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

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I. Introduction

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

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

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

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

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

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

1. Legislative practices

In the Human Rights Council report on the **United Kingdom of Great Britain and Northern Ireland**,[1] the Special Rapporteur on freedom of religion or belief welcomed that the Racial and Religious Hatred Act 2006 had entered into force in England and Wales on 1 October 2007. This has closed 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" to include Jews and Sikhs but no other religions. Furthermore, the Special Rapporteur noted 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". Moreover, 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.[2]

In the same report, however, the Special Rapporteur on freedom of religion or belief expressed concern at the existence of the common-law offence of blasphemy, which imposed a strict liability on anybody who intended to make a statement on a Christian topic, even though the person could not know at that stage whether or not he/she would be found to have blasphemed. The Special Rapporteur shared the criticism that the blasphemy offence in the United Kingdom was discriminatory because it favoured Christianity alone and lacked a mechanism to take account of the proper balance with freedom of expression. The Special Rapporteur also agreed 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 reiterated 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 (2) of the ICCPR.[3] Subsequently, the Criminal Justice and Immigration Act 2008 was adopted, abolishing the common-law offences of blasphemy and blasphemous libel, which since 8 July 2008 are no longer criminal offences in England and Wales.[4]

The Special Rapporteur on racism noted in his Human Rights Council report on **Germany**[5] that section 130 of the German Criminal Code contains robust provisions against whomever "incites hatred against segments of the population or calls for violent or arbitrary measures against them", including through the dissemination of writings and broadcasts. The German Criminal Code also contains a prohibition on the activities of parties and organizations declared to be unconstitutional (sections 84 and 85), the propaganda of unconstitutional organizations (section 86) and the use of symbols of unconstitutional organizations (section 86a). Roma and Sinti leaders emphasized that there is a general recognition among the German public of the history of Roma and Sinti suffering during the Holocaust, however, they noted

[1] See A/HRC/7/10/Add.3, paras. 74-75.
[2] Article 29J of the Public Order Act 1986 (as amended by the Racial and Religious Hatred Act 2006) provides: "Nothing in this Part shall be read or given effect in a way which prohibits or restricts discussion, criticism or expressions of antipathy, dislike, ridicule, insult or abuse of particular religions or the beliefs or practices of their adherents, or of any other belief system or the beliefs or practices of its adherents, or proselytising or urging adherents of a different religion or belief system to cease practising their religion or belief system".
[3] See A/HRC/7/10/Add.3, para. 73 and A/62/280, paras. 70-77.
[4] See CCPR/C/GBR/Q/6/Add.1, para. 165.
[5] See A/HRC/14/43/Add.2, paras. 13, 57 and 77.

concern regarding the dissemination of hate messages over the Internet, including direct incitement to racial hatred and violence. The Special Rapporteur recommended that the German Government continue to make use of sections 84 and 85 of the Criminal Code and article 4 (b) of the ICERD in order to declare illegal and prohibit organizations which promote and incite racial discrimination.

In his Human Rights Council report on **Italy**,[6] the Special Rapporteur on racism noted that the Mancino Law (as modified by Law No. 85/2006) prohibits the establishment of, participation in, or assistance to organizations, associations, movements or groups aiming to incite racial discrimination or hatred. Also prohibited is propaganda advocating racial or ethnic superiority or hatred, and instigation to commit or the commission of discriminatory or violent acts on racial, ethnic, national or religious grounds. The amendment introduced in February 2006 by the then Government to the Mancino Law mitigated the punishments attached to the foregoing offences by reducing the initial maximum term of 3 years' imprisonment to either a fine of 6,000 Euros or 18 months' imprisonment. The Special Rapporteur recommended that the Italian Government should continue to promote the adoption of the legislative reforms that have already been initiated, inter alia the restoration of more severe punishment for incitement to racial and religious hatred and related crimes. Furthermore, following violence that had erupted in Calabria in January 2009, the Special Rapporteur urged the Italian authorities to curb the growing xenophobic attitude towards migrant workers, swiftly denounce hate speech, and prosecute the racist and violent actions perpetrated by some individuals.[7]

2. Judicial practices

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

For example, the Special Rapporteur on racism highlighted in his Human Rights Council report on **Latvia**[8] the concerns expressed by Roma representatives regarding cases of racist violence and incitement to racial hatred against Roma by members of extremist groups, including neo-Nazi sympathizers. Widespread insecurity and fear of attacks among the Roma were reported. In particular, a case was brought to the Special Rapporteur's attention concerning a member of a neo-Nazi group who called in public for the "extermination of Jews and gypsies as non-humans". Even though this appalling statement was videotaped and in spite of criminal provisions concerning incitement to racial, ethnic and religious hatred and violence, the case was initially dismissed by a public prosecutor on the grounds of freedom of expression and further rejected by a high court. The Special Rapporteur received the information that on 12 November 2007, the Office of the Prosecutor General revoked the decision to terminate proceedings in this case. In December 2007, the final bill on indictment was prepared and the criminal case was transferred to the court for adjudication. The Special Rapporteur recommended that the Government of Latvia should develop effective practices and general guidelines for the prosecution of cases of incitement to racial hatred, elaborating clear criteria for the threshold of evidence required to be presented and for the investigative conduct of law enforcement bodies. While developing these guidelines, the Government should bear in mind the need for the prohibition of incitement to racial, religious or ethnic hatred established by section 78 of the Criminal Code, article 20 of the ICCPR and article 4 of the ICERD.

[6] See A/HRC/4/19/Add.4, paras. 11 and 71.
[7] See A/65/295, para. 38 and the Special Rapporteur's press statement of 12 January 2009 (www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=9710&LangID=E).
[8] See A/HRC/7/19/Add.3, paras. 64 and 85.

In the Human Rights Council report on **Lithuania**,[9] the Special Rapporteur on racism noted with interest that the Office of the General Prosecutor can initiate inquiries concerning incitement to racial hatred rather than just react to formal complaints. Lithuania's Deputy General Prosecutor highlighted a number of concrete examples of grave issues that were the focus of his Office's attention, including attacks against African students and a Chinese immigrant, that were not duly registered as racist crimes. He emphasized the need to amend the Criminal Code following CERD's recommendation. Authorities also referred to the role of the Parliament-appointed Inspector of Journalist Ethics in examining cases of hate speech contained in the media, including Internet sites. The Inspector has the duty to investigate complaints of violations of professional ethics by journalists, editors and publishers, which includes cases of incitement to racial hatred published in the printed, audio-visual or digital media. The Special Rapporteur recommended that the Government of Lithuania should strengthen the capacity of the Office of the Ombudsperson on Equal Opportunities to thoroughly investigate and act on allegations of racist crimes, incitement to racial hatred and all forms of racial and ethnic discrimination.

In view of incitement to racial hatred and acts of violence perpetrated by neo-Nazi groups in Estonia against non-European minorities, the Special Rapporteur on racism in his Human Rights Council report on **Estonia**[10] also recommended that the Government should adopt holistic national legislation covering all forms of discrimination in a legal act. The Special Rapporteur emphasized that it is particularly important that this legislation be precise in terms of the punishment and prosecution of racially motivated crimes and incitement to racial hatred. In addition, the Estonian Government should further strengthen the capacity of the Chancellor of Justice, including in terms of financial and human resources, to act on allegations of racist crimes and incitement to racial, ethnic or religious hatred. To complement the role of the Chancellor of Justice, the Special Rapporteur recommended that the Estonian Government put in place an independent institution entrusted with a mandate to fight discrimination. Rather than duplicating the role of the Chancellor of Justice, this institution would be responsible for linking the fight against discrimination with the active promotion of multiculturalism as the long-term solution to all forms of discrimination.

In the Human Rights Council report on the **Russian Federation**,[11] the Special Rapporteur on racism referred to the ruling of the Moscow City Court in December 2005, later upheld by the Supreme Court, excluding *Rodina* – the country's then fourth largest political party – from elections to the Moscow City Duma on the grounds of incitement to ethnic hatred. This ruling was interpreted by most civil society organizations as a political move to avoid any potential competition with the United Russia party. In fact, *Rodina*, which was emerging as the major extremist party at the time of the visit of the Special Rapporteur, was attributed 15 per cent of the voting intentions in November 2005.[12] Paradoxically, the suit against *Rodina* was filed by the Liberal Democratic Party of Russia, a party also resorting to xenophobic slogans against certain ethnic groups and foreigners. Both parties sued each other for virtually identical campaigns, demanding that the opponent be banned from the elections. The Moscow City Court took no action against the Liberal Democratic Party.

[9] See A/HRC/7/19/Add.4, paras. 44, 48 and 84.
[10] See A/HRC/7/19/Add.2, paras. 66 and 87-89.
[11] See A/HRC/4/19/Add.3, paras. 27 and 45.
[12] In October 2006, *Rodina* merged with the *Russian Party of Life* and the *Russian Pensioners' Party* into a new party, *Fair Russia*.

In a joint communication sent on 14 November 2005 to the Government of **Denmark**,[13] the Special Rapporteur on racism and the Special Rapporteur on freedom of religion or belief referred to the publication in the newspaper Jyllands Posten of cartoons representing the prophet Muhammad in a derogatory manner. It was reported that the series of cartoons were published in September 2005, after a writer complained that nobody dared illustrate his book about Muhammad. Following the publication, two cartoons illustrators allegedly received death threats. The Special Rapporteurs requested the Danish 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 yet been taken. The Special Rapporteurs also requested information about the existing policy measures to promote religious tolerance. The Danish Government informed that a complaint was taken up by the Regional Public Prosecutor in Vilborg who decided that cartoons fall within the scope of sections 266b and 140 of the Criminal Code.[14] 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. Subsequently, the Director of Public Prosecutions on 15 March 2006, declined to reverse the decision of the Regional Public Prosecutor, noting that sections 140 and 266(b) of the Criminal Code had to be interpreted with due regard for the right to freedom of expression and that accepted usage in Denmark covered even offensive and insulting expressions of opinion. On 29 March 2006, the Islamic Community of Denmark initiated private criminal proceedings against the editor-in-chief and the culture editor of the newspaper, under sections 268 (defamation in the form of libel or slander) and 267 (defamatory statements violating the personal honour of another by offensive words or conduct) of the Criminal Code. The case was heard on 9 October 2006, and the District Court of Aarhus on 26 October 2006 ruled against the complainants.

On 28 March 2008, the Special Rapporteurs on racism, freedom of expression and freedom of religion or belief issued a joint press statement concerning the release of the short online film "Fitna" by a **Dutch** member of Parliament, Mr. Geert Wilders.[15] The three Special Rapporteurs condemned the tone and content of the online film which illustrates an increasing pattern that associates Muslims exclusively with violence and terrorism. While on the one hand, freedom of expression is a fundamental human right that must be respected, it does not extend to include incitement to racial or religious hatred which is itself clearly a violation of human rights. The three Special Rapporteurs also made a special call for vigilance and tolerance, reiterating their joint press release of 8 February 2006, in which they had urged all parties to refrain from any form of violence and to avoid fuelling hatred. Furthermore, they had encouraged States to promote the interrelated and indivisible nature of human rights and freedoms, advocate the use of legal remedies, and pursue a peaceful dialogue on matters which go to the heart of all multicultural societies. The three Special Rapporteurs also recognized the quick and balanced reaction of the Dutch Government to the release of this film rejecting the equation of Islam with violence and noting that the "vast majority of Muslims reject extremism and violence." The three Special Rapporteurs emphasized that enhanced efforts to promote inter-religious and inter-cultural dialogue may help to restrain any possible violent reaction.

[13] See the Special Rapporteurs' communication of 14 November 2005 (E/CN.4/2006/5/Add.1, paras. 110 and 116) and their press statement of 8 February 2006 (www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=7646&LangID=E).

[14] See the response from the Danish Government dated 24 January 2006 (E/CN.4/2006/5/Add.1, paras. 110-116) and the decision adopted on 1 April 2008 by the Human Rights Committee on communication no. 1487/2006, *Kasem Said Ahmad and Asmaa Abdol-Hamid v. Denmark* (CCPR/C/92/D/1487/2006).

[15] See the Special Rapporteurs' joint press statement of 28 March 2008 (www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=8866&LangID=E).

The Special Rapporteur on freedom of religion or belief has also criticized the vague formulation of some domestic legal provisions that are designed to combat incitement of hatred, discord and intolerance. In the Human Rights Council report on the **former Yugoslav Republic of Macedonia**,[16] for example, the Special Rapporteur noted that article 319 of the Criminal Code had allegedly been misused against a particular religious leader, Bishop Jovan (Zoran Vraniskovski). In 2004, the domestic courts of first and second instance held that, in leaving the Macedonian Orthodox Church and establishing the "Orthodox Archbishopric of Ohrid", the accused had created a schism causing religious hatred, discord and intolerance. Consequently, they sentenced Bishop Jovan to 18 months of imprisonment for undermining the position of the Macedonian Orthodox Church, conducting a service of worship in a private flat and distributing a calendar that offended the religious sentiments of the citizens. An opinion by the OSCE/ODIHR Panel of Experts on Freedom of Religion or Belief expressed concerns about the judgement's approach which seemed to suggest that any form of religious activity that has the effect of challenging the legitimacy and supremacy of the Macedonian Orthodox Church as the dominant religion was to be considered as causing religious hatred.[17] In addition, according to the ODIHR opinion, the fact that Bishop Jovan had conducted religious services that prompted a hostile response by opposing believers could not amount to the commission of the criminal offence of incitement to religious hatred. Subsequently, the Supreme Court partially accepted Bishop Jovan's appeal with regard to his freedom to perform religious rites, and reduced his prison sentence to eight months.

According to the Special Rapporteur on freedom of religion or belief, the risk that legal provisions prohibiting hate speech are interpreted loosely and applied selectively by the authorities underlines the importance of having unambiguous language and of devising effective safeguards against abuses of the law. With regard to the formulation of article 319 of the Criminal Code of the former Yugoslav Republic of Macedonia, the Special Rapporteur expressed concerns that this offence can be committed, inter alia, "in any other manner that causes or incites to national, racial or religious hatred, discord and intolerance".[18] The loose wording of article 319 of the Criminal Code throws the net too wide; for example, "any other manner" could possibly include scholarly remarks, genuine dissent or grievance against specific religious tenets. The legal uncertainty triggered by the formulation of article 319 of the Criminal Code may have a chilling effect on the willingness of individuals to exercise their freedom of expression as well as their freedom of religion or belief, for example by changing their religion or manifesting religion or belief in worship, observance, practice and teaching. In addition, an overreaction against the utterances of a person by any individual or group cannot constitute justification for penalizing such an expression unless the threshold of article 20, paragraph 2, of the ICCPR is crossed. In view of the vague formulation of article 319 of the Criminal Code, the Special Rapporteur urged the Government to review this provision with a view to prevent any arbitrary interpretation and application by the authorities. The Special Rapporteur emphasized that the ultimate goal is to find the most effective ways for the State to protect individuals against advocacy of religious hatred that constitutes incitement to discrimination, hostility or violence. In addition, legislation or policies designed to combat religious discrimination should be all-inclusive, carefully crafted and implemented in a non-biased manner to achieve their objectives.[19]

[16] See A/HRC/13/40/Add.2, para. 47; E/CN.4/2004/63, para. 48; and E/CN.4/2005/61/Add.1, paras. 241-257.
[17] See para. 8 of the *Opinion on the Case of Bishop Jovan (Zoran Vraniskovski)*, Opinion-Nr.: FoRB - MK/035/2005 (Expert Panel on FoRB/IU), 27 July 2005, available at www.legislationline.org/documents/id/1958.
[18] See A/HRC/13/40/Add.2, paras. 48 and 60.
[19] See A/HRC/10/31/Add.3, para. 24.

3. Policies

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

In its Recommendation 1805 (2007), the Parliamentary Assembly of the **Council of Europe** welcomed the preliminary report adopted on 16 and 17 March 2007, by the European Commission for Democracy through Law (Venice Commission) and agreed with it "that in a democratic society, religious groups must tolerate, as must other groups, critical public statements and debate about their activities, teachings and beliefs, provided that such criticism does not amount to intentional and gratuitous insults or hate speech and does not constitute incitement to disturb the peace or to violence and discrimination against adherents of a particular religion" (para. 5).[20] The Parliamentary Assembly recommended that the Committee of Ministers ensure that national law and practice "penalise statements that call for a person or a group of persons to be subjected to hatred, discrimination or violence on grounds of their religion as on any other grounds" (para. 17.2.2) and that national law and practice "are reviewed in order to decriminalise blasphemy as an insult to a religion" (para. 17.2.4). Furthermore, the Committee of Ministers should "condemn on behalf of their governments any death threats and incitements to violence by religious leaders and groups issued against persons for having exercised their right to freedom of expression about religious matters" (para. 17.7). In addition, in its resolution 1754 (2010), the Parliamentary Assembly invited Council of Europe member states to "enforce the penalties foreseen by their legislation against public incitement to violence, racial discrimination and intolerance, including Islamophobia" (para. 13.5) and to "introduce in their criminal legislation provisions against incitement to racial hatred or hate speech, implement the Committee of Ministers Recommendation No. R (97) 20 on hate speech, if they have not yet done so, and endorse the good practices and recommendations laid down in the Council of Europe publication *Manual on hate speech* (2009)" (para. 13.6).[21]

The Council of the **European Union** on 28 November 2008, adopted Framework Decision 2008/913/JHA on combating certain forms and expressions of racism and xenophobia by means of criminal law.[22] Its article 1 on offences concerning racism and xenophobia provides:

> "1. Each Member State shall take the measures necessary to ensure that the following intentional conduct is punishable: (a) publicly inciting to violence or hatred 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; (b) the commission of an act referred to in point (a) by public dissemination or distribution of tracts, pictures or other material; (c) publicly condoning, denying or grossly trivialising crimes of genocide, crimes against humanity and war crimes as defined in Articles 6, 7 and 8 of the Statute of the International Criminal Court, 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 when the conduct is carried out in a manner likely to incite to violence or hatred against such a group or a member of such a group; (d) publicly condoning, denying or grossly trivialising the crimes defined in Article 6 of the Charter of the International Military Tribunal appended to the London Agreement of 8 August 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 when the conduct is carried out in a manner likely to incite to violence or hatred against such a group or a member of such a group".

[20] See http://assembly.coe.int/main.asp?Link=/documents/adoptedtext/ta07/erec1805.htm.
[21] See http://assembly.coe.int/Main.asp?link=/Documents/AdoptedText/ta10/ERES1754.htm.
[22] See http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2008:328:0055:0058:EN:PDF.

Article 1 (3) of the Council Framework Decision clarifies that: "For the purpose of paragraph 1, 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". EU Member States should take the necessary measures to comply with the provisions of Council Framework Decision 2008/913/JHA by 28 November 2010.

In 2007, the Advisory Council of Experts on Freedom of Religion or Belief of the OSCE **Office for Democratic Institutions and Human Rights** prepared the "Toledo Guiding Principles on Teaching about Religions and Beliefs in Public Schools".[23] Thus whenever teaching about religions and beliefs in public schools is provided in OSCE participating States, the following guiding principles should be considered:

> "1. Teaching about religions and beliefs must be provided in ways that are fair, accurate and based on sound scholarship. Students should learn about religions and beliefs in an environment respectful of human rights, fundamental freedoms and civic values.
> 2. Those who teach about religions and beliefs should have a commitment to religious freedom that contributes to a school environment and practices that foster protection of the rights of others in a spirit of mutual respect and understanding among members of the school community.
> 3. Teaching about religions and beliefs is a major responsibility of schools, but the manner in which this teaching takes place should not undermine or ignore the role of families and religious or belief organizations in transmitting values to successive generations.
> 4. Efforts should be made to establish advisory bodies at different levels that take an inclusive approach to involving different stakeholders in the preparation and implementation of curricula and in the training of teachers.
> 5. Where a compulsory programme involving teaching about religions and beliefs is not sufficiently objective, efforts should be made to revise it to make it more balanced and impartial, but where this is not possible, or cannot be accomplished immediately, recognizing opt-out rights may be a satisfactory solution for parents and pupils, provided that the opt-out arrangements are structured in a sensitive and non-discriminatory way.
> 6. Those who teach about religions and beliefs should be adequately educated to do so. Such teachers need to have the knowledge, attitude and skills to teach about religions and beliefs in a fair and balanced way. Teachers need not only subject-matter competence but pedagogical skills so that they can interact with students and help students interact with each other in sensitive and respectful ways.
> 7. Preparation of curricula, textbooks and educational materials for teaching about religions and beliefs should take into account religious and non-religious views in a way that is inclusive, fair, and respectful. Care should be taken to avoid inaccurate or prejudicial material, particularly when this reinforces negative stereotypes.
> 8. Curricula should be developed in accordance with recognized professional standards in order to ensure a balanced approach to study about religions and beliefs. Development and implementation of curricula should also include open and fair procedures that give all interested parties appropriate opportunities to offer comments and advice.
> 9. Quality curricula in the area of teaching about religions and beliefs can only contribute effectively to the educational aims of the Toledo Guiding Principles if teachers are professionally trained to use the curricula and receive ongoing training to further develop their knowledge and competences regarding this subject matter. Any basic teacher preparation should be framed and developed according to democratic and human rights principles and include insight into cultural and religious diversity in society.
> 10. Curricula focusing on teaching about religions and beliefs should give attention to key historical and contemporary developments pertaining to religion and belief, and reflect global and local issues. They should be sensitive to different local manifestations of religious and secular plurality found in

[23] See http://www.osce.org/publications/odihr/2007/11/28314_993_en.pdf. See also A/HRC/16/53, paras. 20-62.

schools and the communities they serve. Such sensitivities will help address the concerns of students, parents and other stakeholders in education."[24]

The Camden Principles on Freedom of Expression and Equality were prepared in 2009 by the **NGO** *ARTICLE 19* on the basis of discussions involving a group of high-level UN and other officials, and civil society and academic experts in international human rights law on freedom of expression and equality issues.[25] The Camden Principles represent a progressive interpretation of international law and standards, accepted State practice (as reflected, inter alia, in national laws and the judgments of national courts), and the general principles of law recognized by the community of nations. The Camden Principles also address the issue of incitement to hatred and in this context Principle 12 provides the following:

"12.1. All States should adopt legislation prohibiting any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence (hate speech). National legal systems should make it clear, either explicitly or through authoritative interpretation, that:

i. The terms 'hatred' and 'hostility' refer to intense and irrational emotions of opprobrium, enmity and detestation towards the target group.

ii. The term 'advocacy' is to be understood as requiring an intention to promote hatred publicly towards the target group.

iii. The term 'incitement' refers to statements about national, racial or religious groups which create an imminent risk of discrimination, hostility or violence against persons belonging to those groups.

iv. The promotion, by different communities, of a positive sense of group identity does not constitute hate speech.

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

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

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

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

III. Concluding remarks

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

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

[24] Toledo Guiding Principles on Teaching about Religions and Beliefs in Public Schools, pp. 16-17.
[25] See http://www.article19.org/advocacy/campaigns/camden-principles.

community relations. In that context, a clear distinction should be made between three types of expression:

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

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

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

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

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

Whereas some have argued that "defamation of religions" could be equated to racism, we would like to caution against confusion between a racist statement and an act of "defamation of religion". We fully concur with the affirmation in the preamble of the International Convention on the Elimination of All Forms of Racial Discrimination that "any doctrine of superiority based on racial differentiation is scientifically false, morally condemnable, socially unjust and dangerous". However, invoking a direct analogy between concepts of race or ethnicity on the one hand and religion or belief on the other hand may lead to problematic consequences. Religious adherence, membership or identity can be the result of personal choices the possibility of which constitutes an essential component of the human right to freedom of religion or belief. For this reason, freedom of religion or belief also covers the rights to search for meaning by comparing different religions or belief systems, to exchange personal views on questions or religion or belief, and to exercise public criticism in such matters. For this reason the criteria for defining religious hatred may differ from those defining racial hatred. The

difficult question of what precisely constitutes religious hatred, at any rate, cannot be answered by simply applying definitions found in the area of racial hatred.

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

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

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

The notion of incitement to *hostility* may, however, be more prone to subjective approaches, very much depending on the perspective taken. Indeed, the alleged perpetrator of hate speech, the alleged victim, the average man on the street or a judge may come up with completely different definitions of what constitutes – or not – incitement to hostility. We have to bear in mind that whoever interprets the concepts of hostility, there always remains a risk of subjectivity. In addition, as elaborated above, the criteria for defining religious hatred or hostility cannot be simply deduced from the criteria applicable to racial hatred or hostility. It is at least conceivable that some provocative expressions which, if directed to some person's ethnic characteristics would doubtless amount to hostility, may find a different assessment when applied to questions of religion or belief.

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

- The public intent of inciting discrimination, hostility or violence must be present for hate speech to be penalized;
- Any limitations on freedom of expression should be clearly and narrowly defined and provided by law. In addition, they must be necessary and proportionate to the objective they propound to achieve, i.e. prohibiting hate speech;

- Limitations should not threaten the exercise of the right itself. The least intrusive means insofar as freedom of expression is concerned should be used to prevent a chilling effect;
- The adjudication of such limitations should be made by an independent and impartial judiciary.

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

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

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