

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

**Expert workshop on the Americas
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I. Introduction

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

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

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

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

II. Legislative and judicial practices as well as policies in the Americas

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

¹ As of 2 September 2011, Mr. Muigai has resigned as Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance.

1. Legislative practices

We note positively the relevant provisions in the **American Convention on Human Rights** “Pact of San José, Costa Rica”² with regard to freedom of conscience, religion, thought and expression as well as the prohibition of incitement to hatred in articles 12 and 13:

“Article 12: Freedom of Conscience and Religion

1. Everyone has the right to freedom of conscience and of religion. This right includes freedom to maintain or to change one’s religion or beliefs, and freedom to profess or disseminate one’s religion or beliefs, either individually or together with others, in public or in private.
2. No one shall be subject to restrictions that might impair his freedom to maintain or to change his religion or beliefs.
3. Freedom to manifest one's religion and beliefs may be subject only to the limitations prescribed by law that are necessary to protect public safety, order, health, or morals, or the rights or freedoms of others.
4. Parents or guardians, as the case may be, have the right to provide for the religious and moral education of their children or wards that is in accord with their own convictions.

Article 13: Freedom of Thought and Expression

1. Everyone has the right to freedom of thought and expression. This right includes freedom to seek, receive, and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing, in print, in the form of art, or through any other medium of one's choice.
2. The exercise of the right provided for in the foregoing paragraph shall not be subject to prior censorship but shall be subject to subsequent imposition of liability, which shall be expressly established by law to the extent necessary to ensure:
 - a. respect for the rights or reputations of others; or
 - b. the protection of national security, public order, or public health or morals.
3. The right of expression may not be restricted by indirect methods or means, such as the abuse of government or private controls over newsprint, radio broadcasting frequencies, or equipment used in the dissemination of information, or by any other means tending to impede the communication and circulation of ideas and opinions.
4. Notwithstanding the provisions of paragraph 2 above, public entertainments may be subject by law to prior censorship for the sole purpose of regulating access to them for the moral protection of childhood and adolescence.
5. Any propaganda for war and any advocacy of national, racial, or religious hatred that constitute incitements to lawless violence or to any other similar action against any person or group of persons on any grounds including those of race, colour, religion, language, or national origin shall be considered as offenses punishable by law.”

The **Inter-American Declaration of Principles on Freedom of Expression**, adopted in 2000, elaborates on the limitations set in article 13 of the American Convention on Human Rights.³ Principle 5 reiterates that “prior censorship, direct or indirect interference in or pressure exerted upon any expression, opinion or information transmitted through any means of oral, written, artistic, visual or electronic communication must be prohibited by law”. Principle 7 further provides that “Prior conditioning of expressions, such as truthfulness, timeliness or impartiality is incompatible with the right to freedom of expression recognized in international instruments.” Pursuant to Principle 10, “privacy laws should not inhibit or restrict investigation

² <http://www.oas.org/juridico/english/treaties/b-32.html>.

³ See <http://www.iachr.org/declaration.htm> and A/HRC/9/25, para. 69.

and dissemination of information of public interest”. Principle 11 adds that public officials are subject to greater scrutiny by society and that “laws that penalize offensive expressions directed at public officials, generally known as *desacato laws*, restrict freedom of expression and the right to information.”

The Special Rapporteur on racism, in his country report on **Guatemala**,⁴ emphasized that the Constitution affirms and recognizes the primacy of the human person as the subject and object of State action. In addition, the Comprehensive Agreement on Human Rights of 29 March 1994, called on the Government to undertake a number of legislative and institutional reforms to protect human rights in general and combat racial discrimination in particular. As regards the media, the Broadcasting Act (Decree No. 433) prohibits the broadcasting of comments that are denigrating or insulting or that incite racial discrimination. The Special Rapporteur noted that the adoption on 17 October 2002, of Decree No. 57-2002, which introduced article 202 bis into the Criminal Code, marked a significant step forward in the provision of criminal sanctions for discriminatory acts. This article describes discrimination as “any distinction, exclusion, restriction or preference based on gender, race, ethnic origin, language, age, religion, financial status, state of health, handicap, civil status or any other ground, reason or circumstance with the intention of preventing or hindering a person, group of persons or association from enjoying a legally established right, including a right established by customary law or custom, in accordance with the Political Constitution of the Republic and international human rights treaties”.

In his country report on **Canada**,⁵ the Special Rapporteur on racism noted that the federal Government has adopted an array of laws that aim to eliminate social inequalities while combating all forms of discrimination in the country. These include the Canadian Charter of Rights and Freedoms and other provisions of the Constitution Act, 1982, the Canadian Bill of Rights, the Canadian Human Rights Act, the Canadian Multiculturalism Act, the Employment Equity Act, the Canada Labour Code, the Public Service Staff Relations Act, the Public Service Employment Act and the Criminal Code of Canada. The Criminal Code contains three provisions relating to hate propaganda: advocacy of genocide (sect. 318), public incitement of hatred (sect. 319, para. 1) and willful promotion of hatred (sect. 319, para. 2). The provincial human rights statutes also contain provisions of dealing with discriminatory messages in various forms.

The Special Rapporteur on freedom of religion or belief, in his country report on **Argentina**,⁶ referred to the Anti-Discrimination Act No. 23592 (1998) which provides for criminal penalties for discriminatory acts and omissions on grounds of religion, race or sex. Article 2 of the Act reads: “The most lenient penalty on the scale of criminal penalties for offences punishable by the Penal Code and supplementary laws shall be increased by one third and the harshest penalty by one half when the offence was committed by means of persecution or out of hatred of a race or religion or for the purpose of destroying all or part of a national, ethnic, racial or religious group”. Article 3 reads: “Anyone who takes part in an organization or produces propaganda based on ideas or theories of the superiority of one race or group of persons of a particular religion, ethnic origin or colour for the purpose of justifying or advocating racial or religious discrimination in any form shall be liable to one month to three years’ imprisonment. The same penalty shall apply to anyone who by any means encourages or incites persecution or hatred against any person or group of persons because of their race,

⁴ E/CN.4/2005/18/Add.2, paras. 15-16.

⁵ E/CN.4/2004/18/Add.2, paras. 23-26.

⁶ E/CN.4/2002/73/Add.1, paras. 36 and 126.

religion [...]”. The Special Rapporteur noted the substantial legislative arsenal designed to prevent and punish any discrimination based on religion or belief, in the context of framework legislation of general scope which provides for criminal penalties (the 1998 Anti-Discrimination Act), as well as laws covering specific areas such as citizenship, the sphere of work, political parties, trade union associations and education.

In his country report on **Guyana**,⁷ the Special Rapporteur on racism noted that with a view to preventing racial discrimination and combating incitement to racial hatred, in December 2000, the Parliament adopted Act No. 17, which prohibits all individuals and political parties from publishing opinions or engaging in acts intended, or likely, to incite racial hatred or provoke racial violence. On 26 September 2003, the Racial Hostility Amendment Act 2002 was reinforced with stiffer penalties for anyone convicted of incitement to racial hatred.

The Special Rapporteur on racism, in his country report on the **United States of America**,⁸ noted that according to the U.S. Criminal Code, crimes motivated by race, color, religion or national origin can be investigated and prosecuted by federal authorities only when the crime occurs because of the victim’s participation in a federally protected activity (e.g. public education, employment, etc.). In cases that do not meet the latter requirement, the jurisdiction lies at the state level. Other federal statutes related to hate crimes include conspiracy against rights (18 U.S.C. 241), damage to religious real property (18 U.S.C. 247c), criminal interference with the right to fair housing (18 U.S.C. 3631) and criminal interference with voting rights (42 U.S.C. 1973). Apart from federal regulations, 47 U.S. states have laws on hate crimes. However, many states lack the capacity and resources to thoroughly investigate and prosecute such crimes. In this regard, a Local Law Enforcement Hate Crimes Prevention Act designed to strengthen the role of the Federal Government in the investigation and prosecution of such crimes and to expand the grounds for protection was approved in the House of Representatives and the Senate in 2007; however, it was withdrawn after an expression by the White House that the then U.S. President would veto the bill.⁹

2. Judicial practices

As noted in a recent report by the Office of the High Commissioner for Human Rights¹⁰, the **Inter-American Court of Human Rights** has in its jurisprudence stressed the prohibition of prior censorship. In the case of *Olmedo Bustos et al. v. Chile*, the Inter-American Court held that Chile had violated the right to freedom of thought and expression embodied in article 13 of the Inter-American Convention by blocking the showing of the film “The Last Temptation of Christ”. The Inter-American Court noted that freedom of expression is not limited to the right to speak or write, but that it is also closely linked to the right to use any appropriate method to disseminate thought and allow it to reach the greatest number of persons. The Inter-American Court stated that the exception to prior censorship in article 13 (4) of the Inter-American Convention is intended to regulate access for the moral protection of children and adolescents, limited to public entertainment. In all other cases, any preventive measure implies the impairment of freedom of thought and expression.¹¹ With regard to the right to freedom of conscience and religion, the Inter-American Court stated that the refusal of the authorities to

⁷ E/CN.4/2004/18/Add.1, paras. 8 and 26.

⁸ A/HRC/11/36/Add.3, para. 22.

⁹ A/HRC/11/36/Add.3, para. 56.

¹⁰ See A/HRC/9/25, paras. 70-72.

¹¹ Inter-American Court of Human Rights, case of “*The Last Temptation of Christ*” (*Olmedo-Bustos et al.*) v. *Chile*, judgment of 5 February 2001, para. 70 (http://www.corteidh.or.cr/docs/casos/articulos/seriec_73_ing.pdf).

screen the film did not impair or deprive anyone of their right to maintain, change, profess or disseminate their religion or beliefs with total freedom.

In the *Olmedo Bustos* case, the **Inter-American Commission on Human Rights**¹² had also argued that “there are three alternative mechanisms by which restrictions to the exercise of freedom of expression may be imposed: subsequent liability, regulation of the access of minors to public entertainment, and the obligation to prevent the justification of religious hatred. These restrictions may not exceed the provisions of Article 13 of the Convention and may only be applied in accordance with laws enacted for reasons of general interest and in accordance with the purpose for which such restrictions were established, as stipulated in Article 30 of the Convention.” Furthermore, the Inter-American Commission stressed that “article 13(5) of the Convention establishes the positive obligation of the State to avoid the dissemination of information that could generate illegal actions. This case does not fall within this assumption, since the Martin Scorsese film has been defined as a work of art with a religious content that does not attempt to disseminate propaganda. Moreover, during the actions before the local courts and the procedure before the Commission, the exception established in this article was never invoked. Also, Article 13(5) should be understood within the principle established in Article 13(1); that is to say, that ‘those who justify religious hatred should be subject to subsequent liability in accordance with the law’.”

We are concerned at reported expressions of incitement to racial and religious hatred or manifestations of religious intolerance in some countries of the Americas. For example, in a communication sent to the Government of **Venezuela** on 10 February 2009,¹³ the Special Rapporteur on freedom of religion or belief referred to acts of religious intolerance and violence against members of the Catholic and Jewish communities. On 22 January 2009, the Apostolic Nunciature was reportedly attacked when members of an organization called “La Piedrita” threw gas canisters into its house and left pamphlets insulting Catholic leaders. On 30 January 2009, fifteen unidentified armed men tied up a security guard at the Tiferet Israel Synagogue in the Maripérez district of Caracas, threw Torah scrolls on the floor and spray-painted the walls with anti-Semitic graffiti, such as “Damn the Jews”, “Jews out of here”, “Death to all” and “Israel assassins”. Reportedly, this was the second time in a month that the Synagogue was vandalized with graffiti depicting anti-Semitic messages. In addition, earlier in January 2009, the message “Property of Islam” had been sprayed on its walls. President Hugo Chavez publicly condemned the attack on the Synagogue and promised representatives of Venezuela’s Jewish community that those responsible would be brought to justice. On 7 and 8 February 2009, reportedly seven police officers and four civilians were arrested for their alleged involvement in the attack. The Government of Venezuela also informed about further actions taken in this regard.¹⁴

In a communication sent to the Government of the **United States of America** on 28 June 2004,¹⁵ the Special Rapporteur on freedom of religion or belief provided some illustrations of alleged incidents whereby public persons or professionals of the media had acted in ways that could constitute incitement to religious hatred:

- A Congressman had reportedly declared on radio that “85 per cent” of American Muslim community leaders are “an enemy living amongst us” and that “no [American] Muslims” cooperate in the struggle against terrorism;

¹² Ibid., para. 61 (d) and (g).

¹³ A/HRC/13/40/Add.1, paras. 248-250.

¹⁴ See A/HRC/13/40/Add.1, paras. 251-257.

¹⁵ See E/CN.4/2005/61/Add.1, paras. 292-305.

- A radio talk show host reportedly said “I don’t wanna say we should kill ‘em all [Muslims], but unless there’s reform [within Islam], there aren’t a lot of other solutions that work in the ground struggle for survival”;
- Another radio host reportedly declared during his talk show, in reply to a caller speaking of Muslims in the United States, “[y]ou think we should befriend them; I think we should kill them.”

By letter dated 3 August 2004, the Government of the United States of America responded that the First Amendment of the United States Constitution provides that “Congress shall make no law abridging the freedom of speech”. With respect to article 20 of the ICCPR, the U.S. Government noted that the language was susceptible to an expansive interpretation that could run contrary to the vigorous protection of the freedom of expression under the First Amendment of the Constitution. For this reason, the U.S. had made the following formal reservation to article 20 at the time it became party to the ICCPR: “That Article 20 does not authorize or require legislation or other action by the United States that would restrict the right of free speech and association protected by the Constitution and laws of the United States.” According to the Government’s response, statements such as those referred to by the Special Rapporteur, are not illegal under United States law. Even where the U.S. Government finds the content of such expression to be misguided and repugnant, the Constitution mandates that the Government neither prohibit nor regulate speech merely as a result of disapproval of the ideas expressed. The criminal justice system penalizes specific unlawful actions (which might or might not be inspired by hate, xenophobia, or racism), as opposed to punishing speech itself. The U.S. Government’s preferred approach to addressing hate speech is to confront it openly, to denounce it, and to promote tolerance, equality, and similar ideals through competing speech.

With regard to plans by church members of the Dove World Outreach Center in Florida to burn copies of the Qur’an, the Special Rapporteur on freedom of religion or belief and the Special Rapporteur on racism sent two joint communications to the Government of the **United States of America** on 8 September 2010 and 24 March 2011.¹⁶ On a website, the Dove World Outreach Center in Gainesville had publicly announced that on 11 September 2010 their members would be burning copies of the Qur’an, allegedly “in remembrance of the fallen victims of 9/11 and to stand against the evil of Islam – Islam is of the devil!” The United States Secretary of State condemned the church’s plans during her remarks at the Annual State Department Iftar dinner on 7 September 2010, indicating that she was “heartened by the clear, unequivocal condemnation of this disrespectful, disgraceful act that has come from American religious leaders of all faiths, from evangelical Christians to Jewish rabbis, as well as secular U.S. leaders and opinion-makers”.

While no copies of the Qur’an were burned in Florida on 11 September 2010, the Dove World Outreach Center six months later held a mock trial entitled “International Judge the Qur’an Day” on 20 March 2011. In an online poll, 15 out of 16 people reportedly found the Qur’an “guilty of inciting murder, rape and terrorist activities” and that it was “under suspicion of the direct or indirect murder of millions of people around the world”. On 20 March 2011, a copy of the Qur’an was soaked in kerosene and set on fire in the presence of around 30 people in Gainesville. In their communication to the Government of 24 March 2011, the Special Rapporteurs referred to the Durban Programme of Action, which “urges leaders of religious communities to continue to confront racism, racial discrimination, xenophobia and related intolerance through, inter alia, promotion and sponsoring of dialogue and partnerships to bring about reconciliation, healing and harmony within and among societies, invites religious

¹⁶ See A/HRC/16/53/Add.1, paras. 414-421; A/HRC/16/53, paras. 18-19; and A/HRC/18/51.

communities to participate in promoting economic and social revitalization and encourages religious leaders to foster greater cooperation and contact between diverse racial groups”.¹⁷ Furthermore, the Durban Review Conference Outcome Document “reaffirms that the eradication of racism, racial discrimination, xenophobia and related intolerance should aim not only at promoting equality and eliminating discrimination but also at promoting interaction, social harmony and integration, respect for tolerance and diversity among ethnic, cultural and religious communities”.¹⁸ The Special Rapporteurs urged the Government to take all necessary measures to guarantee that the rights and freedoms of members of the Muslim community in the United States of America are respected and protected. The Special Rapporteurs requested to be provided with information on any initiatives taken by the Government of the United States of America in this regard, including preventive ones.

In a communication sent to the Government of **Venezuela** on 11 December 2008,¹⁹ the Special Rapporteur on freedom of opinion and expression expressed concern about sanction procedures initiated by the National Commission of Telecommunications of Venezuela against Globovisión, a private TV news channel, in two cases. On 24 November 2008, Globovisión broadcast the official results by the electoral commission in almost all states, except in Carabobo and Táchira. It further broadcast in live the declarations of the candidate who believed that he had won the seat of Governor of Carabobo. The electoral commission later declared him a winner, and he eventually became Governor of Carabobo. On the same day, the President of Venezuela publicly ordered that the National Commission of Telecommunications of Venezuela (CONATEL) initiated a sanction procedure against Globovisión because it reportedly acted in an irresponsible way. On 27 November 2008, CONATEL notified Globovisión that a sanction procedure had been opened, because the TV news channel had broadcast lies that constitute advocacy or incitement to alter public order on the basis of the Law on Social Responsibility of Radio and Television. Similarly, CONATEL initiated a similar sanction procedure on the same ground because the editor of an independent newspaper had compared, during a TV show broadcast on Globovisión, the President of Venezuela with Benito Mussolini, and stated that “I am concerned that Hugo will end up like Mussolini, hung by the feet”.

3. Policies

In this section, we would like to refer to some policies and international/civil society initiatives conducive to effectively prohibit and prevent advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence.

In his country report on **Canada**,²⁰ the Special Rapporteur on racism welcomed that Canada adopted a multiculturalism policy in 1971, the first of its kind in the world. In 1988, the policy became law when the Canadian Multiculturalism Act was passed. The policy encourages a vision of Canada based on the values of equality and mutual respect without regard to race, national or ethnic origin, colour and religion. According to the Special Rapporteur, the Canadian experience has shown that multiculturalism encourages racial and ethnic harmony and cross-cultural understanding, and discourages ghettoization, hatred, discrimination and violence. Through multiculturalism, Canada recognizes the potential of all Canadians, encouraging them to integrate into their society and take an active part in its social, cultural, economic and political affairs. Furthermore, a wide range of policies and programmes are

¹⁷ A/CONF.189/12, chap. I, para. 211.

¹⁸ A/CONF.211/L.1, para. 106.

¹⁹ See A/HRC/11/4/Add.1, paras. 2647-2653.

²⁰ E/CN.4/2004/18/Add.2, paras. 14, 23, 56 and 59-63.

implemented by Canadian governments in order to combat exclusion and social marginalization resulting from all forms of discrimination; provincial and territorial governments have also adopted extensive legislation, programmes and policies which ensure the implementation of the Convention in their jurisdictions. However, representatives of the Jewish community have stated that satellite television and the Internet play a crucial role in promoting hate-mongering and that hateful rhetoric against Jews spread through those means is increasing dramatically. In addition, Canada's Muslims and Arabs have allegedly also been victims of hate crimes and racial profiling, particularly since the tragedy of 11 September 2001. The Special Rapporteur noted that some media have been playing a negative role in fostering negative images of Arabs and Muslims, e.g. allegedly portraying Arab/Muslims as "foreign elements/other, people who are unable to live in peace with others, sleeper terrorists".²¹

In the country report on the **Dominican Republic**,²² the Special Rapporteur on racism welcomed the elaboration for the first time in the history of the country of a cultural policy that acknowledges the African contribution in the Dominican Republic. The Special Rapporteur expressed his hopes that this policy will be a first step towards restoring the place that Africans and their descendents ought to have in the national memory of the country and counter the invisibility and silence that black Dominicans face in all spheres of society. He also referred to the dictatorial control of Rafael Leónidas Trujillo from 1930 to 1961, who fostered an official policy of racism and promoted a European and Hispanic identity, built around the development of anti-Haitian sentiments and the use of violence against Haitians. However, racial prejudice still seems to be embedded in everyday language, as reflected in the existence of aggressive expressions widely used among society which stigmatize and negatively stereotype black persons, e.g. the use of the terms "black" or "Haitian" as an insult, the frequent association of blacks with both illegal status and criminality as well as the dissemination of prejudices and stereotypes against Haitians in school textbooks and by an increasing sector of the media.

At the conclusion of his country visit to **Paraguay**,²³ the Special Rapporteur on freedom of religion or belief expressed his appreciation with regard to the initiation of the Human Rights National Action Plan and of the National Action Plan on Human Rights Education. He emphasized that National Action Plans in general provide excellent opportunities for bringing together all interested stakeholders, with a view to critically identifying common objectives and existing deficiencies as well as strengthening implementation mechanisms, including concerning issues related to freedom of religion or belief. The Special Rapporteur also welcomed the fact that the Government had recently established an Interreligious Forum providing a space for dialogue amongst groups of different religious as well as philosophical orientations. He encouraged the Government to continue supporting the Interreligious Forum, while ensuring an open and transparent participation of all interested groups and sectors of society. The Special Rapporteur's interlocutors from indigenous peoples mostly agreed that the general attitude towards their traditional beliefs and practices has become more respectful. Whereas in the past traditional practices, such as shamanist healing rituals, used to be denounced as "satanic" by some Christian missionaries, such attitudes have fortunately become rather exceptional. Moreover, some churches, in particular the Catholic Church, nowadays provide support to efforts for strengthening and recapturing the cultural, linguistic and spiritual heritage of indigenous peoples. In spite of such encouraging developments, however,

²¹ E/CN.4/2004/18/Add.2, para. 61. See also the recent report on Canada by the Independent expert on minority issues who notes increasing incidents of hate crimes against Muslims and a substantial implementation gap despite useful legislation and policies in the field of employment equality (A/HRC/13/23/Add.2, paras. 75 and 87).

²² See A/HRC/7/19/Add.5, paras. 7, 29, 37, 46, 48 and 99 (joint mission with the Independent expert on minority issues, A/HRC/7/23/Add.3).

²³ <http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=10903&LangID=E>.

indigenous interlocutors reported on instances in which material benefits or jobs given to indigenous individuals seemingly continue to be made dependent on their compliance with religious norms by members of some Christian denominations.

The **Johannesburg Principles on National Security, Freedom of Expression and Access to Information**²⁴ were adopted on 1 October 1995 and have been endorsed by the Special Rapporteur on freedom of opinion and expression in several reports and referred to by the Commission on Human Rights in annual resolutions on freedom of expression since 1996. The Johannesburg Principles refer to issues of incitement in the following provisions:

“Principle 2: Legitimate National Security Interest

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

Principle 6: Expression That May Threaten National Security

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

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

Principle 7: Protected Expression

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

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

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

The **Camden Principles on Freedom of Expression and Equality**²⁵, prepared in 2009, represent a progressive interpretation of international law and standards, accepted State practice (as reflected, inter alia, in national laws and the judgments of national courts), and the general principles of law recognized by the community of nations. The Camden Principles also address the issue of incitement to hatred and in this context Principle 12 provides the following:

²⁴ See E/CN.4/1996/39, Annex.

²⁵ www.article19.org/resources.php/resource/1214/en/camden-principles-on-freedom-of-expression-and-equality.

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

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

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

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

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

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

We also note the positive development of the adoption, without a vote, by the **Human Rights Council** of resolution 16/18 of 24 March 2011, entitled “Combating intolerance, negative stereotyping and stigmatization of, and discrimination, incitement to violence, and violence against persons based on religion or belief”.²⁶ In this resolution, the Human Rights Council “condemns any advocacy of religious hatred that constitutes incitement to discrimination, hostility or violence, whether it involves the use of print, audio-visual or electronic media or any other means” (operative paragraph 3). It also “recognizes that the open public debate of ideas, as well as interfaith and intercultural dialogue at the local, national and international levels can be among the best protections against religious intolerance, and can play a positive role in strengthening democracy and combating religious hatred, and convinced that a continuing dialogue on these issues can help overcome existing misperceptions” (operative paragraph 4). Furthermore, the resolution notes the speech given by Secretary-General of the Organization of the Islamic Conference, Ekmeleddin İhsanoğlu, at the 15th session of the Human Rights Council and draws on his call on States to take several actions to foster a domestic environment of religious tolerance, peace and respect (operative paragraph 5 (a) to (h)). Finally, the Human Rights Council “calls for strengthened international efforts to foster a global dialogue for the promotion of a culture of tolerance and peace at all levels, based on respect for human rights and diversity of religions and beliefs, and decides to convene a panel discussion on this issue at its seventeenth session within existing resources” (operative paragraph 9). We very much appreciate that the Human Rights Council has – after years of debate – ultimately found a way to unanimously address these worrying phenomena without referring to concepts or notions that would undermine international human rights law. In this context we would like to emphasize the principle that individuals rather than religions *per se* are the rights-holders.

²⁶ See A/HRC/RES/16/18.

In this context, we also welcome General Comment No. 34 on the freedoms of opinion and expression, as adopted by the **Human Rights Committee** on 21 July 2011. In its General Comment, the Committee stresses that “[p]rohibitions of displays of lack of respect for a religion or other belief system, including blasphemy laws, are incompatible with the Covenant, except in the specific circumstances envisaged in article 20, paragraph 2, of the Covenant. Such prohibitions must also comply with the strict requirements of article 19, paragraph 3, as well as such articles as 2, 5, 17, 18 and 26. Thus, for instance, it would be impermissible for any such laws to discriminate in favour of or against one or certain religions or belief systems, or their adherents over another, or religious believers over non-believers. Nor would it be permissible for such prohibitions to be used to prevent or punish criticism of religious leaders or commentary on religious doctrine and tenets of faith.”²⁷ With regard to the relationship of articles 19 and 20 of the Covenant, the Committee notes that these two articles “are compatible with and complement each other. The acts that are addressed in article 20 are all subject to restriction pursuant to article 19, paragraph 3. As such, a limitation that is justified on the basis of article 20 must also comply with article 19, paragraph 3.”²⁸ The Committee further explains that “[w]hat distinguishes the acts addressed in article 20 from other acts that may be subject to restriction under article 19, paragraph 3, is that for the acts addressed in article 20, the Covenant indicates the specific response required from the State: their prohibition by law. It is only to this extent that article 20 may be considered as *lex specialis* with regard to article 19. It is only with regard to the specific forms of expression indicated in article 20 that States parties are obliged to have legal prohibitions. In every case, in which the State restricts freedom of expression, it is necessary to justify the prohibitions and their provisions in strict conformity with article 19.”²⁹

III. Concluding remarks

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

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

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

²⁷ CCPR/C/GC/34, para. 48.

²⁸ CCPR/C/GC/34, para. 50.

²⁹ CCPR/C/GC/34, paras. 51-52.

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

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

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

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

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

It is necessary to anchor the debate on these issues in the relevant existing international legal framework, provided for by the ICCPR. Whereas the ICCPR provides for freedom of expression, it also clearly defines limitations to it, e.g. in articles 19 and 20. Furthermore, article 20 (2) of the ICCPR requires States to prohibit expressions if they amount to advocacy

of national, racial or religious hatred that constitutes incitement to discrimination, hostility and violence. We would like to underline that any measure to implement article 20 of the ICCPR will have to withstand the clear test that article 19 (3) imposes for restrictions on freedom of expression.

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

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

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

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

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

In addition, the Camden Principles on Freedom of Expression and Equality provide useful guidance for the interpretation of international law and standards, inter alia with regard to incitement to hatred. We would like to reiterate its Principle 12 which clarifies that the terms *hatred* and *hostility* refer to “intense and irrational emotions of opprobrium, enmity and

detestation towards the target group”, that the term *advocacy* is to be understood as “requiring an intention to promote hatred publicly towards the target group” and that the term *incitement* refers to “statements about national, racial or religious groups which create an imminent risk of discrimination, hostility or violence against persons belonging to those groups”.

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

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