologiques), plus ou moins riches

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<sup>14</sup> L'expression est inspirée de la DUDH, a.17, sur le droit à la propriété : « Toute personne, aussi bien seule qu'en collectivité, a droit à la propriété ». L'expression « individuellement ou en commun » est aussi utilisée pour le droit à la liberté de pensée, de conscience et de religion, PDCP, a. 18 ; l'article 27 du même Pacte énonce que « les personnes appartenant à ces minorités ne peuvent être privées du droit d'avoir, en commun avec les autres membres de leur groupe, leur propre vie culturelle, de pratiquer et professer leur propre religion, ou d'employer leur propre langue ». L'observation générale n° 23 concernant cet article stipule que « bien que les droits consacrés à l'article 27 soient des droits individuels, leur respect dépend néanmoins de la mesure dans laquelle le groupe minoritaire maintient sa culture, sa langue ou sa religion. En conséquence les Etats devront également parfois prendre des mesures positives pour protéger l'identité des minorités... ». Suit une liste d'objets collectifs à protéger, ce qui n'est pas la même chose que la revendication de droits collectifs qui seraient au même niveau que les droits personnels.

d'œuvres culturelles auxquelles les personnes peuvent faire référence. Les milieux religieux n'échappent pas à cette constatation.

*19. Pour une typologie des objets des droits culturels à protéger : les œuvres culturelles*

Une œuvre est culturelle dès lors qu'elle ne se réduit pas à une production mais contribue à la communication, en tant que « porteuse d'identités, de valeurs et de sens » selon l'expression de la *Convention sur la protection et la promotion de la diversité des expressions culturelles*<sup>15</sup>. *Ce qui est culturel est ce qui relie par le sens, ce qui permet la circulation du sens*. Par « œuvres culturelles » ou « biens culturels », on peut entendre des savoirs (être, faire, transmettre) portés par des personnes, des choses ou des institutions (organisations ou communautés). La dignité est individuelle et ne peut en aucun cas être relativisée à quoique ce soit qui la mettrait en péril, mais elle est inconcevable sans ses modes de filiation, de transmission ; ses écoles, ses communautés, ses lieux de culte et de création, ses médias, ses musées ...

***Les « interdits fondateurs », seuils de la protection mutuelle***

*20. La protection mutuelle de la diversité et des droits culturels*

La *Déclaration universelle de l'UNESCO sur la diversité culturelle* a établi le lien entre diversité et droits culturels<sup>16</sup> et défini le principe de la protection mutuelle entre diversité culturelle et droits de l'homme, interdisant ainsi les dérives relativistes et l'enfermement communautaire<sup>17</sup>. L'obstacle majeur à la reconnaissance du respect de la diversité est en effet que toute diversité culturelle n'est pas bonne en soi. C'est le respect des droits de l'homme, indivisibles et interdépendants, qui permet la valorisation mutuelle de tout ce que les milieux culturels contiennent de richesse et d'interprétation de l'universel. C'est aussi le dialogue interculturel en faveur d'une meilleure compréhension de l'universalité qui permet d'identifier les pratiques qui, sous prétexte culturel, y compris religieux, sont contraires aux droits humains.

*21. Les « interdits fondateurs » : la base commune aux religions et aux droits de l'homme*

l'article 20 ne constitue pas, à proprement parler une restriction, mais la définition d'un interdit qui montre le sens des libertés pour l'épanouissement de la dignité, qui fonde l'interprétation de leur substance. L'interdit du meurtre est la base des religions comme des droits de l'homme, même si l'histoire a pu justifier un certain nombre de dérogations. C'est pourquoi, l'exercice d'une liberté qui couvrirait un appel au meurtre – ou ce qui peut conduire au meurtre : la haine et la violence – va à l'encontre de l'esprit des libertés. Une pratique religieuse qui produirait le même effet va à l'encontre de l'esprit religieux, de l'esprit qui relie, à un bien commun. Aux moins trois interdits sont directement concernés et sont les bases communes entre les fois religieuses et la foi humaniste universaliste :

<sup>15</sup> 18<sup>ème</sup> *considérant* : « considérant que les activités, biens et services culturels, ont une double nature, économique et culturelle, parce qu'ils sont porteurs d'identités, de valeurs et de sens... ».

<sup>16</sup> Article 5, et § 4 du Plan d'action : « Avancer dans la compréhension et la clarification du contenu des droits culturels, en tant que partie intégrante des droits de l'homme. »

<sup>17</sup> Premier principe de l'article 2. La Résolution 60/167 adoptée par l'Assemblée générale des Nations Unies, le 7 mars 2006, considère le lien de renforcement mutuel « entre le respect de la diversité culturelle et des droits culturels de tous » (§8).

- *l'interdit du meurtre*, y compris l'abandon d'une personne à la mort par manque de soin, de nourriture ou par isolement ;
- *l'interdit du mensonge*, compris comme déformation volontaire d'un savoir établi, par intention de nuire : cet interdit est celui qui concerne le plus notre sujet ; en termes positifs, il ne se traduit pas par le respect de la vérité, car nul ne peut prétendre posséder entièrement une vérité autre que factuelle, mais le respect de la recherche de la vérité ;
- *l'interdit du vol*, ou de la corruption, qui rend dérisoire le respect du bien commun et du bien d'autrui, et entraîne, directement ou indirectement le non respect de l'ensemble des droits de l'homme.

Les interdits fondateurs ne sont pas négociables, ils sont les seuils qui permettent le dialogue et la mise en commun des ressources culturelles pour délégitimer et combattre les pratiques meurtrières, mensongères et corruptrices qui sont à la base des violations des droits de l'homme. Mais la définition de ces seuils est plus ou moins élevée et peut servir à définir un niveau d'exigence de culture démocratique.

### ***Le « respect critique » : vers une articulation des libertés ?***

#### *22. Critique et conscience sont les deux faces de la même liberté*

Non seulement, il n'y a pas de conflit entre deux libertés selon le principe de l'indivisibilité et de l'interdépendance, mais libertés de conscience, de conviction et de religion déploient la même liberté de critique<sup>18</sup> : adhérer à une conviction signifie juger, et est synonyme d'exercer un jugement critique. *Science (dynamique, ouverte) et conscience ne sont pas séparables*. Adhésion et critique sont les deux faces du jugement en conscience. « Nulle contrainte en religion » signifie cela : une contrainte rendrait hypocrite l'acte de foi. On peut trouver dans toutes les grandes traditions religieuses, que plus un homme a de foi, plus il est critique, et jouit d'une liberté intérieure dans l'appréciation de ses manifestations.

#### *23. Conscience et manifestation sont nettement distinctes, mais liées*

Selon l'article 18 PDCP, tandis que la liberté de juger en conscience ne peut être atteinte ni limitée d'aucune façon, les manifestations, s'inscrivant dans un tissu social sont sujettes à limitation, non seulement dans le respect des libertés d'autrui (ce qui est une limitation positive), mais aussi en fonction de la sensibilité, du contexte, voire des faiblesses d'autrui (ce qui peut être une réelle limitation impliquant une retenue, voire une auto-censure pour ne pas provoquer ou blesser inutilement)<sup>19</sup>. Cette restriction ne peut cependant pas atteindre la substance de la liberté, elle en est la « politesse » (un usage « policé » ou citoyen : respectueux de son public). Il reste qu'un manque d'alimentation du *forum externum*, du fait de la censure ou simplement de la pauvreté provoque une asphyxie du *forum internum* : l'exerce des libertés internes et externes est interdépendant.

#### *24. Le « respect critique » : point crucial*

Il ne suffit pas de protéger l'individu si on ne porte pas aussi l'attention sur ses liens *appropriés*, les références culturelles qu'il reconnaît comme essentielles à son identité et à ses valeurs. Le respect des libertés du sujet suppose la considération des œuvres. La question est posée

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<sup>18</sup> Rapport conjoint, §41.

<sup>19</sup> A. Jahangir, §10.

aujourd'hui aussi bien dans le cas des « faussaires de l'histoire », ceux qui portent atteinte à la dignité de la mémoire, que dans le cas du « dénigrement » des religions. Il s'agit de protéger à la fois les libertés intellectuelles et la qualité des références aux œuvres culturelles. Cela signifie que l'accès à l'objet suppose une *discipline*. Chaque « objet culturel » - un savoir porté par une communauté, une tradition, un livre, une architecture - possède une cohérence qu'il convient d'apprendre à connaître, sans quoi ces objets sont inaccessibles ou non respectés. **Une liberté devient culturelle lorsqu'elle est cultivée, c'est-à-dire qu'elle a su maîtriser une discipline et son langage, quitte à s'en affranchir ensuite.** Sans recherche d'une vérité commune – celle du respect commun de la discipline partagée - les libertés des individus perdent leur sens et ne peuvent communiquer : elles sont abandonnées à l'arbitraire et à l'anarchie du relativisme culturel. Les savoirs acquis constituent un seuil d'intelligibilité commune : l'état d'une rationalité en chantier. Par « respect critique » ou « considération », nous entendons que l'attitude critique par rapport à un savoir, un patrimoine, une activité, une institution ou une tradition, n'est légitime que si elle se fonde sur le principe de la bonne foi dans la recherche du raisonnable.

### *25. La place de l'interprétation : critère de légitimité*

Le droit au « respect critique », non seulement permet et tolère, mais appelle la libre critique : la référence devient elle-même aveugle et liberticide si l'espace d'interprétation, de critique et d'adaptation n'est pas garanti et régulièrement occupé. Toute religion prône, d'une façon ou d'une autre, un lien avec une puissance qui dépasse le monde, tout en lui étant présente. Cela implique une humilité fondamentale exprimée de diverses façons : « nul ne possède la vérité entière », « nul homme ne peut être juge, car il y a un seul Juge », et bien d'autres formules qui constituent une éthique commune d'hospitalité, d'œcuménisme, qui n'enlève rien à la spécificité de chaque tradition. Les intégrismes et les fondamentalismes de toutes sortes, religieux ou athées, en se posant en juges, ignorent cette éthique commune et justifient ainsi les diverses discriminations.

### ***Vers une échelle de gravité des atteintes, des obligations et des sanctions***

#### *26. La diffamation et ses conséquences à l'égard des personnes*

Il n'y a donc aucune raison d'opérer une distinction de principe entre diffamation à l'égard des religions ou des croyants, et diffamation sous prétexte religieux à l'égard d'autres religions et croyants ou à l'égard de personnes considérées comme moins croyantes ou athées. Une diffamation est comprise ici comme l'acte de porter sciemment atteinte à l'honneur d'une personne. Il n'y a pas d'objection à penser qu'un acte diffamatoire puisse porter atteinte à l'honneur d'un groupe désigné par une caractéristique religieuse ou autre, car il s'agit toujours de personnes, mais à la condition que la désignation des personnes soit assez précise.

#### *27. Peut-on parler de diffamation à l'égard d'une tradition ?*

Mais il n'est pas évident d'appliquer cette notion à une œuvre culturelle, notamment à une tradition religieuse. Pour commencer, une « religion » est une notion beaucoup trop vague, car il y a une diversité de confessions et de communautés à l'intérieur d'une famille religieuse et aussi une variété de modes d'affiliation et de croyance. En outre, il est trop facile à un pouvoir religieux ou étatique de considérer une critique qui leur est adressée, comme une diffamation à l'égard de « la » religion. Une religion peut être définie comme une tradition porteuse de savoirs et de pratiques qui sont des références pouvant être essentielles pour des croyants, et importantes pour des non-croyants. Il faut alors nettement distinguer entre une atteinte au principe même de



la liberté de conviction qui serait une violation grave, et la critique d'une pratique. Cette dernière relève de la liberté d'expression et de conviction et n'a rien de spécifique.

### *28. Le mépris pour l'« égale dignité »*

Les cultures ne sont pas égales, puisqu'elles sont incomparables, mais on désigne par la notion d'« égale dignité », leur potentiel qu'il convient de respecter a priori, à savoir leur capacité à fournir aux personnes qui s'y réfèrent ou peuvent s'y référer, des ressources précieuses pour vivre leur dignité. Il en va ainsi des religions : les religions ne sont pas égales, car elles sont incomparables, tant leur diversité est grande. Mais elles constituent des patrimoines et traditions de références essentielles pour la conviction la plus intime de nombre de personnes. Si cette égale dignité est dénigrée et méprisée, c'est une atteinte indirecte, et grave, à la dignité des personnes. On peut comprendre cette violation des droits culturels dans la logique des atteintes à la mémoire. Des hommes et des femmes choisissent de donner leur vie pour protéger des œuvres ou pour les développer, non par fanatisme, mais par conviction et générosité pour la valeur intrinsèque de ces œuvres, à la fois héritage reçu grâce au don des morts, et héritage à transmettre pour les vivants à venir. Les religions universelles, comme celles des peuples autochtones, ainsi que nombre de traditions éthiques, témoignent de cet héritage qu'il serait criminel d'ignorer.

### *29. Le mépris pour des œuvres culturelles peut entraîner une violation indirecte des libertés*

« Le droit international relatif aux droits de l'homme notamment protège au premier chef les individus dans l'exercice de la liberté de religion et non pas les religions elles-mêmes »<sup>20</sup>. Mais les libertés individuelles sont abstraites si elles ne sont pas considérées dans les capacités de choix et d'accès à des ressources culturelles. C'est pourquoi nous pouvons définir des violations « au second chef », qui ne sont pas des violations de droits collectifs, car nous sommes au niveau des droits des personnes, mais une violation indirecte des droits des personnes par une atteinte à la qualité d'une ressource culturelle, notamment une tradition religieuse. Si la diffamation à l'égard des personnes est une violation directe de leur dignité, sous l'angle de leurs droits culturels (droits à choisir et vivre librement leur identité dans le respect d'autrui), le mépris affiché pour des œuvres culturelles, notamment des traditions religieuses, auxquelles des personnes entendent se référer comme des sources essentielles de leur identité, peut être considéré comme **une violation indirecte des droits culturels**, une diffamation indirecte des personnes. Celles-ci peuvent, en effet, être alors empêchées ou restreintes dans l'accès à leurs ressources culturelles et à leurs liens sociaux. Cependant, pour garder la distinction entre les deux niveaux, il peut être préférable de parler de **diffamation à l'égard des personnes et de mépris à l'égard des œuvres et patrimoines vivants**.

### *Les échelles de gravité*

#### *30. La nécessité d'une échelle : agir avant les violations directes*

Je ne peux donc pas partager, sur ce point, l'opinion de Mme Jahangir : « Le Rapporteur spécial pense donc que l'expression d'une opinion ne peut être interdite en vertu de l'article 20 que si elle est une incitation à commettre dans l'instant un acte de violence ou de discrimination contre un individu ou un groupe en particulier »<sup>21</sup>. L'expérience des génocides, des massacres liés à la purification ethnique, des pratiques de torture et des guerres sous prétexte de lutte contre le

<sup>20</sup> Rapport conjoint, §27.

<sup>21</sup> Ibid. §47.

terrorisme, des conflits entre communautés à forte référence religieuse, montre à l'envi qu'il faut agir en amont. Une échelle dans la gravité de l'interdit a l'avantage d'indiquer des « seuils d'alerte », ce que la Francophonie appelle l'« alerte précoce » et de répondre ainsi à une réduction des libertés de critique dans un espace public dégradé, de lutter contre la « banalité du mal », et d'indiquer ainsi l'objectif démocratique : la protection mutuelle de la diversité et des droits culturels.

### 31. Deux échelles de gravité

Il est essentiel cependant de définir des échelles de gravité afin que, par une clarification de la finalité publique de l'exercice des libertés (l'esprit des lois), on puisse privilégier la prévention sur la répression<sup>22</sup>. Nous sommes en face de deux types d'atteintes, l'une à l'égard des personnes entraînant des violations directes des droits de l'homme, l'autre à l'égard des patrimoines, entraînant des violations indirectes.

1. Violation directe du droit des personnes : incitation à la discrimination, à la haine et à la violence (trois niveaux de gravité) à l'égard de personnes ou de groupes de personnes. L'incitation à la discrimination est le germe des autres violations, et mérite une attention spéciale au niveau préventif. De façon classique, cette violation peut être provoquée par une intention de nuire, ou par une négligence, confirmée par un refus de rectifier.
2. Violation indirecte du droit des personnes par atteinte aux patrimoines :
  - par destruction physique, l'interdit d'accès, ou la profanation d'un patrimoine religieux matériel : lieux et objets de culte, interdiction des symboles...
  - par atteinte aux dimensions immatérielles d'un patrimoine : dénaturation systématique et unilatérale des contenus de savoir d'une tradition, incitation au mépris des références religieuses par la divulgation de messages produits par intention de nuire, ou de façon irresponsable, sans volonté de réparation ; désinformation systématique permettant, voire encourageant, la circulation dans l'espace public de propos qui trompent sur la nature d'une tradition religieuse, soit pour la dénigrer, soit au contraire pour en présenter une comme évidente et unique en dénigrant toutes les autres. Les propos provocateurs et satiriques ne sont pas dommageables s'ils sont exprimés dans le respect des personnes et de la réceptivité des publics visés et potentiels.

### 32. Le droit à une information adéquate et le droit à l'éducation

Contrairement aux tenants d'une liberté d'opinion sans retenue et sans contenu, il est possible de distinguer entre des informations et enseignements qui sont échangés « dans un esprit de vérité »<sup>23</sup> et ceux qui le sont pour asseoir un pouvoir au prix de discriminations plus ou moins graves et systématiques. Les deux droits complémentaires que sont les droits à la formation et à l'information sont principalement concernés, *car ce sont eux qui présentent le contenu culturel*

<sup>22</sup> Non seulement la prévention est plus efficace, mais elle indique aussi que l'ordre démocratique n'est pas statique : il ne se réduit pas à une prétendue éradication de la violence, mais il se construit sur une approche progressiste de la dignité, par le croisement de plus en plus exigeant des savoirs.

<sup>23</sup> A. Jahangir, §38 cité plus haut. Face au relativisme, « l'expression pacifique des opinions » est une notion centrale qui fournit le principe pour discriminer entre une incitation à la discrimination ou au dialogue critique. Du point de vue du droit, ce principe est une autre expression de la « bonne foi », en précisant que la bonne foi implique aussi une responsabilité de chercher les informations suffisantes.

*du débat aux libertés d'expression*, ce sont eux qui montrent « l'état de la science » à la liberté de conscience, et les « règles de l'art » pour un débat démocratique ouvert et exigeant.<sup>24</sup>

### ***Les échelles de sanction***

#### *33. Des seuils pour une action pénale*

Deux types de violations sont susceptibles de tomber sous le coup d'une sanction pénale : les atteintes directes et indirectes aux droits des personnes. La définition des seuils de pénalisation et d'action civile est essentielle. Le seuil des atteintes indirectes n'est pas plus difficile à définir, dans la mesure où une violence matérielle peut être constatée. La violence immatérielle est plus délicate, mais on ne saurait nier le lien de l'une à l'autre. De même qu'a pu être pénalisé l'acte de « fausser » les données historiques pour justifier le négationnisme, il n'y a pas de raison de ne pas appliquer le même traitement à des messages qui nieraient les contextes historiques et littéraires des Livres sacrés des religions, ainsi que la valeur qu'ils ont acquise, en tant que patrimoine commun de l'humanité, indépendamment de la foi personnelle des uns et des autres. Du point de vue pénal, il faut cependant encore démontrer s'il y a intention de nuire par désinformation systématique (intention de tromper) ou par provocation dommageable (incitation à la discrimination), ou qu'il y a une négligence grave. L'application d'une sanction pénale doit cependant rester l'exception, tout l'effort devant être porté sur la prévention et la diversité des contrôles mutuels et sanctions sociales en amont.

#### *34. Relativité de la gravité du dommage en fonction de la sensibilité du public : définir les échelles de tolérance*

Un propos peut être considéré comme diffamatoire dans une société et passer inaperçu dans une autre. Toutefois, à l'heure d'internet, chaque auteur ou entreprise qui publie un message est obligé de tenir compte du fait qu'il est impossible de limiter sa distribution dans le monde et court le risque de blesser inutilement, mais aussi d'être instrumentalisé par des groupes qui cherchent tous les prétextes pour diffuser la haine. C'est pourquoi un progrès dans la définition du respect des patrimoines vivants – incluant celui des espaces d'interprétation – est une garantie, modeste mais nécessaire, contre le désordre informationnel mondial.

#### *35. Des seuils pour une action civile*

L'action civile ouvre une voie encore plus large à l'interprétation et permet un large impact sur la qualité de l'espace public. Le but n'est pas d'élever le niveau de la censure, mais d'indiquer clairement les règles d'une éthique de la discussion (au sens de J. Habermas), afin de distinguer le débat démocratique des mouvements d'opinion qui sont sujets aux appels à la discrimination. L'action civile classique ouvre deux types d'actions : *défensives*, en prévention, cessation, constatation et réparatrices, par définition des dommages-intérêts, tort moral et remise de gain. La voie civile permet ainsi d'agir en amont comme en aval en fournissant des moyens de clarification des exigences de respect. Encore une fois, ces exigences devraient permettre, non pas de limiter la critique, mais au contraire d'en garantir la légitimité, la nécessité et la portée, dans un esprit de respect mutuel qui n'exclut pas de vifs combats d'idées, non seulement religieuses, mais impliquant des visions sociales et politiques qui peuvent être opposées.

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<sup>24</sup> C'est pourquoi ces deux droits figurent en parallèle dans la Déclaration de Fribourg sur les droits culturels, et constituent, avec le droit de participer aux patrimoines, les trois droits de la communication.

### *36. Diligence due et diversité des sanctions*

Il va de soi que, puisque l'objectif est de développer progressivement une culture du dialogue fondée sur l'exigence commune de la recherche de l'excellence, l'essentiel ne se situe pas au niveau pénal, ni civil, mais dans la recherche commune de mécanismes qui permettent de sélectionner les opinions exprimées à un haut niveau de respect critique. Selon une culture démocratique avancée, les lois doivent être orientées de façon à donner le maximum de place à l'exercice interactif des libertés, doté d'un mécanisme de sélection permettant à l'interprétation de s'exercer de façon progressive en s'appuyant sur les savoirs acquis, ainsi que de « cliquet » minimisant les risques de retour en arrière. Cela se traduit par un contrôle interactif des lieux et institutions d'information et de formation, laïcs et religieux, par les différents acteurs concernés. Leur obligation commune est de veiller à la qualité de l'espace public, c'est-à-dire au niveau d'exigence d'une culture démocratique. Dans un tel espace, la performance législative se mesure au libre jeu des sanctions positives et négatives bien informées, de natures et d'origines diverses : elles relèvent des choix individuels, d'institutions de formation, de canaux d'information, de référence à telle ou telle communauté et comportent des conséquences économiques médiatiques et politiques.

### *37. Responsabilités des autorités religieuses*

Les autorités religieuses ont la responsabilité d'authentifier les contenus et pratiques de la foi des communautés qu'elles représentent, d'une façon ouverte au dialogue intra et interreligieux, et compatibles avec le respect de la dignité humaine. Ces autorités ne doivent pas avoir le sentiment d'être « mises sous tutelle » de normes internationales, voire occidentales, car ces normes ne sont, en principe, en rien supérieures aux traditions religieuses, elles sont au contraire leur fondement commun. Plus encore et comme par le passé, les autorités religieuses sont invitées par la communauté internationale à contribuer à une compréhension plus exigeante de l'universalité. C'est par la pratique de l'interprétation inter et intrareligieuse que les doctrines et pratiques contraires à la dignité humaine peuvent être définies et écartées<sup>25</sup>.

## **Recommandations**

### *38. Le socle des droits de l'homme*

L'avantage d'une approche du traitement de la violence, rigoureusement fondée sur les droits de l'homme<sup>26</sup>, est que : 1) elle est universelle et impartiale et traite en même temps de toutes les discriminations opérées sous le prétexte de la religion et de la conviction, 2) elle exclut les amalgames et les responsabilités collectives, 3) elle respecte la complexité des droits, libertés et responsabilités par la prise en compte de l'interdépendance, 4) elle s'appuie au maximum sur les instruments existants. Encore faut-il à présent davantage prendre en compte l'importance des droits culturels.

### *39. Développer l'interprétation*

Le socle étant garanti, il est essentiel cependant de comprendre que si les droits de l'homme sont des droits des personnes, leur respect, protection et réalisation implique la prise en compte des ressources qui, dans leur diversité et dans leur qualité, permet à chacun de puiser ce qu'il juge

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<sup>25</sup> A. Jahangir, *ibid*, résumé.

<sup>26</sup> Voir la synthèse du Colloque organisé à Nouakchott par l'Observatoire de la diversité et des droits culturels: *Les droits culturels et le traitement des violences* (DS 15 en ligne) .

nécessaire pour le développement ses propres capacités et de celles des personnes avec lesquelles il entend être solidaire (famille, communauté, peuple). Plutôt que de créer un instrument spécial sur la protection des religions, sur une base conflictuelle et floue, car nul ne peut définir où commence et où s'arrête une religion, il semble plus opportun de constater un manque dans l'interprétation des instruments existants et de suggérer aux différents comités concernés de développer une interprétation conjointe des dispositions concernées dans les deux Pactes, en tenant compte des autres traités, notamment par le biais des observations générales, nouvelles ou révisées. Il s'agit de prendre en compte notamment :

- le développement des normes qui concernent les droits culturels, mais aussi le contenu ou la dimension culturelle d'autres droits de l'homme,
  - le respect de la diversité culturelle – notamment de la diversité de religions et de convictions.
- Cette interprétation plus exigeante pour les droits individuels, mais aussi plus respectueuse de l'importance des patrimoines et des communautés, ne peut se faire qu'en coopération avec l'UNESCO dans le cadre de la mise en œuvre de la convention, en tenant compte du Plan d'action adopté avec la Déclaration universelle sur la diversité culturelle. Cette coopération devrait accorder une large place aux ONG, qui sont des observatoires et des porte-parole essentiels dans le domaine des droits culturels.

#### *40. Développer les capacités d'observation*

La première obligation permettant de développer la diligence requise est de créer et d'entretenir des observatoires de la diversité culturelle qui, selon les cas, peuvent se spécialiser sur l'observation de la liberté de conscience et de religion ou sur l'ensemble des droits culturels. Compte tenu du fait que les appels à la discrimination sont de natures très diverses, et que l'appréciation de leur gravité, des mesures de prévention et de répression, sont extrêmement relatives au contexte, il est essentiel que dans chaque pays existe un ou plusieurs organe d'observation sur le respect de la diversité culturelle, notamment des religions et des convictions, ainsi que des droits culturels. Cette mission pourrait être confiée aux institutions nationales des droits de l'homme ou à un organe spécifique qui y serait associé.

## *Annex*

### *List of experts and biographical information*

**Mr. Abdelfattah Amor** is professor emeritus in public international law and political science. Mr. Amor has been member of the United Nations Human Rights Committee since 1999, which he chaired from 2003 to 2005. He was also United Nations Special Rapporteur on freedom of religion or belief from 1993 to 2004 and submitted more than 30 reports to the Commission on Human Rights and the General Assembly concerning the elimination of all forms of intolerance and discrimination based on religion or belief. He is Honorary Dean of the Faculty of Legal, Political and Social Science of Tunis since April 1993. He was President of the International Consultative Conference on Freedom of Religion or Belief, Tolerance and Non-discrimination (Madrid 2001) and President of the UNESCO Prize for Human Rights Education (2000-2008).

**Ms. Agnès Callamard** is the current executive director of ARTICLE 19, an international human rights organization promoting and defending freedom of expression and access to information globally. Ms. Callamard has evolved a distinguished career in human rights and humanitarian work. She has founded and led HAP International (the Humanitarian Accountability Partnership) where she oversaw field trials in Afghanistan, Cambodia and Sierra Leone and created the first international self-regulatory body for humanitarian agencies committed to strengthening accountability to disaster-affected populations. She is a former *Chef de Cabinet* for the Secretary General of Amnesty International, and as the organization's Research Policy Coordinator, she led Amnesty's work on women's human rights. Ms. Callamard has conducted human rights investigations in a large number of countries in Africa, Asia, and the Middle East. Ms. Callamard has worked extensively in the field of international refugee movements with the Center for Refugee Studies in Toronto. She has published broadly in the field of human rights, women's rights, refugee movements and accountability and holds a PhD in Political Science from the New School for Social Research in New York.

**Mr. Doudou Diène** was born in Senegal in 1941 and holds a law degree from the University of Caen, a doctorate in public law from the University of Paris and a diploma in political science from the Institut d'Études Politiques in Paris. Having joined the UNESCO Secretariat in 1977, in 1980 he was appointed Director of the Liaison Office with the United Nations, Permanent Missions and United Nations departments in New York. Prior to this, he had served as deputy representative of Senegal to UNESCO (1972-77) and, in that capacity, as Vice-President and Secretary of the African Group and Group of 77. Between 1985 and 1987, he held the posts of Deputy Assistant Director-General for External Relations, spokesperson for the Director-General, and acting Director of the Bureau of Public Information. After a period as Project Manager of the 'Integral Study of the Silk Roads: Roads of Dialogue' aimed at revitalizing East-West dialogue, he was appointed Director of the Division of Intercultural Projects in 1993 (currently Division of Intercultural Dialogue). In this capacity, he directed various projects on intercultural dialogue, including the Slave Route, Routes of Faith, Routes of al-Andalus, and Iron Roads in Africa. In 1998 he was placed in charge of activities pertaining to inter-religious dialogue. In 2002, he was appointed by the Commission on Human Rights as Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance, a mandate in which he served until July 2008.

**Mr. Mohamed Saeed M. Eltayeb** is a human rights lawyer, scholar and consultant. He holds a Bachelor of Laws from the University of Khartoum, two post-graduate Diplomas in international relations and international law (University of Khartoum and Institute of Social Studies, The Hague) and two Masters Degrees in international relations and international law from the University of Amsterdam and Lund University (Sweden) respectively. He obtained his Ph.D. in international human rights law from Utrecht University (The Netherlands). Mr. Eltayeb has worked, inter alia, at the Netherlands Institute for Human Rights (SIM), International Commission of Jurists (ICJ) and Faculty of Law of the University of Khartoum and the Institute for Women, Gender and Development Studies of the Ahfad University (Sudan). He currently works as a legal expert for the Bureau of Human Rights of the Qatari Ministry of Foreign Affairs. Mr. Eltayeb also served as a visiting researcher at several institutes in Europe and the United States of America, including the Swiss Institute of Comparative Law of the University of Lausanne, the Human Rights Centre at Essex University, the Law and Religion Program at Emory University School of Law, the Islamic Legal Studies Program at Harvard Law School and Raoul Wallenberg Institute of Human Rights and Humanitarian Law at Lund University. He has published several works on human rights in Muslim countries.

**Ms. Nazila Ghanea** is a Lecturer in International Human Rights Law at the University of Oxford. She also serves as the Editor-in-Chief of the international journal of Religion and Human Rights. She was previously the MA Director and Senior Lecturer in International Law and Human Rights at the University of London. Her publications include five books (including *Human Rights, the UN and the Bahá'ís in Iran*, 2003); articles in the journals *International and Comparative Law Quarterly*, *Human Rights Quarterly*, *International Affairs*; publications with the UK Economic and Social Research Council (ESRC), Minority Rights Group International and the UN publication *Ethnic and Religious Minorities in the Islamic Republic of Iran* (E/CN.4/Sub.2/AC.5/2003/WP.8). Her publications span minority rights, freedom of religion or belief, women's rights, and human rights in the Middle East. She is a Trustee of the One World Trust, held an OSI International Policy fellowship (2006-2007) and initiated and now serves on the board of the international network "Focus on Freedom of Religion or Belief".

**Ms. Asma Jahangir** was appointed United Nations Special Rapporteur on Freedom of Religion or Belief in July 2004. In this function she has submitted several reports to the Commission on Human Rights, to the General Assembly and to the Human Rights Council. Previously she had already served as United Nations Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions from 1998 to 2004. In her two mandates she has conducted a total of 22 country visits. Presently, she is also Commissioner of the International Commission of Jurists, Executive Member of the International Crisis Group and Chairperson of the Human Rights Commission of Pakistan. In her home country Pakistan she is Director of AGHS Legal Aid Cell, a NGO set up in 1980 to provide free legal aid to women. Over the years, the mandate of AGHS has expanded to respond to the needs of a growing civil society and the demands made by various groups for legal recourse. Ms. Jahangir represents clients in the High Court, Federal Shariat Court and the Supreme Court of Pakistan.

**Mr. Frank La Rue** has worked on human rights for the past 25 years. He is the founder of the Center for Legal Action for Human Rights (CALDH), both in Washington DC and Guatemala, which became the first Guatemalan NGO to bring cases of human rights violations to the Inter-American System. CALDH was also the first Guatemalan NGO to promote economic, social and cultural rights. Mr. La Rue also brought the first genocide case against the military dictatorship in Guatemala. As a human rights activist, his name was presented to the Nobel Peace Prize committee in 2004. Mr. La Rue has previously served as a Presidential Commissioner for Human Rights in Guatemala, as a Human Rights Adviser to the Minister of Foreign Affairs of Guatemala, as President of the Governing Board of the Centro-American Institute of Social Democracy Studies and as a consultant to the Office of the High Commissioner for Human Rights. Mr. La Rue holds a B.A. in Legal and Social Sciences from the University of San Carlos, Guatemala and a postgraduate degree from Johns Hopkins University.

**Mr. Natan Lerner** was born in Poland and educated in Argentina, where he obtained his law degree in 1950 and his doctorate in Law and Social Sciences in 1958, both from Buenos Aires University. He was a practicing lawyer in Buenos Aires until 1963. From 1963 to 1966 he worked in New York for the World Jewish Congress. In Israel since 1966, he was director of the Israeli office of the World Jewish Congress until 1983. From 1984 to 1989 he was director of the International Center for the University Teaching of Jewish Civilization. Simultaneously, he taught International Law and Human Rights at the university level. Since 1989 his main activity is university teaching. Since his retirement from Tel Aviv University, after more than 20 years, he teaches at the Interdisciplinary Center Herzliya. His main course is International Law and he also conducts seminars on State and Religion, Racial Discrimination, Minorities, and Genocide. Mr. Lerner is the author of the following books in English: *Religion, Secular Beliefs and Human Rights* (Leiden, 2006); *Religion, Beliefs and International Human Rights* (New York, 2000); *Group Rights and Discrimination in International Law* (The Hague, 2003); *The UN Convention on the Elimination of All Forms of Racial Discrimination* (Alphen an den Rijn, 1980); *The Crime of Incitement to Group Hatred* (New York, 1965). He also published several books in Spanish. He is the author of many articles in Spanish, English and Hebrew, published in books and journals of Israel, the USA, Spain, Argentina and other countries.

**Mr. Patrice Meyer-Bisch** is coordinator of the *Institut interdisciplinaire d'éthique et des droits de l'homme* and of the *Chaire UNESCO pour les droits de l'homme et la démocratie* at the University of Fribourg, Switzerland. Born in 1950, Mr. Meyer-Bisch studied in Nancy, Fribourg and Paris, and obtained his Ph.D. in Philosophy from the University of Fribourg. Mr. Meyer-Bisch is very active in various fields of research, conducting in particular studies on cultural rights, the ethics of economic activity and human rights, the theory of subject and democracy, the methodology of social science and pluridisciplinarity, and cultural indicators of development.

**Mr. Vitit Muntarbhorn** is a Professor of Law at Chulalongkorn University, Bangkok. He has served in various capacities for the United Nations system. From 1990 to 1994, he was Special Rapporteur on the sale of children, child prostitution and child pornography and since 2004 he is Special Rapporteur on the situation of human rights in the Democratic People's Republic of Korea. He was awarded the 2004 UNESCO Prize for Human Rights Education in



recognition of his outstanding contribution to education for human rights and diverse activities at national, regional and international levels in favour of promotion and protection of all human rights for all.

**Mr. Mogens Schmidt** is Deputy Assistant Director-General for Communication and Information and Director of the Division for Freedom of Expression, Democracy and Peace at UNESCO since 2003. At UNESCO he is also responsible for the organization's activities in post conflict and post disaster environments. Born in Denmark in 1950, Mr. Schmidt has since 1974 been active as lecturer at the University of Aarhus, Denmark, Director of the Danish School of Journalism, Director of the European Journalism Centre, Maastricht (The Netherlands), and Assistant Director General of The World Association of Newspapers, Paris (France). Mr. Schmidt has extensive experience with research, training and management of media development programmes from a large number of countries all over the world.

**Mr. Patrick Thornberry** is Professor of International Law at Keele University (United Kingdom) and a Fellow of Kellogg College, University of Oxford. Mr. Thornberry has been a member of the United Nations Committee on the Elimination of Racial Discrimination (CERD) since 2001 and was rapporteur of that Committee from 2002 until spring 2008. He currently chairs the Early Warning and Urgent Action Group in CERD, dealing with a range of pressing situations notably including land and resource questions involving indigenous peoples. He is a former Chairman of Minority Rights Group International and has acted as consultant and adviser to a range of international organizations. Mr. Thornberry is the author of numerous works in the field of minority rights, rights of indigenous peoples and racial discrimination, notably *International Law and the Rights of Minorities* (Clarendon Press, Oxford, 1991), *Indigenous Peoples and Human Rights* (Manchester University Press, 2002) and (with M.A. Martin Estebanez) *Minority Rights in Europe* (Council of Europe Publishing 2004). He is currently working on a commentary for Oxford University Press on the International Convention on the Elimination of All Forms of Racial Discrimination, to be published in 2010.