PROHIBITION OF INCITEMENT TO NATIONAL, RACIAL OR RELIGIOUS HATRED IN ACCORDANCE WITH INTERNATIONAL HUMAN RIGHTS LAW

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Nature and means of effective remedies

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The objective of remedies

The "strikingly different" characteristic of human rights law from other bodies of international law is precisely the fact that "it stipulates that obligations are owed directly to individuals (and not to the national government of an individual); and it provides, increasingly, for individuals to have access to tribunals and fora for the effective guarantee of those obligations".[1] The right to access an effective remedy safeguards enjoyment of human rights. As Nowak has argued

> The very notion of human rights implies that rights-holders must have some possibility to hold duty bearers accountable for not living up to their legally binding human rights obligations.[2]

This is upheld in Article 2(3) of the International Covenant on Civil and Political Rights which requires that States Parties undertake:

> (a) To ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity;
> (b) To ensure that any person claiming such a remedy shall have his right thereto determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of the State, and to develop the possibilities of judicial remedy;
> (c) To ensure that the competent authorities shall enforce such remedies when granted.

Having a remedy, determined by law, which is enforceable – these are necessary steps to the enjoyment of human rights.

Types of Remedies

'Remedies' contain "two separate concepts, the first being procedural and the second substantive", as explained by Dinah Shelton,

> "In the first sense, remedies are the processes by which arguable claims of human rights violations are heard and decided, whether by courts, administrative agencies, or other competent bodies. The second notion of remedies refers to the outcome of the proceedings, the relief offered the successful claimant."[3]

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[1] Rosalyn Higgins *Problems and Process: International Law and How We Use it* (Oxford: Oxford University Press, 1994) p. 95.
[2] Manfred Nowak 'The Need for a World Court of Human Rights' 7 *Human Rights Law Review* (2007) p. 254.

States are required to "provide effective remedies for human rights violations".[4] The victim, whose rights have been violated, and has suffered harm or injury, should be offered procedural remedies in the form of access to justice as well as substantive redress.

Access to justice therefore requires:

a. Remedial institutions and procedures to which victims have access.
b. These institutions and procedures should be:
    I. independent
    II. able to afford a fair hearing; "through judicial or non-judicial remedies, or both"[5]
    III. able to "investigate, prosecute, and punish violators"[6]

Substantive redress requires that the above procedures be:

a. Effective "i.e. capable of redressing the harm that was inflicted";[7] and furthermore that
b. The reparation should be
    I. "adequate,
    II. effective,
    III. prompt, and
    IV. proportional to the gravity and harm suffered".[8]

In sum, the terms 'remedies' or 'redress' refer to

> "the range of measures that may be taken in response to an actual or threatened violation of human rights. They thus embrace the substance of relief as well as the procedures through which relief may be obtained. Remedies may include an award of
> damages,
> declaratory relief,
> injunctions or orders, and
> attorney's fees and costs".[9]

In the case of remedies for incitement, therefore, what is required is the right to access effective remedies both procedurally through access to effective institutions and procedures that can offer an independent and fair hearing, able to investigate, prosecute and punish those found to have incited hatred; and substantively, since the remedy is irreparable, the focus should be on the accountability of wrongdoers, restoring the dignity of the victims, the guarantee of non-repetition and possibly injunctions and legal costs. The question arises of how the question of effective remedies applies to the prohibition of incitement to national, racial or religious hatred?

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[3] Dinah Shelton, *Remedies in International Human Rights Law* (Oxford: Oxford University Press, 2005, 2nd ed) p. 7 (emphasis added).
[4] Dinah Shelton, p. 8.
[5] Gabriela Echeverria, *The draft Basic Principles and Guidelines on the Right to Remedy and Reparation: An effort to develop a coherent theory and consistent practice of reparation for victims*, http://www.article2.org/mainfile.php/0106/60/#8 (last accessed February 2011).
[6] Dinah Shelton, p. 9.
[7] Ibid.
[8] Gabriela Echeverria.
[9] Dinah Shelton, p. 7.

Remedies with regard to incitement to hatred: ICCPR Article 20

Article 20 of the ICCPR, described as being "among the strongest condemnations of hate speech",[10] states

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.

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".[11] It does, however, require them to prohibit – though not necessarily criminalise[12] – other incitement.[13] This can be contrasted with Article 4 of International Convention on the Elimination of All Forms of Racial Discrimination (CERD) which specifically calls for criminalisation.[14] Even in this instance, however, in practice the Committee has agreed with States parties that, having criminalised racist speech, they have prosecutorial discretion as to whether or not they press charges in a particular case. However, "it is incumbent upon the State to investigate with due diligence and expedition" every threat of racial violence, "especially when they are made in public and by a group".[15]

Applying the above discussion on remedies to victims of Article 20 incitement, however, is not straightforward and depends on a number of factors. This discussion will restrict itself to Article 20 incitement alone and not to the distinct and important,

[10] Eric Heinze 'Viewpoint Absolutism and Hate Speech' 69.4 *The Modern Law Review* (2006) p. 544.

[11] Manfred Nowak *U.N. Covenant on Civil and Political Rights, CCPR Commentary* (Kehl: NP Engel Publisher, 1993) p. 475.

[12] See: Article 19 *Briefing note on International and Comparative Defamation Standards* (London, February 2004) available at http://www.article19.org/pdfs/analysis/defamation-standards.pdf (last accessed February 2011).

[13] 'Incitement' is used as a shorthand for Article 20(2)'s "advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law". This is a far more specific articulation than the general reference to 'hate speech', defined by one author as "speech designed to promote hatred on the basis of race, religion, ethnicity or national origin". Michael Rosenfeld 'Hate Speech in Constitutional Jurisprudence: A Comparative Analysis' 24 *Cordozo Law Review* (2003) p. 1523.

[14] This has been critiqued by a number of authors including Partsch. See: K. J. Partsch 'Racial Speech and Human Rights: Article 4 of the Convention on the Elimination of All Forms of Racial Discrimination' in Sandra Coliver (ed.) *Striking a Balance: Hate Speech, Freedom of Expression and Non-discrimiantion* (London: Article 19 and University of Essex: Human Rights Centre, 1992) pp. 27-28.

[15] See: *Yilmaz-Dogan v. The Netherlands*, CERD Report, 1988, GAOR A/43/18, Annex IV, para. 6.6. See also: Patrick Thornberry 'Forms of Hate Speech and the Convention on the Elimination of All Forms of Racial Discrimination (ICERD)', Conference room paper 11, Expert seminar on the links between articles 19 and 20 of the International Covenant on Civil and Political Rights (ICCPR): Freedom of expression and advocacy of religious hatred that constitutes incitement to discrimination, hostility or violence, (2-3 October 2008, Geneva), available at http://www2.ohchr.org/english/issues/opinion/articles1920_iccpr/2008_experts_papers.htm (last accessed February 2011).

topic of incitement to genocide.[16] It will also not be able to address the developing hate speech case law from international criminal law.[17]

Article 20(2) "does not declare a right that individuals hold vis-à-vis the government".[18] It requires governments to prohibit certain behaviour of private or government actors vis-à-vis private actors. States parties "should themselves refrain from any such propaganda or advocacy".[19] The Article does not fit the mould of most of the other ICCPR articles "in that it does not set forth a specific human rights but merely establishes limitations on other rights",[20] through "a separate provision".[21]

The reasons for this anomalous article are largely historical and political. The late Kevin Boyle reminded us of how highly ideological Cold War debates coloured the drafting of this article

> There were three positions, broadly speaking: the Soviet Union and its allies, who had little enthusiasm for the idea at all; the United States, which believed in it – many thought – too much; and the rest, the other Western democracies and developing countries, who tried to hold the middle ground. These contrasting positions were most vividly displayed over the question of how to deal with 'bad' speech, that expression and propaganda for war.[22]

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[16] See, for example, the following article which warns of the problems stemming from conflating hate speech with incitement to genocide and instead calls for a clear distinction between the two. See: Susan Benesch, 'Vile Crime or Inalienable Right: Defining Incitement to Genocide' 48.3 *Virginia Journal of International Law* (2008) pp. 485-528. She puts forward a 'Reasonably Possible Consequences Test' through a six-prong inquiry in order to aid the interpretation of the existing legal standard for incitement to genocide:

1. Was the speech understood by its audience as a call to commit genocide?
2. Was the speaker able to influence the audience, and was the audience able to commit genocide?
3. Had the targeted group suffered recent violence?
4. Was the 'marketplace of ideas' still functioning?
5. Did the speaker dehumanize the target group, and justify killing?
6. Had the audience already received similar messages?

See Banesch, pp. 520-525. Timmermann, meanwhile, discusses acts of hate propaganda for genocide as distinction from direct and public incitement of genocide. For discussion see: Wibke Kristin Timmermann 'The Relationship between Hate Propaganda and Incitement to Genocide: A New Trend in International Law Towards Criminalization of Hate Propaganda' 18.2 *Leiden Journal of International Law* (2005) pp. 257-282. See also the 'Declaration on the prevention of genocide', International Committee on the Elimination of all Forms of Racial Discrimination, CERD/C/66/1, 17 October 2005 and 'Decision on follow-up to the Declaration on the Prevention of Genocide: Indicators of Patterns of Systematic and Massive Racial Discrimination, International Committee on the Elimination of all Forms of Racial Discrimination, CERD/C/67/1, 14 October 2005. Of the 15 indicators and additional 4 subset general indicators, those most closely associated with incitement are the following:

> (8) Systematic and widespread use and acceptance of speech or propaganda promoting hatred and/or inciting violence against minority groups, particularly in the media.
> (9) 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.

[17] See, for example: Josef Rikhof 'Hate Speech and International Criminal Law, The *Mugesera* Decision by the Supreme Court of Canada' 3.5 *Journal of International Criminal Justice* (2005) pp. 1121-1133 and Wibke Kristin Timmermann 'Incitement in International Criminal Law' 88.864 *International Review of the Red Cross* (2006) pp. 823-852, available at (last accessed February 2011).

[18] Stephanie Farrior 'Molding The Matrix: The Historical and Theoretical Foundations of International Law Concerning Hate Speech' 14.1 *Berkeley Journal of International Law* (1996) p. 8.

[19] General Comment 11 on Article 20 of the ICCPR, para. 2.

[20] Manfred Nowak (1993) p. 468.

[21] Ibid.

He explained the Soviet preoccupation with hate and war propaganda as being "in part simply the Cold War dance and the need to take an opposite position to the United States".[23] Other scholars have traced back the Article's rationale further back to the pre-war period and the Holocaust and this indeed finds support in the *travaux préparatoires* too.

Notwithstanding its drafting, it should be noted that Article 20(2) presents something of an anomaly within the ICCPR in that it advocates for a prohibition, which has implications for limiting certain freedoms rather than guaranteeing freedoms.[24] The question therefore has to arise as to whether Article 2(3) is in fact applicable to Article 20(2)? The right to a remedy, as outlined in Article 2(3)(a) requires that States Parties undertake to ensure a remedy to "any person whose rights or freedoms as herein recognized are violated". As Article 20(2) does not recognise rights and freedoms, but is addressed to States parties to act in prohibiting something, then one could argue that no right to a remedy applies directly with respect to Article 20(2).

Though this would seem prima facie correct, it loses sight of the wider objectives of the ICCPR. 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."

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, this should not distract us from the wider responsibility of States parties to prevent *all* discrimination.[25]

Seeking a Remedy: Incitement as 'aggravated discrimination'

Drawing from other human rights norms and provisions, serves to situate the question of remedies for incitement into the broader challenge of combating discrimination. After all, the advocates of hatred intend "to reverse or impede the struggle for human equality of treatment".[26] The *travaux préparatoires* of the ICCPR lend force to such a perspective, where in the context of discussions of the limitations to Article 19 there was a concern with "the continued existence of such

[22] Kevin Boyle, 'Hate Speech, The United States versus the rest of the World?' 53.2 *Maine Law Review* (2001) p. 489.
[23] Ibid.
[24] This is brought up in the *travaux préparatoires* on the drafting of Article 20, where Australia notes that "the article, whether in its original form or any of the amended versions, contained no provision setting forth any particular right or freedom…; on the contrary, it could be used by any government to suppress the very rights and freedoms which the Covenant was designed to preserve". Third Committee, 16th session (1961) regarding Article 20, available at: Marc J. Bossuyt *Guide to the 'Travaux Préparatoires' of the International Covenant on Civil and Political Rights* (Dordrecth: Martinus Nijhoff, 1987) p. 407.
[25] 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.
[26] Ibid., p. 501.

evils as national, racial and religious hatred or prejudices".[27] Article 20's 'incitement to discrimination, hostility or violence' therefore provides "safeguards" in the "conflict between speech rights and equality rights".[28]

Articles 2, 26 and 27 of the ICCPR uphold non-discrimination, including against persons belonging to minorities. Article 2(1)'s non-discrimination provision states:

> Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, 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 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 such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

Taken together with Article 27 of the ICCPR, given below, it is clear that the prohibition of discrimination relates to all persons, as well as there being particular additional attention to persons belonging to minorities.[29]

> In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language.

Indeed, the interrelated nature of rights requires that we read Article 20 along with other ICCPR obligations. Further to the obligations falling upon States parties in relation Article 27, we should also note that even in instances of public emergencies which threaten the life of the nation, Article 4 requires that derogations "do not involve discrimination".[30] It follows, therefore, that any actions stemming from Article 20 too should not have even the indirect effect of discriminating, *inter alia* against minorities. The importance of ensuring that restrictions on rights not have a discriminatory effect is also emphasised elsewhere. For example, in relation to Article 18 of the ICCPR, the Human Rights Committee comments "In interpreting the scope of permissible limitation clauses, States parties should proceed from the need to protect the rights guaranteed under the Covenant, including the right to equality and non-discrimination on all grounds specified in articles 2, 3 and 26".[31] Furthermore, the Human Rights Committee insists that any limitations "for the purpose of protecting morals must be based on principles not deriving exclusively from a single tradition". This is a standard that should be observed in guiding

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[27] Third Committee, 16th session (1961) regarding Article 19, available at: Marc J. Bossuyt, p. 393.

[28] Elizabeth F. Defeis 'Freedom of Speech and International Norms: A Response to Hate Speech' (1992) 29.57 *Stanford Journal of International Law* pp. 57-130.

[29] For a discussion see: Nazila Ghanea, 'Minorities and Hatred: Protections and Implications' 17.3 *International Journal of Minority and Group Rights* (2010) pp. 423-446.

[30] Article 4(1), ICCPR.

[31] General Comment 22, para. 8.

understandings of incitement. There should be careful regard for any action justified under Article 20 that singularly protects only one race, religion or ethnicity; particularly if that happens to also constitute a dominant majority.

Enjoyment of human rights without discrimination is a fundamental right which clearly also entails the right to a remedy. As in other human rights violations, the remedies for incitement and discrimination would likely focus on the one hand on procedural redress, and on the other on the accountability of wrongdoers, non-pecuniary damages for the victims,[32] and awareness raising. In this regard, ECRI has commented that

> "[i]f member States' legal commitment to combating racism and intolerance is to be fully effective, sustained measures must be taken to ensure that everyone is aware of the remedies available and how to make use of them. These measures should be matched by efforts to inform the broader public about legislation to combat racism, xenophobia, antisemitism and intolerance, so that its effects in terms of access to the courts and compensation are supplemented by an educational impact on the general public".[33]

The *travaux preparatoirés* of Articles 19 and 20 of the ICCPR suggest that there was scant discussion of remedies. However, a number of contributions seemed to support that the emphasis should be on 'corrective remedies' such as "a right to reply".[34] It is interesting to note that where the UN Committee on the Elimination of Racial Discrimination found a violation of Article 4 in *The Jewish Community of Oslo et al v. Norway*[35] case they also found violation of Article 6 (effective protection and remedies) and asked the government to take steps and report back within 6 months to ensure that such speech does not enjoy protection under freedom of speech in

[32] Pecuniary loss is generally awarded on the basis of specific evidence of loss, which is generally impractical in such cases. Non-pecuniary loss is for pain and suffering. Ascertaining damages for non-pecuniary loss in a principled way, however, can be difficult to ascertain. See: Robert Carnworth, 'Remedies from a Common law perspective' 49 *International and Comparative Law Quarterly* (2000) pp. 517-527.

[33] ECRI, Position Paper, European contribution to the World Conference against Racism, Racial Discrimination, Xenophobia and Related Intolerance, Strasbourg, 11-13 October 2000, EUROCONF (2000) 5, August 2000, para. 20, available at http://www.sissco.it/fileadmin/user_upload/Dossiers/negazionismo/documenti/Ecri_p_papers_2000.pdf (last accessed February 2011).

[34] Drafting Committee, 2nd session (1948) regarding Article 19, available at: Marc J. Bossuyt, p. 375, para. C2h. The argument that the response to hate speech is more speech is proposed by many. In a 'Viewpoint' issued by the Council of Europe Commissioner for Human Rights Thomas Hammarberg states that despite considering the Danish cartoons as "irresponsible and a reflection of Islamophobia" he is not in favour of stronger blasphemy laws but rather the attempt to "to tackle such differences through a free and open discussion" and better understanding of the "role played by journalists in the promotion of a culture of understanding of and tolerance for different cultures and religions". Thomas Hammarberg, *Viewpoints* 2007, 'Do not criminalize critical remarks against religion' available at http://www.coe.int/t/commissioner/Viewpoints/070611_en.asp (last accessed February 2011).

[35] *The Jewish Community of Oslo et al v. Norway* (case 30/2003, 2005).

Norwegian law.[36] It is therefore suggested that incitement, as articulated in Article 20(2), constitutes a *highly* aggravated form of discrimination.

Remedies for 'aggravated discrimination' at the European level

The absence of remedies singularly for incitement is reflected in the European context, where the most relevant standards are those of Article 10 (freedom of expression), Article 11 (freedom of assembly and association), Article 17 (restriction on activities aimed at the destruction of Convention rights)[37] and Article 14 (enjoyment of rights without discrimination).

The European Commission against racism and intolerance (ECRI) has commented that

> in conformity with the obligations assumed by States under relevant international instruments and in particular with Articles 10 and 11 of the European Convention on Human Rights, oral, written, audio-visual expressions and other forms of expression, including the electronic media, inciting to hatred, discrimination or violence against racial, ethnic, national or religious groups or against their members on the grounds that they belong to such a group are legally categorised as a criminal offence.[38]

ECRI therefore calls for ensuring that "adequate legal remedies are available to victims of discrimination, either in criminal law or in administrative and civil law where pecuniary or other compensation may be secured", whilst also ensuring procedural redress by ensuring "that adequate legal assistance is available" as well as ensuring "awareness of the availability of legal remedies and the possibilities of access to them".[39]

In many instances, the European Court of Human Rights determines the finding of a violation itself as sufficient just satisfaction in a range of discrimination cases. Examples of this include *Grzelak v. Poland*[40] and *Lehideux and Isorni v. France*[41] where violation was found of Article 10. In some other cases, however, non-pecuniary damages and costs and expenses are also awarded. Examples include the following:

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[36] For a discussion of ICCPR case law on this Article see: Nazila Ghanea 'Articles 19 and 20 of the ICCPR', Conference room paper 3, Expert seminar on the links between articles 19 and 20 of the International Covenant on Civil and Political Rights (ICCPR): Freedom of expression and advocacy of religious hatred that constitutes incitement to discrimination, hostility or violence, (2-3 October 2008, Geneva), available at http://www2.ohchr.org/english/issues/opinion/articles1920_iccpr/2008_experts_papers.htm (last accessed February 2011).

[37] See: *Lawless v. Ireland* (application no. 3, 1961).

[38] ECRI, General Policy Recommendation no. 1: Combating racism, xenophobia, antisemitism and intolerance, CRI(96)43 rev., 4 OCTOBER 1996, available at http://www.coe.int/t/dghl/monitoring/ecri/activities/gpr/en/recommendation_n1/Rec01en.pdf (last accessed February 2011).

[39] ECRI, General Policy Recommendation no. 1.

[40] *Grzelak v. Poland* (application no. 7710/02, 2010).

[41] *Lehideux and Isorni v. France* (application no. 24662/94, 1998).

- In the recent case of *Jehovah's Witnesses of Moscow v. Russia* (application no. 302/02, 2010) the Court decided held that Russia had to pay the applicants 20,000 Euros in respect of non-pecuniary damage and 50,000 Euros for costs and expenses;
- In *Sampanis and others v. Greece* (application no. 32526/05, 2008) the Court awarded each of the applicants 6,000 Euros in respect of non-pecuniary damage and 2,000 Euros for costs and expenses;
- In the case of *Angelova and Iliev v. Bulgaria* (application no. 55523/00, 2007), where the Court noted the knowledge of the authorities about an attack which was incited by racial hatred against a person of Roma origin, it found violation of Articles 2 (right to life) and 14 and it awarded 15,000 Euros in respect of non-pecuniary damage to the applicants and 3,500 Euros in respect of costs and expenses;
- In the case of *Secic v. Croatia* (application no. 40116/02, 2007), where the applicant had suffered both racially motivated physical attacks and racist verbal abuse on grounds of his Roma origins, violation was found of Article 3 (inhuman treatment or punishment) and Article 14 and the applicant was awarded 8,000 Euros in respect of non-pecuniary damage and 6,000 Euro for costs and expenses.
- In *Klein v. Slovakia* (application no. 72208/01, 2006) the Court found violation of Article 10 with respect to the applicant who was a journalist and film critic who had criticised Archbishop Ján Sokol, the highest representative of the Roman Catholic Church in Slovakia, in an article that he described as a literary joke. The article contained strong imagery and made reference to an act of incest committed between a church dignitary and his own mother in the film the Archbishop sought to outlaw. He also alluded to the Archbishop's alleged cooperation with the secret police of the former communist regime and he invited the members of the Catholic Church to leave their church if they considered themselves to be decent. The Court decided that the applicant had not discredited and disparaged Catholics and had not interfered with their freedom of religion, it had only been pejorative and vulgar with respect to the Archbishop. It awarded the applicant 6,000 Euros for non-pecuniary damage and 5,210 Euros for costs and expenses.
- In *Norwood v. United Kingdom* (application no. 23131/03, 2004) the Court declared inadmissible the case of the applicant, a British National Party (BNP) regional organiser, who was claiming violation of Article 10. He had posted a large poster with a photograph of the Twin Towers in flame with the words 'Islam out of Britain - Protect the British People' and a symbol of a crescent and star in a prohibition sign. The police removed the poster and asked him to interview in the local police station but he refused to attend and was charged with aggravated offence under section 5(1)(b) of the Public Order Act 1986 for displaying, with hostility towards a racial or religious group, a representation which was threatening, abusive or insulting, within the sight of a person likely to be caused harassment, alarm or distress by it. He was convicted of the offence and fined £300. The applicant claimed that the poster referred to Islamic extremism and was not abusive or insulting, he claimed violation of his Article 10 rights and discrimination contrary to Article 14. The Court, however, agreed with the assessment of the domestic courts that the poster amounted to a public expression of attack on all Muslims in the United Kingdom and therefore constituted an act within the meaning of Article 17, which did not,

therefore, enjoy the protection of Articles 10 or 14. It therefore unanimously declared the application inadmissible.

- In *Glimmerveen and Habenbeek v. The Netherlands* (application no. 8348/78 and 8406/78, 1979), the first European Convention case addressing hate speech, the European Commission on Human Rights dealt with the convictions of two members of a right-wing political party for possessing leaflets inciting racial discrimination by urging the removal of all non-white immigrants from the Netherlands. The applications, claiming violation of Article 10, were declared inadmissible based on Article 17 and the destruction of the rights of others.

The above is illustrative of a range of remedies offered by the European Court of Human Rights in 'aggravated discrimination' cases.

Countering the scourge of discrimination at the European level

Countering discrimination effectively is a serious challenge that needs continuous, proactive, united[42] and positive attention, underpinned with a genuine respect for diversity and a progressive outlook.[43] Numerous Concluding Observations of CERD and the UN Human Rights Committee are indicative of the scale of this challenge.[44] Though addressing a different context, the warning of Crenshaw is highly relevant, that

> antidiscrimination discourse is fundamentally ambiguous and can accommodate conservative as well as liberal views of race and equality … antidiscrimination law represents an ongoing ideological struggle in which the occasional winners harness the moral, coercive, consensual power of law.[45]

A similar sentiment is addressed by ECRI when bemoaning the fact that "the main problem concerning existing anti-discrimination provisions is how to ensure that they are effectively implemented. Too often … [it] fails to achieve the sought-after effect".[46] As in other parts of the world, European systems too demonstrate weaknesses in appropriately applying non-discrimination principles to minorities and continued vigilance is required for conservative views to give way to inclusivity.[47] It is

[42] For a discussion of the importance of keeping the focus on the common challenge of racial and religious discrimination see: Nazila Ghanea '"Phobias and Isms": Recognition of Difference or the Slippery Slope of Particularisms?' in Nazila Ghanea, Alan Stephens and Raphael Walden (eds.) *Does God Believe in Human Rights?* (Leiden: Martinus Nijhoff, 2007).

[43] A range of regional instruments address this, including the Framework Convention for the Protection of National Minorities and the European Charter for Regional or Minority Languages.

[44] In 2005, for example, CERD raised concerns a range of Council of Europe countries in its Concluding Observations including: France, Luxembourg, Georgia and Iceland (CERD A/60/18, 2005); and the Human Rights Committee has raised concerns regarding a range of Council of Europe countries including Switzerland and Sweden (ICCPR, A/57/40, vol. 1 2002), Russian Federation, Belgium and Serbia and Montenegro (ICCPR, A/59/40 vol. 1, 2004).

[45] Kimberlé Williams Crenshaw 'Race, Reform and Retrenchment: Transformation and Legitimation in Antidiscrimination Law' 101.7 *Harvard Law Review* (1988) p. 1335.

[46] ECRI, Position Paper, European contribution to the World Conference against Racism, Racial Discrimination, Xenophobia and Related Intolerance.

[47] An example of this is arguably the Şahin judgment of the European Court of Human Rights which, Beleleieu critiques as follows:

simplistic, however, to assume that more laws and new laws alone will act as a panacea to this age old problem.

In traversing the long journey to countering discrimination, whether at the European level or elsewhere, the prohibition of incitement has a role to play in particular contexts. However, it is a blunt and very particular tool whose over-exploitation will prove far more damaging to that end than its under-utilisation.

It is for reasons such as this, that specialist bodies such as ECRI have consistently emphasised that legal remedies must be supplemented by other measures. ECRI has recommended that as well as legal measures such as ensuring the commitment of the State to equal treatment and the countering of intolerance in national criminal, civil and administrative law; there needs to be attention given to policies in a number of areas including: education, information, awareness raising, training, and developing formal and informal structures for dialogue between minority communities and state agencies such as the police.[48] The challenge is to commit to "policies and practices aimed at encouraging respect for the human rights and dignity of those in society who are regarded as different".[49]

Ensuring procedural and substantive redress in this area requires a long term commitment which supplements legal remedies with a wide range of other commitments, structures and policies. Indeed the importance of prevention and the depth of the problem demand this.

Recommendations for the Seminar

(1) Levels of Response

As argued elsewhere,[50] on the one hand we should be wary of the risks carried by Article 20 but, on the other we should not be negligent of our duty to address discrimination robustly. We are offered three avenues in international human rights law with which to respond to very different levels of discrimination. Abhorrent though discrimination undoubtedly is in all its guises, the responses are tailored to the scale of the violation.

1. The first level response is armed with the tools such as Articles 5, 19, 26, 27 and 19 of the ICCPR.

> "The headscarf, like any other symbol, has several connotations and carries different messages, one of which is religious fundamentalism, but the message conveyed depends on the carrier of the symbol as well as the audience of that symbol. Does the headscarf have the same symbolic meaning for a Christian man in Sweden as it does for a Turkish woman from Izmir? For the 'Christian Club' of Europe as well as the Turkish elite following the mold of Kemalism, unveiling is a mark of emancipation ... The court voices this same rhetoric towards the headscarf ... But nowhere in its judgment does the Court state or provide evidence that Leyla Şahin was forced or coerced into wearing the headscarf."

Christopher D. Belelieu 'The Headscarf as a symbolic enemy of the European Court of Human Rights' Democratic Jurisprudence: Viewing Islam through a European Legal Prism in light of the *Şahin* Judgment' 12 *Columbia Journal of European Law* (2006) p. 619.

[48] ECRI, General Policy Recommendation no. 1.

[49] Paul Gordon 'Racist Violence: The Expression of Hate in Europe' in Sandra Coliver, p. 17

[50] For a discussion, inter alia, of the particularly high threshold of Article 20 see: Nazila Ghanea 'Articles 19 and 20 of the ICCPR'.

2. The second level response, which I've labelled 'aggravated discrimination' in this paper, is armed with Article 20(2) and Article 4 of ICERD.
3. The final set of tools is designed for responding to the incitement of genocide and genocide prevention, which the limitations of this paper have not allowed us to explore fully.

The *travaux préparatoires* and the case law over the last three to four decades from the international and regional levels, and the language of the standards themselves, suggest that the gap between the first and second level tools is much wider than that between the second and third. Indeed, it was concern with the scenario at the third level that prompted the very drafting of the second level limitations.

(2) Non-Discrimination

The significance of non-discrimination in international human rights law is such that even in the context of public emergencies derogations must not involve discrimination. It has been suggested therefore that in the rare instances where Article 20 actions are triggered, there should be vigilance that they too do not result in discrimination. There should be a particular concern with actions justified by reference to Article 20 which protect only the dominant race, religion or ethnicity.

(3) Remedies that Apply

It has been argued above, that the right to a remedy does not singularly apply to Article 20(2). However remedies are applicable to violations of discrimination more generally, whether at the gravity of the first, second or third levels, as outlined above.

In such instances, both procedural and substantive redress is applicable, such as bringing wrongdoers to justice, non-pecuniary damages for the victims, court costs and expenses, and awareness raising towards the objective of non-repetition.

(4) Required Responses

Whilst legal processes in general can be criticised for being slow, remote and conservative, an overview of European case law has brought to light instances where it has shown vigilance for victims and concern with the dangers of incitement for minorities. Legal processes need to be vigorously supplemented with other societal measures in recognition of the depth of the challenge of discrimination and the importance of its prevention.

(5) **Differing hatreds and human rights**[51]

Any effort to transplant thresholds and standards across various human rights norms to create new normative instruments or interpretations, without careful deliberation, could lead to unforeseen and damaging human rights consequences. 'Creative borrowing', say between race and religion, needs to be cognizant of the distinctions and protections originally offered. There are distinctions that relate to, for example: limitation grounds, whether the right is absolute or not, whether the right can be subject to derogation or not, relevant standards such as 'without interference' (Article 19, ICCPR) or 'without coercion' (Article 18, ICCPR), and so on. Even the extent of freedom of expression underlying rights differs. For example, the very enjoyment of human rights in one area, such as freedom to have, adopt or change a religion or belief of one's choice (Article 18, ICCPR), is largely facilitated by freedom of

[51] See: Nazila Ghanea, Compilation of Relevant International Instruments relating to 'incitement' and 'defamation', Eleven points for consideration.

expression. This alerts us to the need to be as open as possible with regards to critical expressions of diverging *ideas* related to religious or other beliefs. However, critical expressions of racial superiority do not enable the enjoyment of any human right. In fact they inhibit the enjoyment of an environment free of the racial hatred (Article 4, ICERD).