
Report of the expert workshop for Europe on the prohibition of incitement to national, racial or religious hatred (unedited)

Introduction

1. On 2 and 3 November 2008 an expert seminar was held in Geneva on articles 19 and 20 of the International Covenant on Civil and Political Rights (ICCPR) with regard to freedom of expression and incitement to hatred. In follow-up to that seminar, the Office of the United Nations High Commissioner for Human Rights is organizing a series of expert workshops on the prohibition of incitement to national, racial or religious hatred in international human rights law. The objectives of the workshops are:

- (a) To gain a better understanding of legislative patterns, judicial practices and various types of policies in countries of the various regions of the world with regard to prohibiting incitement to national, racial, or religious hatred while ensuring full respect for freedom of expression as outlined in articles 19 and 20 of the International Covenant on Civil and Political Rights;
- (b) To arrive at a comprehensive assessment of the state of implementation of the prohibition of incitement in conformity with international human rights law;
- (c) To identify possible actions at all levels.

2. Four workshops were scheduled for 2011: one for the European region, held in Vienna on 9 and 10 February 2011, one for the African region (Nairobi, 6 and 7 April 2011), one for the Asian and Pacific region (Bangkok, 6 and 7 July 2011), and one for the Americas region (Santiago, 12 and 13 October 2011).

I. Opening of the meeting

3. The expert workshop for Europe on the prohibition of incitement to national, racial or religious hatred was opened on Wednesday, 9 February 2011, by Mr. Ibrahim Salama, Director, Human Rights Treaties Division, Office of the United Nations High Commissioner for Human Rights, who welcomed participants.

4. A video message was delivered by Ms. Navanethem Pillay, United Nations High Commissioner for Human Rights. She noted that, as the world became increasingly interconnected, those seen as others, who did not share a community's history, traditions and values, were often perceived by that community to be predatory competitors or threats to the community's belief system. As discrimination and racial hatred were on the rise, often conveyed through hate speech broadcast in the mass media, it was legitimate to restrict well-defined and narrowly limited classes of speech to safeguard against such transgressions.

5. Freedom of expression and freedom of religion were mutually dependent and reinforcing. Criticism of religion could be constructive and yet still critical; it was not something that should be outlawed, as only free and critical evaluation in open debate could probe whether religious interpretations adhered to, or distorted, the original values that underpinned religious belief. At the same time, however, freedom of expression was not absolute and could be restricted within strictly defined parameters. In that regard, there was a need to distinguish between forms of expression that should constitute offences under criminal law in accordance with international norms, forms of expression that were not criminally punishable but might justify civil liability, and forms of expression that did not give rise to either criminal or civil sanctions but still raised concerns in terms of tolerance, civility and respect for the convictions of others.

6. In conclusion, she stressed that there was a need to counter the escalation of prejudice predicated on ethnic, national or religious divides and to break the vicious cycles of hatred and retribution. The current workshop, by considering possible limitations on a fundamental right, would test whether there was a genuine commitment to the full and interdependent set of human rights or whether they were merely being used as expedients in the pursuit of political agendas.

7. Mr. Jorge Sampaio, UN High Representative for the UN Alliance of Civilisations, delivered an opening statement in which he underlined that article 20 of the International Covenant on Civil and Political Rights constitutes a solid basis to move forward and to avoid the pitfalls of useless additional

conceptual controversies which are not supported by international law. In this regard, he underlined the need to make domestic laws compatible with international human rights law. Mr. Sampaio furthermore stressed that the United Nations Alliance of Civilisations (UNAOC) seeks to forge collective political will and to mobilize concerted action at institutional and civil society levels to overcome prejudice, misperceptions and polarization. It does so by establishing a paradigm of mutual respect based on the UN Charter, the Universal Declaration of Human Rights and other related human rights instruments.

8. Regarding issues such as respect for and protection of religious diversity, Mr. Sampaio underlined that National Plans are an appropriate framework to develop key policy tools. Further cooperation is needed to address these issues through more inter-religious platforms for dialogue, at various levels of leadership, including mechanisms of consultation at city level. Regional strategies that promote further intercultural dialogue and cooperation among countries as well as international and regional organizations on the ground are a practical way to build tolerance, respect and trust, and to prevent conflict. In this regard, the UNAOC Rapid Response Media Mechanism – as a media early warning mechanism on intercultural crises – could be expanded to become available to decision-makers throughout the UN system.

9. In conclusion, he stressed that a combined top-down and bottom-up approach is needed using soft power tools in the field of education, youth, media and migration with a view to realizing rights for all on the ground.

10. Ambassador Dr. Johannes Kyrle, Secretary-General for Foreign Affairs of the Austrian Federal Ministry of European and International Affairs, also delivered some opening remarks. He underlined that States have the obligation to guarantee the right of freedom of expression, but that both international law and the Austrian constitution accepts restrictions in certain well-defined circumstances. Identifying such circumstances is not easy and therefore this workshop would be important, and would contribute to the international debate on tolerance. Referring to the 1993 World Conference on Human Rights, held in Vienna, Ambassador Kyrle informed that Austria will be hosting a meeting of the Alliance of Civilisations in 2013.

II. Adoption of the programme of work

11. The participants adopted the programme of work before them.

III. Introduction of the preparatory study

12. Mr. Louis-Léon Christians introduced the background study he had prepared for this workshop.¹ The study demonstrated that the legal practice on the issues discussed is very different across countries of the region. Also the practical approach varies. Indeed many instances of hate speech never reach the courts which explains the low degree of available case law. However, even when there is case law, it is often not published or easily accessible in databases. One should also underline the social and cultural diversity in Europe. Difficult questions regarding for instance the requirement of “intent” in penal law are not dealt with in a consistent manner.

13. Mr. Christians elaborated on similarities across European countries and indicated that almost all States prohibit some kind of hate speech. However, no national offense has the exact same wording as article 20 of the ICCPR. In general, European countries have more pervasively defined provisions on restrictions of freedom of expression than for instance the “clear and present danger” test. Hate speech provisions in Europe, contrary to those on for instance blasphemy, are relatively recent and not frequently applied. But when applied, there is a risk of political interpretation and application of the laws. Penal law, although important, is not sufficient to prevent hostility or violence. It is furthermore clear that the media and the internet play a very specific and increasing role. Lastly, European countries are converging politically, through the European Union, the Council of Europe, and the Organisation for Security and Cooperation in Europe (OSCE), and are working towards adopting policies at the regional level.

14. In terms of diversity across Europe, Mr. Christians highlighted the internal diversity of wording and of formal requirements. He highlighted that the thematic field of protection is diverse. Some countries have more fields of protection whereas others go beyond the ICCPR to regulate for instance issues related to gender and sexual orientation. Also the role attributed to “criminal intention” varies, with some countries only requiring “negligence” or “recklessness”. National laws furthermore differ

¹ http://www.ohchr.org/Documents/Issues/Expression/ICCPR/Vienna/ViennaWorkshop_BackgroundStudy_en.pdf

on whether the offense can be committed in private or only in public. Differences can also exist when it comes to the consequences or the impact of incitement, with some countries requiring tangible consequences, others not. Penalties are also diverse and changing. These range from fines and prison sentences to alternative sanctions in some cases.

15. Important to note is that in some countries there is only one offence of hate speech, whereas other countries have multiple types of offenses related to hate speech, for example on denial of genocide, offending religious feeling, blasphemy, attacks on national unity, or insult of individuals belonging to a certain group.

16. It is clear that national legislations are constrained by international standards such as the ICCPR. European countries have to respect also other international standards such as the European Convention of Human Rights and Fundamental Freedoms as well as other Council of Europe standards. Further constraints are judicial traditions and socio-cultural traditions, which may affect outcomes.

IV. Work of the expert mechanisms

A. Presentations by the special rapporteurs and discussion

17. Mr. Frank La Rue, Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, and Mr. Heiner Bielefeldt, Special Rapporteur on freedom of religion or belief, introduced a joint submission reflecting the experience of their mandates with the prohibition of incitement to discrimination, violence or hostility.²

18. Mr. La Rue said that freedom of opinion has no limitations whereas the freedom of expression does have limitations which are derived from other human rights. In order to arrive at a violation of the right to freedom of expression, certain external acts need to have been undertaken and the intention to commit an offense needs to be demonstrated. Freedom of expression is a right that facilitates the exercise of other human rights. It should be seen as the solution to instances of national, racial or religious hatred. He mentioned that the UNESCO constitution indicates that it should support the free flow of ideas between nations, which is essential. Today we are being confronted with stereotypes, prejudice and discrimination on the basis of race, nationality, or religion which often times hides structures of power or geopolitical interests. What is needed is more dialogue, more communications and more understanding. At the same time, all religions should be open to criticism and comment as long as these are not of an offensive nature. While some countries have created the concept of “defamation of religions”, Mr. La Rue emphasized that defamation could only serve to protect the honour and reputation of individuals, and should not be applied to religions. Moreover defamation should only lead to civil and not criminal action.

19. Mr. La Rue stressed that the principles for applying the ICCPR provisions on incitement to hatred have to be established on the basis of human rights law and subsequently be applied on a case-by-case basis. Action taken under article 20 ICCPR needs to respect the three-part test for restrictions as contained in article 19, paragraph 3, of the ICCPR.

20. On the question of racism and racial discrimination, there are recommendations by CERD. But in terms of religion, the public manifestation of faith or non-faith is to be protected. Mr. La Rue referred to the massive expulsion of the Roma from France to illustrate how certain events can indirectly lead to hatred against certain groups, and to the debate on minarets in Switzerland to underline how also architecture is a form of expression. He also stressed how new technologies, the internet and other forms of mass communications constitute new challenges to the development of existing human rights. In conclusion, he referred to the “fitna” film in the Netherlands and to the Danish cartoons to underline the different approaches taken in each case by the Governments in question and to illustrate the importance of engaging in dialogue.

21. Mr. Bielefeldt made seven points. First, hatred is found in all regions of the world and often due to a paradoxical combination of fear and contempt. When envy is involved as well, it becomes a toxic mix. Second, an appropriate response is to have more speech, more debate, more deconstruction of stereotypes, free and fearless articulation of experiences rather than more restrictions. Third, there are of course limits to freedom of speech, for instance when speech is unfair. Such responses should be first and foremost public rejection. Civil litigation is also possible and criminal proceedings should be the very last resort with high thresholds attached. Fourth, clear definitions are imperative, because a vague wording or selective application of hate speech laws may have a chilling effect both on freedom of expression and freedom of religion. Fifth, he referred to the United Kingdom which, following a

² http://www.ohchr.org/Documents/Issues/Expression/ICCPR/Vienna/CRP3Joint_SRSubmission_for_Vienna.pdf

recommendation of the Parliamentary Assembly of the Council of Europe, had abolished the common law offense of “blasphemy”. At the same time, the United Kingdom closed a protection gap by issuing the 2006 Racial and Religious Hatred Act, as previously protection only existed for persons affected by racial hatred but not religious hatred. Sixth, human beings need protection against different forms of hatred. One needs to differentiate between racial and religious hatred as religious identity is a result of choice whereas one’s racial identity is innate. Therefore, the criteria for both forms of hatred are not the same. Seventh, the notion of “defamation of religions” is problematic and in this context Mr. Bielefeldt appreciated the shift from this notion to the legal concept of “incitement to hatred” as contained in article 20 of the ICCPR. Lastly, Mr. Bielefeldt noted that human rights are both complicated and easy.

22. The moderator subsequently opened the floor for a discussion among experts.

23. Ms. Ghana underlined that while certain articles of the ICCPR can be derogated from, this is not the case for article 18 on freedom of religion or belief. Hence manifestation of religion or belief should enjoy a heightened protection compared to other forms of expression. Furthermore, if the atmosphere is so invasive and the power structures so prohibitive that the very manifestation of religion or belief becomes impossible, one enters into the realm of genocide prevention.

24. Mr. Orhun agreed with the interdependence between freedom of expression and religion. Both are however not substitutes to each other and need to be examined separately. The crux of the matter is that there can be criticism of religions but not hatred of religions. He underlined that there are difficulties in arriving both at an objective definition of defamation of religions and of the terms contained in article 20 of the ICCPR. Mr. Orhun took exception to applying international law differently with regard to race/ethnicity on the one hand, and religion on the other hand. He expressed the view that human rights are evolutionary tools to address contemporary forms and manifestations of racism through normative standards.

25. Mr. Jardim referred to the historical development of laws on anti-Semitism in Europe in the 1990s and to the provisions on negationism adopted by certain countries. He underlined that there are two kinds of crimes in European penal codes, one on discrimination and the other, which is force in Portugal, to deal with crimes against religious feelings. While it is difficult to determine what certain provisions imply, it is clear that certain behaviour will need to be criminalised while realising that penal codes rarely contain the whole solution for society.

26. Mr. Verkhovsky stressed that human rights belong to humans and not to ideas, customs or practices and that one needs to enter into dialogue and open discussion. However, the law needs to be defined clearly enough on what is prohibited and courts need to decide on a case-by-case basis.

27. Mr. White added that, from a journalist’s point of view, when there is legal uncertainty on what constitutes for instance racism, there are massive problems when making an editorial selection for publication. Self-censorship is a concept that exists because of fear of reprisals and impacts on the freedom of information. The proliferation of voices, as a non-legal method of solving conflicts, is much welcomed but also raises problems. A great problem facing media today is the different approaches to distribution of information. There is great anxiety within society about the use of information. Therefore, ethical values need to be reinforced in the use of information in order to prevent abuse. One needs to look at such issues in a broader context rather than only as issues of law.

28. Mr. Lattimer commented that in many parts of the world it is difficult to make a distinction between religion on the one hand and race or ethnicity on the other hand as in some countries one is born into a given religion and dies as part of that same religion. Similarly, there is difficulty with looking at ethnicity as an engrained identity. It is therefore better to look into what is meant by hatred instead of looking at differences between grounds for hatred.

29. The moderator intervened by illustrating how the European Court of Human Rights, and some constitutional courts in Europe, had qualified the question of negationism as a form of implicit hate speech, thereby justifying its prohibition.

30. One observer shared experiences from the Barcelona Prosecutor’s Office and interjected that the use of the penal code must be the last option but nevertheless an important option to combat racism and xenophobia. Additional clarification is needed to ensure legal and terminological precision.

31. Another observer added that one needs to pay attention to the restricting force of criminal law provisions as these need to be applied in a context of specific legal traditions, for instance on the clear and present danger test, and to pay attention to the defences available such as the safe harbour provisions of the United Kingdom of Great Britain and Northern Ireland.

32. One observer highlighted that, although linked, one needs to examine the freedoms of religion and expression on their own rights. In this regard, he referred to the OSCE commitments on freedom of religion which include, among other things, the right to congregate and the right to issue information. He also underlined the importance of giving attention to Christianophobia, in addition to anti-Semitism and Islamophobia.

33. A representative of the Council of Europe, European Commission against Racism and Intolerance, highlighted that the European Court for Human Rights has adopted a factual approach to issues related to the prohibition of incitement to hatred. In evaluating the facts of a case, the Court pays a great deal of attention to the context of the group targeted, although in other case law it has indicated that there are limits on how much weight should be attributed to the reaction of the targeted group. For instance, the Court has indicated that the strong reaction of a majority against homosexuals cannot justify a restriction of their freedom of expression. The speaker also stressed that the approach is stricter when the speech is made by public authorities.

B. Presentations on the Human Rights Committee and the Committee on the Elimination of Racial Discrimination

34. Mr. O’Flaherty qualified article 20 of the ICCPR as a “Cinderella provision”. Although it is of central importance, it is disliked by many who champion freedom of expression, and its construction is sui generis under the Covenant as if confers a duty on States without creating a specific right. Until recently, it has featured little in the practice of the Human Rights Committee.

35. In terms of the consideration of periodic reports, whereas between 2006-2010, article 20 of the ICCPR featured in less than 10 % of concluding observations on Council of Europe Member States, between 2006-2010 it featured in 50 % of such concluding observations. The fact that the majority of concluding observations containing references to article 20 are European could potentially be explained by a more active civil society, and through cross-referencing of the work of other mechanisms such as CERD and the Universal Periodic Review. The Committee has demonstrated its willingness to address concerns of a wide and diverse groups of affected communities. It is not shy in identifying the groups and communities as culprits. The Committee doesn’t recognise a single integrated regime as a solution, instead it is satisfied when a wide and de-facto system is put in place. The Committee often refers to criminal law but one needs to keep in mind that States are free to use non-criminal laws to implement article 20. Mr. O’Flaherty also referred to concerns about prohibitions which exceed the terminology and threshold of article 20. The Human Rights Committee often matches its call for legislation and enforcement with public policy measures, such as education and public awareness raising campaigns.

36. Mr. O’Flaherty also gave some examples of individual cases which had come before the Committee. He developed further on the ongoing discussion in the Committee on the elaboration of General Comment 34 on article 19 of the ICCPR. The draft makes clear that articles 19 and 20 are compatible with each other and that article 20 is not an exception to article 19. Any prohibition undertaken pursuant to article 20 must satisfy the conditions of article 19 (3). The discussion of limitation clauses is very comprehensive. With regard to the protection of rights and reputation of others, it refers that such communities can be defined by faith or ethnicity. In terms of blasphemy, the draft General Comment 34 makes clear that such provisions may not be discriminatory and that criminal prohibition may usually be inappropriate. Blasphemy provisions, furthermore, may not be used to prevent criticism of religious leaders or religious doctrine. Mr. O’Flaherty also indicated that the Committee had decided to remove from the draft its previous definitions of the terms contained in article 20.

37. Ms. Crickley elaborated on the role of the CERD and indicated how, including under article 4 ICERD, the Committee is willing to address concerns of diverse groups under the terms of the Convention in view of multiple forms of discrimination including those on the basis of their religious beliefs. She furthermore referred to CERD’s General Recommendations on discrimination against non-citizens (General Recommendation 30), on discrimination in the administration and functioning of the criminal justice system (General Recommendation 31), and on special measures under the convention (General Recommendation 32).

38. Ms. Crickley expressed the view that the legal framework moves between different levels of protection for different groups at different times. Procedurally speaking, there is a big gap between legitimate expectations as a consequence of global discussions and legislation put in place and the unsatisfactory realisation of this framework. In terms of prosecution of journalists, the legislation failed in certain instances, for example in Ireland, and one needs to look also at ownership of different

forms of media. Furthermore, Ms. Crickley noted that in the European context not only the CoE framework needs to be taken into account but also the OSCE framework on hate crimes as well as the one which is developing in the EU under the Lisbon Treaty. Ms. Crickley also referred to the blasphemy law in Ireland which is controversial since it offers protection for religious views instead of protection for believers. One furthermore needs to pay more attention to the increased designation of religious undertones to what was previously seen as only cultural. She also stressed the importance of examining the root causes of instances of incitement to hatred and to go beyond legal considerations. Furthermore, more data and more monitoring needs to be available in order to avoid overly reliance of perception. She also suggested full use of regional and international instruments. Furthermore, one needs to ensure adequate protection instead of focusing on overlapping provisions. Lastly, ethnic or religious profiling needs to be discontinued and in order to achieve this, data needs to be collected.

V. Law and judicial practices

39. Mr. Jardim introduced his paper on the legal framework in Portugal for regulating the duties and rights of religions and confessions and illustrated how this accords with the freedom of religion. The key undertone of this law was equality between the various confessions.³

40. Ms. Callamard underlined the coherence between articles 19 and 20 of the ICCPR and the explicit recognition that the three part test of legality, proportionality, and necessity should equally apply to cases related to incitement to hatred. National laws implementing the provisions of the ICCPR should in her view explicitly build on article 20 of the ICCPR. In terms of the countries in Europe, the situation can be described as a patchwork, with vague and ad hoc application. She also underscored the need to adopt robust definitions of the key terms at the heart of article 20 of the ICCPR. In particular “hostility” is a more difficult term to define although in any event, there should be a high threshold. An attempt at providing such definitions was contained in her paper and could also be found in the “Camden Principles”.

41. Ms. Callamard continued to introduce her paper which reflects the work undertaken by the organisation “Article 19” in providing guidance for applying thresholds in relation to restrictions of freedom of expression, in particular under article 20 of the ICCPR.⁴ These guidelines comprise a seven-fold test regarding: severity, intent, content, extent, imminence, likelihood or probability of action, and context. Ms. Callamard elaborated on each of these tests and concluded by underlining the importance of judicial training on article 20 of the ICCPR. She reiterated the need to look into other approaches than that of criminal law.

42. Mr. Orhun guarded against adopting pre-conceived solutions and instead suggested to openly think about ways and means to address alienation, discrimination, and stigmatisation. In this regard, one needs to realise that articles 19 and 20 of the ICCPR are not sacrosanct and that there is a need to draft new normative standards, in a consensual manner, on for instance vilification or defamation of religions.

43. Mr. White commended the paper provided by the organisation “Article 19” and underlined how it could guide journalists’ difficult daily decisions on which stories to produce. He also underlined the need for more research and analysis of practice in relation to protecting the process of expression.⁵ Our ambition should not be to seek to define the exact terms in law but instead ensure that the law does not inhibit expression but instead contributes to building dialogue and better understanding while also ensuring better quality of journalism in light of the changing electronic media landscape. There is furthermore a clear need for more policies toward diversity in media, reinforcing editorial independence, good and effective self-regulation, and the responsibility in management of media organisations. More systematic research and monitoring of hate speech, where it is and who is carrying it out would be needed. In addition, more commitment to support initiatives of media organisations to counter hate speech would be helpful. Mr. White noted a rise in populist media in Europe, which are used by scrupulous politicians and exploited for commercial gains. There should not only be a debate among policy makers and legal experts but also among journalists and civil society. The competitive nature of the media landscape sometimes causes journalists to lose sight of ethical and moral values, to inadequately assess the value of a story and to be overtaken by a drive to beat competition or generate maximum revenue out of a story.

44. Mr. Lattimer recalled that article 20 of the ICCPR is about the need for States to regulate the speech of individuals whereas the general thrust of human rights law is to provide protection for

³ <http://www.ohchr.org/Documents/Issues/Expression/ICCPR/Vienna/CRP4Jardim.pdf>

⁴ <http://www.ohchr.org/Documents/Issues/Expression/ICCPR/Vienna/CRP7Callamard.pdf>

⁵ <http://www.ohchr.org/Documents/Issues/Expression/ICCPR/Vienna/CRP8White.pdf>

individuals against the power of the State. The greatest threat, in his view, comes from hate speech by Government officials as exemplified by recent incidents affecting the Roma community in Europe. The type of sanctions for hate speech by public officials should not be the same as for private actors. Criminal provisions are often not cooling enough when it comes to Government officials statements while judicial review as an administrative decision is also difficult in the absence of written proof. Additional public law remedies need to be conceived such as public interest litigation.

45. Ms. Petrova agreed that article 20 of the ICCPR does not have the same format as other articles in the Covenant. A critical question in this regard concerns identifying the rights holder. Another complicated issue is the distinction between the broader offense of discrimination – which requires a lower threshold – and that of incitement to hatred, which is narrower and carries a higher threshold.

46. Mr. Verkhovsky referred to the responsibility of civil servants and to criminal law provisions which indicate that when hate speech is uttered by a civil servant, this may qualify as an aggravating circumstance. Other responses could be in the form of disciplinary actions against such individuals.

47. Mr. O’Flaherty raised the point that article 20 of the ICCPR might be too narrow given the European context, for instance in relation to sexual minorities. He also referred to the very high burden of proof for an individual to raise an *actio popularis* to bring a case under article 20 of the ICCPR.

48. One observer noted the tendency to give greater importance to the indicator of religion over the indicator of nationality or ethnicity. In terms of thresholds, he referred to discriminatory harassment and linked this to public assembly, for example processions, or to discriminatory harassment within employment.

49. Another observer referred to jurisprudence in his country indicating that for prohibited incitement to hatred to be established a crime needs to be committed while in other cases an atmosphere of threat had been sufficient.

50. One observer underlined the need to ensure accountability within Government for hateful discourse by Government officials. A number of measures are available in addition to a legal response as indeed the political system as such can provide checks and balances to create accountability. Policy makers reaching out across party lines to condemn excesses in terms of freedom of speech or excluding individuals having committed hate speech from electoral lists are pragmatic ways of penalising those public officials who have engaged in hate speech. In any event, the existence of laws should never serve as an excuse for lawmakers not condemning hateful discourse.

51. Another observer agreed that the principles and thresholds contained in the paper provided by the organisation “Article 19” can indeed reduce ambiguity and prevent abuse but only if and when applied consistently, fairly and impartially by national authorities.

52. Mr. Sampaio indicated that the challenges for society linked for example to migration should be addressed at the policy level and grassroots level. with regard to building a culture of tolerance and peace, the Alliance of Civilizations can collaborate with the Human Rights Council and institutions both in Geneva and Strasburg. Mr. Sampaio stressed that the role of new media deserves great attention and he referred to the need for new ethics and codes of conduct. Efforts to identify tests and thresholds are extremely important, as they will ultimately help to implement provisions on the basis of common standards. Mr. Sampaio emphasized that hatred as a social phenomenon is much wider than the legal meaning. We need legal clarity on the thresholds but should not lose sight of the underlying social circumstances which enhance confrontation. Mr. Sampaio recommended to have a multi-layered approach to address the various stakeholders of everyday confrontations and to obtain actions at all levels.

53. Ms. Ghanea introduced her paper which examined the nature and means of effective remedies in international human rights law.⁶ It also highlighted that remedies are both procedural (access to justice and effective institutions) and substantive (reparations that are adequate, prompt and proportional to the gravity of offenses and which may include restoring reputation, preventing reoccurrence and paying legal fees). As such, article 20.2 ICCPR does not declare a right of individuals vis-à-vis the government which renders the question on available remedies more complicated. In her view, incitement to hatred may in certain cases constitute aggravated discrimination, although one should not conflate incitement to hatred with discrimination. Non-discrimination is non-derogable under the Covenant, therefore any action stemming from article 20 should not discriminate. Ms. Ghanea highlighted that the European Court on Human Rights has found violations, and imposed varying remedies ranging from the mere finding of a violation to paying financial damages.

⁶ <http://www.ohchr.org/Documents/Issues/Expression/ICCPR/Vienna/CRP5Ghanea.pdf>

54. Ms. Ghana concluded by providing five recommendations. One needs to guard against the risk of overusing article 20 and instead address discrimination more robustly through three avenues in human rights law (first level response in articles 5, 19, 26 and 27 of the ICCPR; second level response in article 20 of the ICCPR and article 4 of the ICERD; and third level response in genocide prevention). The response to discrimination needs to be pushed up instead of pushing down the threshold for incitement to hatred and genocide. As violations under article 20 would often constitute violations also under other provisions of the ICCPR, diverse remedies exist and need to be applied. Legal processes are not the only solution and need to be supplemented by other measures. Lastly, as there exist distinctions in the grounds for limitations and indeed the various standards themselves, in our response we need to focus on victimhood and remain faithful to the instruments on which we draw.

55. Mr. O’Flaherty added that before a violation of article 20 of the ICCPR can be established, there will normally have been a violation of article 19 as article 20 is a higher grade of problem. He asserted that there is a big problem world-wide with States not acting under their article 20 obligations. In terms of remedies, action under article 20 does not automatically require criminalisation, but any response needs to be effective (strong public information campaigns, training for relevant public officials, gathering of disaggregated data, empowerment of targeted communities, muscular multi-culturalism).

56. Mr. Lattimer interjected that one shouldn’t overstate the possible role of international criminal law as it is very conservative with regard to incitement to hatred and he referred in this regard to the Rome Statute’s inchoate crime of direct and public incitement to commit genocide.

V. Institutions and different types of policies

57. A representative for the European Commission against Racism and Intolerance (ECRI) presented the work and experiences of his organisation. ECRI’s activities are much guided by the work of the European Court of Human Rights and by recommendations of the Council of Europe Committee of Ministers. ECRI provides guidance on establishing a policy framework and puts great focus on criminalisation and criminal law remedies, especially in relation to intentional acts. In the European context, ECRI’s experience shows that some countries do not have hate speech legislation, while legislation in other countries is inadequate or sometimes not applied. In terms of penalties, proportionality of penalties is a concern for ECRI. In terms of application of the law, ECRI recommends training for judges, lawyers, and police officers. It also supports awareness-raising on norms, providing legal aid to minorities and the collection of data. Hate speech on the internet is a substantial problem and ECRI recommends to enhance monitoring capacity and international cooperation. In conclusion, the representative described ECRI’s approach as broader than criminalisation and encompassing prevention.

58. A representative of the Office of Democratic Institutions and Human Rights (ODIHR) presented the work and experiences of her organisation. ODIHR works with the Member States of the Organisation for Security and Cooperation in Europe on various issues, including religious intolerance. The organisation focuses on effective non-legal responses to hate speech. Regarding the internet, ODIHR is working also with internet providers and governments to develop policies to restrict dissemination of hate speech on the internet. ODIHR produces a yearly hate crimes report which draws on inputs including from Member States. While recognising different approaches in the region, the annual report does use a single working definition. The representative underlined that the working definition concerns bias-motivated crimes to which – although distinct from hate speech – provisions regarding incitement to hatred are often applied.

59. A representative of the Fundamental Rights Agency of the European Union (FRA) presented the work and experience of his organisation. FRA’s mission is to provide comparative data, expertise and advice to the institutions as well as European Union Member States and to raise awareness by promoting dialogue and disseminating information. FRA’s work is based on evidence gathering, collecting, recording, analysing and disseminating data which is reliable, objective and comparable. FRA collects official criminal justice data on racist violence and crime with a view to present trends. No direct comparison can be made between countries but fluctuations within a given member state can be recorded. FRA also assesses the quality of official criminal justice data collection systems. In the European Union, or at least in most of its member states, there is a clear absence of comprehensive data regarding racist crimes and a problem of comparability. Therefore FRA collects its own data itself through interviews of minority respondents on victimisation in a number of areas.

60. Following the presentation, the moderator opened the floor for comments by the experts. Experts took the floor and enquired about how the organisations dealt with superiority claims in the

name of religion as opposed to those in the name of race or ethnicity. They also queried about new challenges of monitoring the internet and rendering service providers responsible. The question was asked how the organisations address incitement to hatred on the basis of sexual orientation. Also a problem with regard to using various notions of discrimination, hatred and incitement interchangeably was flagged. A brief discussion ensued.

61. Subsequently, Mr. Lattimer made a contribution regarding civil society's response to occurrences of incitement to hatred and he underlined some trends in this regard. There has been an exponential growth in forms of speech, both through the internet or more traditional forms of media which has given rise to huge problems of regulation. Furthermore, the globalisation of speech gives rise to cross-border effects and challenges, for example the violence in some parts of the world following the publication of the Danish cartoons. There is also a growing reluctance on the part of international criminal law to be involved in these issues as illustrated by the fact that offenses of incitement to hatred are not criminalised in the Rome Statute (with the exception of incitement to commit genocide as mentioned in Article 25 of the Rome Statute). Nevertheless, there is a growing set of national criminal jurisdictions engaging on the problem of hate speech. The single most important initiative in the region is EU Council Framework Decision on combating forms of expression of racism and xenophobia by means of criminal law. Prosecutions for hate speech are very rare, uneven across and within countries, but also used widespread against members of minorities or marginalised communities.

62. The nature of civil society's reaction includes reporting and awareness-raising about incidents of hate speech, use of complaint mechanisms at various levels, litigation in some cases, challenging of hate speech in the public arena, or tackling the underlying causes through a panoply of activities. However, civil society does not react systematically because of a lack of awareness of rights or of means to make complaints combined with the lack of confidence in a successful outcome of complaints. Another consideration is the awareness that reacting to every incident may give greater visibility to the incident. One often also sees perpetrators alluding to subjects in order to avoid direct attacks which could lead to condemnation. Furthermore, a failed condemnation attempt risks being used as endorsement of the speech. What is clear, in conclusion, is the desire on the part of victims and civil society groups to enjoy greater access to the media and benefit from corrective speech and the right of reply.

Ms. Petrova introduced her paper which contained observations on the role of civil society and national human rights institutions in Europe regarding the framing of incitement to national, racial or religious hatred.⁷ She noted that if civil society is described broadly, it contains both the perpetrators and victims of incitement to hatred. More than other human rights issues, advocacy of hatred is very controversial at present and generates diverging responses from the established human rights community which points to an unsettled normative environment on this issue. In the last ten years, the debate on advocacy to hatred has been strongly influenced by the fast growing discourse on equality and non-discrimination law in the European Union, as exemplified by a number of European Union directives and equality bodies. Ms. Petrova called for an integrated approach to both the paradigms of equality and human rights. She also highlighted great effort on the part of civil society to counter-act abusive laws meant to address prohibited forms of incitement to hatred but which in fact are used perversely to target organisations or individuals who criticise Government or report on sensitive issues. Anti-terrorism legislation has been a case in point. In conclusion, Ms. Petrova mentioned that activities of national human rights institutions (NHRIs) deal with standard-setting, monitoring and reporting, litigation, awareness-raising and capacity building. NHRIs and civil society organisations play an important role in balancing freedom of expression and the need to counter incitement to hatred.

63. Mr. Verkhovsky added that one unfortunately has become accustomed to hateful messages on the internet because of their huge prevalence. Civil society often encounters difficulties when attempting to remove such messages of hatred as in some instances Governments are assisting service providers. What is crucial, however, is to more systematically condemn hate speech publically. Better cooperation between Governments and civil society is important in this regard.

64. Mr. Bielefeldt expressed the view that some extremist groups and individuals have successfully hijacked the agenda on freedom of expression by profiling themselves as defenders of freedom of expression. Therefore the need for public condemnation of excesses, on the basis of fairness principles, is even more crucial.

65. Ms. Callamard underlined the need for free speech activists to defend limitations to freedom of expression without suffering from being silenced.

⁷ <http://www.ohchr.org/Documents/Issues/Expression/ICCPR/Vienna/CRP6Petrova.pdf>

66. One observer referred to the lack of trust in the institutions which is exacerbated by insufficient representation of minority groups in the police force and by hate speech of high-ranking officials.
67. Another observer said that civil society can create many innovative solutions and she provided some examples on what her organisation had done in relation to the announced burning of the Koran in Florida. She also cautioned that hate speech can lead to increased violence, while potential perpetrators may feel empowered and feel a sense of impunity if it goes unpunished.
68. One other observer spoke on the issue of ensuring the freedom to freely profess one's religion while protecting religious communities in closed institutions and referred to a handbook his organisation had published in this regard.
69. Mr. Orhun introduced his paper on inter-cultural dialogue, media, freedom of expression, mediation and reconciliation.⁸ In his view, the objective of inter-cultural dialogue should not be confined only to achieving a "deeper understanding", but the aim should be broader to include conflict prevention and de-escalation, combating prejudices and stereotypes in public and political discourse and facilitating coalition-building across diverse cultural and religious communities. The paper highlighted the importance of promoting and facilitating inter-cultural and inter-religious dialogue and partnerships. Mr. Orhun recalled the important role of international organisations in order to promote democratic institutions and fundamental freedoms as the context for inter-ethnic understanding. He also focused on the need to give a role to civil society, as a means to promote inclusion and diversity.
70. Ways need to be identified to use dialogue and civil society partnerships as means to promote conflict-prevention, to combat stereotypes, and to facilitate coalition building. Mr. Orhun cautioned that the richness of multicultural societies may lead to social conflict and at times violence as one witnesses an increasing polarisation across cultural and religious lines. A comprehensive strategy of interaction on stimulating tolerance and enhancing cross-cultural understanding needs to be established. Key elements in this regard are transparency, inclusiveness, trust, and equality of members of society.
71. Mr. Orhun recalled that many western countries' legal systems prohibit disseminating of material which is threatening, abusive or insulting and likely to stir up hatred. Some legal systems go further and criminalise views which insult groups on the basis of ethnicity or religion. Mr. Orhun stated that the anti-Muslim sentiment across the European continent is growing, and this more than for any other religious group, however, Muslims in Europe are not a homogenous group. Mr. Orhun furthermore shared some reflexions on the role of mediation and reconciliation.
72. Mr. Verkhovsky introduced his paper on the topic of data-collection.⁹ He asserted that data collection is vital although it has not been acknowledged as a fundamental tool probably because of the difficulties regarding methodology and given the variation of legal systems. Few European countries undertake systematic data collection and often only in relation to law enforcement. According to Mr. Verkhovsky, the benefits of analysis and data collection are better enforcement of the law and better quality evaluation of policies. Assessing the degree of dangerousness of incidents is important for classifying these as either calling for direct violence or as more insidious or watered down incidents. A clear distinction has to be made between incitement to discrimination, on which there is international agreement, and other forms of incitement on which there is as of yet no consensus. However, there will always be ambiguity and overlap as there are very few clear-cut cases. He concluded by submitting that anyone undertaking data-collection will have to distinguish between the narrow focus of hate speech and the broader focus of intolerant speech. For as far as the media is concerned, mass media is too vast to monitor. Therefore targeted monitoring is required for instance on the basis of the popularity of an outlet or its audience or the number of hits for internet sites.
73. Mr. Lattimer referred to the use of "hatred" in other standards such as the European Framework Decision. He also flagged that since discrimination is usually not thought of as a criminal offense, incitement to discrimination, contrary to incitement to violence, will always be difficult to address under criminal law.
74. One observer referred to the typologies of different forms of inflammatory speech or what is colloquially referred to as hate speech. A distinction needs to be made between incitement and other forms of inflammatory speech. Key is to consider the reason for prohibiting speech, e.g. because it will provoke an audience to react in some way, or because a normative community has accepted it to be offensive or insulting. She furthermore introduced an analytical framework, to identify one or the other above-mentioned category, consisting of five criteria which affect the dangerousness of a

⁸ <http://www.ohchr.org/Documents/Issues/Expression/ICCPR/Vienna/CRP1Orhun.pdf>

⁹ <http://www.ohchr.org/Documents/Issues/Expression/ICCPR/Vienna/CRP2Verkhovsky.pdf>

specific speech act: speaker, audience, the speech itself, historical and sociological context, as well as the means of dissemination.

75. Another observer commented on the assertion that a strategic response to hate speech is more speech, and she underlined the need to give a voice to minority groups. She also underlined the importance of a good education system for fostering intolerance.

76. One other observer stressed the narrow level of conduct which constitutes incitement to hatred under article 20 of the ICCPR, and she advocated for a range of positive measures, instead of criminalisation, to be adopted to conduct that does not meet this threshold.

VII. Suggestions for further action

77. Mr. Bielefeldt noted the tendency, in Western Europe, that the debate on freedom is hijacked by right-wing and extremist movements. It is important to provide clarification on the nature of international obligations and to ground the response in fairness principles. Other essential requirements are a culture of public discourse with more speech and more diversity, as well as a media culture of self-regulation and a media infrastructure that overcomes monopolies. Mr. Bielefeldt asserted that a holistic approach requires taking freedom of expression and freedom of religion together and to oppose an antagonistic construction of these freedoms. He furthermore advocated to stick to the specifically defined criteria in ICCPR. He concluded by suggesting that the question of religious and racial discrimination needs further discussion.

78. Ms. Ghanea reiterated her suggestion to keep the responses to incitement to hatred, to discrimination and to genocide prevention separate as different thresholds and different standards are applicable in each case. One needs to increase the robustness of our response to discrimination rather than push down the threshold of article 20 of the ICCPR. Article 20 of the ICCPR should not be dismantled but understood as embedded in the ICCPR. Any action under article 20 ICCPR should therefore respect for instance the principle of non-discrimination. Lastly, one should guard against the perverse use of incitement to hatred provisions.

79. Ms. Callamard recalled the limits of a criminal law approach to incitement to hatred and underlined the need to also respond to a number of forms of speech which do not meet the threshold of article 20 but which create an environment not conducive to equality. She encouraged the regional expert meetings to continue their work and informed that the non-governmental organization Article 19 will continue its work on thresholds taking into account suggestions made during the meeting.

80. Ms. Crickley recalled that while there are sufficient mechanisms available in the European region, there is a lack of coordination between regional mechanisms, of information, of political will and of implementation procedures. She therefore called for an enhanced emphasis on implementation tools and measuring instruments and also suggested to upgrade public awareness and education programs and to provide training to lawyers and the judiciary. She concluded by underlining the need to, in addition to tackling incitement to hatred, adequately deal with ordinary racism and discrimination.

81. Mr. La Rue underlined the need to adopt a proactive approach to freedom of expression and recalled that limitations should be exceptional, justified by the protection of other rights, and grounded in international human rights law instead of cultural particularities. He added that in his view the press needs to be absolutely free but at the same time needs to be encouraged to adopt their own ethical standards. Mr. La Rue also reminded that the prohibition of incitement to hatred does not necessarily imply criminalisation and referred in this regard to what he perceived as a renewed push for criminalising certain expressions in a religious context. He concluded by stating that one has to look at prevention by establishing a proper education process that can foster a culture of peace in society.

82. Mr. Orhun noted the agreement on the need to protect and promote freedom of expression while recognising the necessity to combat intolerance, discrimination, and incitement to hatred based on ethnicity or religion. The challenge faced in this regard is about reconciling these two priorities. The debate needs to be entered into from the right angle, i.e. realising the multicultural and interconnected, complex nature of our world. He noted a growing hostile environment in Europe toward migrants, Muslims, Roma, or people considered as “the other”. Such manifestations not only put the victims at risk but also attack the social cohesion of our societies. He concluded that regardless of the nomenclature of issues debated, all concern the same problem that needs to be addressed through a growing and evolving normative framework. One needs to start by evaluating existing international legal regimes and subsequently to evolve the norms on a conceptual and consensual basis.

83. Ms. Petrova stated that this series of workshops should only be the beginning of a process of clarifying the content and application of article 20 of the ICCPR. She underlined the need for a more focused and concentrated discussion on legal criteria and definitions concerning incitement to hatred and she suggested that OHCHR commission studies on certain sub-topics, such as an analysis of discrimination law approaches and human rights law approaches regarding incitement to hatred, the relationship between incitement to racial and religious hatred, or the perverse use of incitement legislation to suppress dissent.

84. Mr. Verkhovsky stated that assessing the danger of a given speech is heavily determined by context and he referred to some examples from his home country in this regard. Moreover, he asserted that it is difficult and even counterproductive to penalise every single action. He concluded by saying that for dialogue to be truly representative, it needs to be multifaceted and diverse.

85. One observer queried how the new Framework Decision of the European Union will assist victims of hatred in Europe and how the Lisbon Treaty will better empower Governments to implement incitement to hatred legislation.

VIII. Concluding remarks and closing of the meeting

86. Concluding the meeting, the moderator delivered a statement encapsulating the main points of the workshop discussion (see annex).

ANNEX

Vienna Workshop on the prohibition of incitement to national, racial or religious hatred

Vienna, 9 and 10 February 2011

Chair's wrap-up of the discussion

- In recent years, there has been an increase in the amount of incidents in Europe of advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence (incitement to hatred). This trend is also reflected in the work of international and regional human rights mechanisms. The significant change in demography resulting from the increasingly interconnected nature of our multicultural and globalized society calls for increased participation by all communities, including through access to media.

- At the international level, the legal prohibition is clearly established. However, there is a need to clarify the principles involved both for its better implementation and to avoid its misuse. In particular, the relevant criteria were thoroughly discussed – with a basis on the seven tests proposed by one of the experts:

- Severity
- Intent
- Content
- Extent, in particular the public nature of the speech
- Imminence
- Likelihood or probability of action
- Context

- While limitations to freedom of expression should be an exception, their content should be clear, consistent and effective and adjudicable by the courts on a case by case basis. The three part test of legality, proportionality and necessity of article 19 (3) applies also to article 20.

- The situation in Europe, when it comes to legislation and jurisprudence, can be described as a patchwork, ad hoc in its implementation and often defined by the context. The three grounds identified in article 20 (2) ICCPR are not consistently used. The reality is more diverse than what can be inferred from jurisprudence and actions taken by judicial actors. There is a very low recourse to judicial and quasi-judicial mechanisms in incitement and discrimination cases – as shown by the FRA study.

- Participants identified a clear need for:
 - additional research on the jurisprudence
 - additional monitoring by State and non-State actors

- systematic disaggregated data gathering (including human rights-sensitive guidance on methodology), including data for early warning
 - improving synergies among mechanisms.

- Participants acknowledged the important work of ECRI, FRA, ODIHR, specialized bodies and NGOs active in this field.

- Laws should not serve as a cover not to address hate speech by non-legal means. Human sentiment of hatred is deeper and larger than the offenses of discrimination and incitement to hatred, therefore a multilayered approach is necessary to address it at its roots and in its many facets.

- Prevention of discrimination demands that we do not put all our hopes on incitement laws. All avenues in international human rights law to combat discrimination should be used and there is a need to tailor the response. The use of article 20 should be exceptional.

- A progressive and proportionate response to incitement is needed. Criminalization should be a last resort. Non-legal responses are crucial. Such remedies should include:
 - Strong public campaigns and awareness-raising, including by public authorities
 - Training for police, judges and other law officials to prevent abuse
 - Gathering of disaggregated data
 - Empowerment of the targeted communities
 - Assertive multiculturalism and embracing diversity
 - Promoting tolerance and respect through education

- There is a clear and absolute obligation of authorities not to incite to hatred themselves; incitement to hatred should be seen as aggravated when it is committed by public officials. Sanctions in such cases should not be limited to penal sanctions, but should include disciplinary measures. Hate speech legislation should not be misused by States. States have a positive obligation to promote equality, diversity and pluralism. Recent experience shows that timely and proactive reactions by public authorities to incitement to hatred by private persons can alleviate tensions.

- Articles 2 and 20 (2) ICCPR imply that there is a right not to be discriminated against, including through incitement.

- The relative ambiguity of article 20 (2), particularly the thresholds for prohibited forms of incitement, makes the daily task of journalists' and editors' more difficult. The rise in populist journalism for commercial gains and the instrumentalization thereof by scrupulous politicians exacerbate the problem. The unregulated nature

of modern communication technologies, often internet-based, compounds the problem. Media should be encouraged to self-regulate, setting up its own codes of conduct.

- Civil society in Europe is facing different challenges, and often chooses not to react to incitement because they fear unintended consequences (such as providing undesired publicity to the hate speakers). Civil society actors have been both perpetrators and victims.
- Denial laws were considered by some as a form of protection against “implicit incitement”; others cautioned that historical events should be open to discussion.
- Although it is not necessarily within the scope of article 20 (2) ICCPR, practice in Europe show an increasing tendency to protect against incitement to hatred on the basis of a person’s sexual orientation – with 13 European countries having introduced such legislation.
- Human beings need protection from hatred. There was a discussion concerning the different approaches adopted by European States when it comes to a potential differentiation between incitement to racial/ethnic hatred and religious hatred.
- The Human Rights Committee could consider adopting a new general comment on article 20 ICCPR, at an appropriate time. The Human Rights Committee and the Committee on the Elimination of Racial Discrimination could discuss the relationship between article 4 CERD and article 20 ICCPR. The relevant Special Procedures’ further reflection on the issue is encouraged.
- Participants referred to the increased globalization of speech, as consequences of inflammatory rhetoric is felt beyond the scope of national jurisdictions ; which raises intricate questions of extraterritoriality.