INQUIRY INTO SERIOUS VILIFICATION AND HATE CRIMES

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We are grateful for the opportunity to contribute this submission to the *Inquiry into serious vilification and hate crimes*.

Executive summary

This submission invites the Legal Affairs and Safety Committee to take into consideration, in its assessment of any measures combatting serious vilification and hate crimes, the accumulated experience of similar initiatives which UN convention monitoring bodies and mandate holders have made available. Of particular relevance to Australia are the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD) and the International Covenant on Civil and Political Rights (ICCPR). Australia has ratified both treaties and is bound by their terms.

The primary concerns are that any measures adopted:

- Achieve protection for those affected by serious vilification and other harmful conduct proscribed in hate crimes, while preserving the individual and collective autonomy of all Australians, particularly in the areas likely to be most affected. These are freedom of thought, conscience and religion, and the freedoms of expression, assembly and association, guaranteed by Articles 18 to 22 of the ICCPR.
- Consistent with these principles of international human rights law, promote diversity throughout Australia by eliminating discrimination on <u>all</u> recognised grounds and ensure that legal measures and remedies do not divide Australian society by weaponising individuals or groups against ideological, political or religious opponents.

It is important to have regard to ICERD and the ICCPR for a variety of reasons, among them that:

- Australia has ratified both treaties and is bound by their terms (sub-national/state legislation may not be a source of inconsistency with Australia's treaty obligations)
- The human rights which are at the core of *Human Rights Act 2019* (Qld) are defined in section 7, of which the civil and political rights in Part 2, Division 2 are derived from the ICCPR (with the exception of property rights in section 24). This has a bearing both on the
  - the importance of those rights, which the Act seeks to protect and promote in Queensland
  - the process established by the Act for examining any proposed legislation which may result from this inquiry, in particular that legislation's compatibility with those human rights.

UN convention provisions binding on Australia

The key hate speech provisions in conventions binding on Australia are:

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- ICCPR article 20(2), which requires prohibition (by criminal or civil law) of the 'advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence'
- ICERD article 4(a), which requires prohibition (by criminal law) of 'all dissemination of ideas based on racial superiority or hatred, incitement to racial discrimination, as well as all acts of violence or incitement to such acts against any race or group of persons of another colour or ethnic origin'.

Although the categories of discrimination now acknowledged under the ICCPR have broadened over the years, its hate speech prohibition remains directed at *incitement to discrimination, hostility or violence*.

The hate speech provisions of ICERD and the ICCPR are drafted so that they will operate without prejudicing the freedoms found in other provisions of the ICCPR. Important principles to observe in this context are that:

- Convention implementation of hate speech obligations must preserve freedom of expression in accordance with ICCPR Article 19 (the need for this is particularly clear from guidance by the monitoring body for ICERD, the Committee on the Elimination of All Forms of Racial Discrimination).
- ICCPR Article 19(3) permits restrictions on freedom of expression *only* where necessary in support of "the rights or reputations of others … the protection of national security or of public order … or of public health or morals". A number of principles developed by the ICCPR monitoring body, the Human Rights Committee, should be observed to ensure proper justification for all restrictions on freedom of expression. These are outlined below.
- Similarly, any restriction on the other expressive freedoms (freedom of religion (Article 18), freedom of assembly (Article 21), and freedom of association (Article 22)) must be justified according to their respective limitation provisions, which parallel Article 19(3).
- The types of speech categorised by ICERD article 4(a) and ICCPR article 20 are of such a serious nature as to justify restriction under ICCPR Article 19(3) (and equivalent limitation provisions of other expressive freedoms). Categorical proscription of precisely this sort is justified *only* by the severity of such speech, i.e. where hate speech is defined at a very high threshold. Thus the prohibited speech must constitute "advocacy" of national, racial or religious hatred, and must constitute "incitement to discrimination, hostility or violence" (ICCPR article 20(2)). When hate speech laws are framed consistently with ICCPR article 20 the requirements of ICCPR Article 19(3) are met, not avoided, because of the appropriately high threshold at which unlawful hate speech is defined.
- Hate speech restrictions outside such extreme categories must always meet the standards of justification established by article 19(3). It is therefore recommended that hate speech prohibitions must either be framed consistently with ICCPR article 20 or be otherwise demonstrated to meet article 19(3) standards of justification due to the severity of the speech that is the subject of the prohibition.

Guidance from international sources on specific hate speech issues

The following guidance from international sources on the interface between hate speech and concurrent freedoms may assist the Legal Affairs and Safety Committee.

The use of limitation provisions

The disciplines applied by the Human Rights Committee to determine whether restrictions on the expressive freedoms are justified include: the importance of being guided by the aim of facilitating a right, rather than seeking unnecessary or disproportionate limitations to it;[1] that content restrictions, aimed at the message itself, are particularly egregious;[2] and that it is difficult to find any justification for restrictions on freedom of expression imposed on someone solely for exercising their rights under the ICCPR. In connection with freedom of assembly the Human Rights Committee has emphasised the need to identify "a specific and significant threat to public order and safety", to avert real (not merely hypothetical) dangers, and that the mere existence of reasonable and objective justifications for limiting rights is not enough.[3] The Committee has also often reiterated certain fundamental principles concerning the meaning of a democratic society,[4] including that it is a cornerstone of a democratic society to be able to peacefully promote ideas that are not necessarily favourably viewed by the government or by the majority of the population.[5]

The *Rabat Plan of Action* was the product of a series of workshops held by experts on the inter-relationship between freedom of expression and hate speech. The plan was endorsed by the UN High Commissioner for Human Rights when launching it in 2013.[6] The High Commissioner acknowledged that '[p]roperly balancing freedom of expression and the prohibition of incitement to hatred is no simple task.' Of cardinal importance however, was upholding ICCPR article 19(3): "[l]et me state clearly that any limitations to this fundamental freedom must remain within strictly defined parameters flowing from the international human rights instruments, in particular the [ICCPR] and [ICERD]. Article 19, paragraph 3, of the [ICCPR] lays down a clear test by which the legitimacy of such restrictions may be assessed".[7]

Difficulties associated with particular hate speech terminology

The *Rabat Plan* itself noted with some concern an increasing trend towards vagueness in the terminology used in hate speech legislation, and the creation of new categories of restrictions not supportable by reference to ICCPR article 19(3), or article 20. The broader the definition of incitement to hatred in domestic legislation, the more it opens the door for arbitrary application of the law. In the present context this could result in interference with the freedoms protected by ICCPR articles 18 to 22. The *Rabat Plan* is attached because of the more general guidance it provides in the area of hate speech measures.

The *United Nations Strategy and Plan of Action on Hate Speech* is also instructive. It was launched in June 2019 and sets out strategic guidance to address hate speech at the national and global level. It put the above international law provisions in perspective by explaining that they do not prohibit hate speech as such, only *incitement* to discrimination, hostility and violence. This type of speech requires prohibition in the ICCPR and ICERD because it is

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[1] *Kirsanov v. Belarus*, CCPR/C/110/D/1864/2009, 20 March 2014 [9.7].
[2] *Alekseev v. Russian Federation*, Communication No 1873/2009, CCPR/C/109/D/1873/2009, Views of 25 October 2013 [9.6]; *Kirsanov v. Belarus*, Communication No 1864/2009, CCPR/C/110/D/1864/2009, Views of 20 March 2014 [9.7].
[3] *Jeong-Eun Lee v. Republic of Korea*, Communication No. 1119/2002, CCPR/C/84/D/1119/2002, Views of 23 August 2002 [7.2]-[7.3].
[4] *Zvozskov et al. v. Belarus*, CCPR/C/88/D/1039/2001, 17 October 2006 [7.2]; *Korneenko et al. v. Belarus*, CCPR/C/88/D/1274/2004 31 October 2006 [7.3].
[5] *Kungurov v. Uzbekistan*, CCPR/C/102/D/1478/2006, 20 July 2011 [8.4].
[6] Annual report of the United Nations High Commissioner for Human Rights, A/HRC/22/17/Add.4 (11 January 2013).
[7] A/HRC/22/17/Add.4 (11 January 2013) [9].

especially dangerous. It explicitly and deliberately aims to provoke *discrimination, hostility and violence*, which may also lead to or include terrorism or atrocity crimes.[8]

The *Strategy and Plan of Action on Hate Speech* proposed a working definition for hate speech: "any kind of communication … that attacks or uses pejorative or discriminatory language with reference to a person or a group on the basis of who they are, in other words, based on their religion, ethnicity, nationality, race, colour, descent, gender or other identity factor". However, it acknowledged that the characterisation of what is "hateful" is controversial and disputed.[9] That working definition for hate speech does not offer a model description of hate speech for legislative purposes. In his 2019 report Michael Kaye, the then *UN Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression* (Special Rapporteur), commented on this definition proposed in the *Strategy and Plan of Action*. He observed that it is appropriate as a basis for political and social action to counter discrimination and hatred, but given its vagueness it would be problematic as the basis for legislative prohibitions, on legality grounds (lacking sufficient certainty). He drew a crucial distinction between conduct deserving that kind of political, social or educative response, and conduct warranting legislative curtailment. It remains essential that the State demonstrate the necessity and proportionality of legislative action restricting freedom of expression. The harsher the penalty, the greater the need to demonstrate the necessity for the measure in exacting terms.[10] Of particular relevance to legislative proposals, the Special Rapporteur stressed that

> expression that may be offensive or characterized by prejudice and that may raise serious concerns of intolerance may often not meet a threshold of severity to merit any kind of restriction. There is a range of expression of hatred, ugly as it is, that does not involve incitement or direct threat, such as declarations of prejudice against protected groups. Such sentiments would not be subject to prohibition under the [ICCPR] or [ICERD], and other restrictions or adverse actions would require an analysis of the conditions provided under article 19 (3) of the Covenant.[11]

The Special Rapporteur also observed that the term "ridicule" is a very broad term, and emphasised that it must only be prohibited where it "clearly amounts to incitement to hatred or discrimination". Ridicule is a type of speech "generally precluded from restriction under international human rights law, which protects the rights to offend and mock". Accordingly, "the ties to incitement and to the framework established under article 19(3) of the Covenant help to constrain such a prohibition to the most serious category".[12]

One common criticism of section 18C of the Racial Discrimination Act 1975 (Cth) is the disparity between the lay and judicial meanings of the words 'offend' and 'insult'. The ALRC Review of Commonwealth Laws for Consistency with Traditional Rights, Freedoms and Privileges reported in December 2015 that section 18C –

> would benefit from more thorough review in relation to implications for freedom of speech. In particular, there are arguments that s 18C lacks sufficient precision and clarity, and unjustifiably interferes with freedom of speech by extending to speech that is reasonably likely to 'offend'. In some

[8] Launch speech of the *United Nations Strategy and Plan of Action on Hate Speech* (Strategy and Plan of Action) by the UN Secretary-General, 18 June 2019, UN Office on Genocide Prevention and the Responsibility to Protect, p.2.
[9]Ibid, p.2.
[10] Special Rapporteur report A/74/486 (9 October 2019) [20].
[11] Ibid [24].
[12] Ibid [16]-[17].

> respects, the provision is broader than is required under international law, broader than similar laws in other jurisdictions, and may be susceptible to constitutional challenge.[13]

A number of respected commentators agree that this wording is problematic. For example, Julian Burnside QC has noted that "[t]he mere fact that you insult or offend someone probably should not, of itself, give rise to legal liability."[14] Similarly, in the context of examination of the complaints handling processes of the Australian Human Rights Commission by the Parliamentary Joint Committee on Human Rights, Professor Sarah Joseph stated that although the right to freedom of speech/freedom of expression is not an absolute right, and may be subject to permissible limitations, the right to freedom of expression cannot be displaced by the right to be free from offence or insult".[15]

Conclusions

Various descriptions may be given to hate speech. Those that are appropriate for legislative prohibition are relatively confined. Broader descriptions may, however, be useful when serving educative or other initiatives.

The universal prevailing justification for restricting freedom of expression (and related freedoms) is established by ICCPR 19(3). It is therefore recommended that it be preserved in any legislative scheme prohibiting hate speech, so that it operates as a general exclusion, in some substantive form, in addition to any specific exclusion which may be available.

The above guidance available from the international law experience of UN monitoring bodies and mandate holders is offered for the Legal Affairs and Safety Committee consideration.

9 July 2021

[13] ALRC Report 129, Final Report, *Traditional Rights and Freedoms—Encroachments by Commonwealth Laws* [4.176].
[14] Sydney Morning Herald, 'Human rights lawyer says 18C went too far,' 29 March 2014.
[15] Parliamentary Joint Committee on Human Rights, *Freedom of speech in Australia*, Inquiry into the operation of Part IIA of the Racial Discrimination Act 1975 (Cth) and related procedures under the Australian Human Rights Commission Act 1986 (Cth), 28 February 2017, p. 135.

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Addendum

Report of the United Nations High Commissioner for Human Rights on the expert workshops on the prohibition of incitement to national, racial or religious hatred[*] [**]

Summary

The Office of the High Commissioner for Human Rights (OHCHR) organized a series of expert workshops on the prohibition of incitement to national, racial or religious hatred, in which legislative patterns, judicial practices and policies in this regard were explored. This report summarizes the results of this initiative. In particular, it provides details on the wrap-up expert meeting organized in Rabat in October 2012, which brought together conclusions and recommendations from the expert workshops and resulted in the adoption by the experts of the Rabat Plan of Action on the prohibition of advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence, which is included in the annex to this report.

[*] The summary of the present report is circulated in all official languages. The report, which is annexed to the summary, is reproduced in the language of submission only.
[**] Late submission.

Annex

[English only]

Report of the United Nations High Commissioner for Human Rights on the expert workshops on the prohibition of incitement to national, racial or religious hatred

Contents

I. Introduction

1. In follow-up to the 2008 Expert seminar on the links between articles 19 and 20 of the International Covenant on Civil and Political Rights with regard to freedom of expression and incitement to hatred, the Office of the High Commissioner for Human Rights (OHCHR) organized, in 2011 and 2012, a series of expert workshops on the prohibition of incitement to national, racial or religious hatred, in which legislative patterns, judicial practices and policies in this regard were explored.

2. Over the years, we have witnessed a number of incidents which have sounded alarm bells about the level of hatred and cynicism that has permeated societies. Unfortunately a number of these incidents have led to violent reactions and deaths. Virulent and hate-laden advocacy can trigger the worst of crimes. Suffice it to recall recent examples of post-electoral violence spurred by hatred along ethnic lines; incidents involving extremist groups; abusive and malicious portrayal, online or in traditional media, of certain religions and their followers. It is clear that hatred has many faces and is present in all parts of the world.

3. As the High Commissioner for Human Rights, I have expressed alarm at the often extraordinarily negative portrayal in many countries of migrants, but also of minority groups by the media, politicians and other actors in the society. I have called for measures to curb growing xenophobic attitudes and underlined the need to swiftly denounce hate speech and prosecute those suspected of inciting racial violence and those who have perpetrated racist and violent actions.

4. I have publicly condemned displays of hatred or bigotry towards followers of certain religions and urged religious and political leaders to do their utmost to restore calm. I have condemned the violence, including murders, that has taken place in reaction to such incidents in various parts of the world.

5. While the concept of freedom of expression has been well-established for many centuries in the legal traditions of different cultures, its practical application and recognition are still far from universal. In many parts of the world, freedom of expression still faces formidable resistance from those who benefit from silencing dissent, stifling criticism or blocking discussion on challenging social issues.

6. With a view to enhancing our understanding of the relationship between freedom of expression and incitement to hatred, I took the initiative of organizing a series of expert workshops, in different regions of the world, to examine legislation, jurisprudence, and national policies with regard to the prohibition of national, racial or religious hatred as reflected in international human rights law. In October 2012, OHCHR convened a wrap-up expert meeting in Rabat, Morocco,[1] in which the recommendations of the earlier expert workshops were discussed, resulting in the adoption of the Rabat Plan of Action. The principal aim of the whole exercise was to conduct a comprehensive assessment of the implementation of legislation, jurisprudence and policies regarding advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence at the national and regional levels, while encouraging full respect for freedom of expression, as protected by international human rights law.

7. A total of five expert workshops were held in Vienna (9-10 February 2011), Nairobi (6-7 April 2011), Bangkok (6-7 July 2011), Santiago (12-13 October 2011) and Rabat (4-5

[1] For the list of experts who attended the meeting, and background details please see http://www.ohchr.org/EN/Issues/FreedomOpinion/Articles19-20/Pages/Index.aspx.

October 2012). We learned that many governments, in response to the challenges outlined above, have reinforced existing laws and introduced new punitive measures. The proceedings shone light on the problem of insufficient national legislation or of new, vague and unclear provisions that have been introduced and are open to misuse. Discussions also showed the uneven and ad hoc application of these laws, compounded often by the absence of dedicated and properly equipped institutions to implement or adjudicate them. Throughout the discussions, examples were provided of the negative impact of anti-blasphemy laws; problems relating to curbing freedom of information and the use of the Internet; harassment of journalists and human rights defenders; or instances where members of minorities are persecuted, with a chilling effect on others, through the abuse of vague or counter-productive legislation, jurisprudence and policies.

8. International expert bodies have a crucial role to play in guiding States in their implementation of provisions of human rights law on incitement to hatred thereby contributing to the progressive development of international law and defusing political tensions. In September 2011, the Human Rights Committee adopted general comment No. 34 on freedom of opinion and expression, and the Committee on the Elimination of Racial Discrimination has commenced consideration of a general recommendation on racist hate speech. Furthermore, joint position papers on the prohibition of incitement to hatred were presented in 2009 and 2011 by the Special Rapporteurs on contemporary forms of racism, racial discrimination, xenophobia and related intolerance; freedom of religion or belief; and the promotion and protection of the right to freedom of opinion and expression.

9. Properly balancing freedom of expression and the prohibition of incitement to hatred is no simple task. Let me state clearly that any limitations to this fundamental freedom must remain within strictly defined parameters flowing from the international human rights instruments, in particular the International Covenant on Civil and Political Rights and the International Convention on the Elimination of Racial Discrimination. Article 19, paragraph 3, of the Covenant lays down a clear test by which the legitimacy of such restrictions may be assessed. However, further guidance is needed in the real world when weighing freedom of expression against the prohibition of incitement to hatred.

10. First, one should realize that the question of distinguishing those forms of expression that should be defined as incitement to hatred and thus prohibited is contextual and the individual circumstances of each case, such as local conditions, history, cultural and political tensions, must be taken into account. An independent judiciary is therefore a vital component in the process of effectively adjudicating cases related to incitement to hatred.

11. Second, restrictions must be formulated in a way that makes clear that its sole purpose is to protect individuals and communities belonging to ethnic, national or religious groups, holding specific beliefs or opinions, whether of a religious or other nature, from hostility, discrimination or violence, rather than to protect belief systems, religions or institutions as such from criticism. The right to freedom of expression implies that it should be possible to scrutinize, openly debate and criticize belief systems, opinions and institutions, including religious ones, as long as this does not advocate hatred that incites violence, hostility or discrimination against an individual or group of individuals.

12. Third, with regard to domestic sanctions, it is essential to make a careful distinction between (a) forms of expression that should constitute a criminal offence; (b) forms of expression that are not criminally punishable, but may justify a civil suit; and (c) forms of expression that do not give rise to criminal or civil sanctions, but still raise concerns in terms of tolerance, civility and respect for the convictions of others.

13. The Human Rights Council, for its part, has also taken decisive action; in March 2011, it adopted unanimous resolution 16/18 that provides a comprehensive road map for a

coordinated national and international effort to ensure that certain rights and freedoms are not misused to undermine the freedom of religion or belief.

14. As the experts highlighted, the Rabat Plan of Action on the prohibition of advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence aims to facilitate and reinforce the implementation and protection of human rights in this difficult context. It contains conclusions and recommendations aimed at better guiding all stakeholders, including the national legislator and judiciary, in implementing the international obligation of prohibition of incitement to hatred. It is the result of a bottom-up, multi-stakeholder and consultative process conducted in four regions, and which enjoyed the participation of 45 experts from different cultural backgrounds and legal traditions.

15. It is my hope that this important initiative will indeed boost national efforts, facilitated by international cooperation, towards the full implementation of the relevant international human rights obligations; and that it will assist us all as we strive to counter the escalation of prejudice predicated on ethnic, national or religious divides and break the vicious cycle of hatred and retribution.

II. Expert workshops on the prohibition of incitement to national, racial or religious hatred

16. In 2011, OHCHR organized four regional workshops in Europe (Vienna, 9-10 February 2011), Africa (Nairobi, 6-7 April 2011), the Asia Pacific region (Bangkok, 6-7 July 2011) and the Americas (Santiago de Chile, 12-13 October 2011). Information regarding these events, including reports on the discussions held, can be found at http://www.ohchr.org/EN/Issues/FreedomOpinion/Articles19-20/Pages/Index.aspx.

17. By grounding the debate on incitement to hatred in international human rights law, the objective of the series of expert workshops was threefold: to gain a better understanding of legislative patterns, judicial practices and policies regarding the concept of 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; to arrive at a comprehensive assessment of the state of implementation of the prohibition of such incitement in conformity with international human rights law; and to identify possible actions at all levels.

18. In October 2012, OHCHR organized a wrap-up expert meeting in Rabat, which marked the culmination of this process, bringing together conclusions and recommendations from the expert workshops and resulting in the adoption of the Rabat Plan of Action by the experts (in appendix).

Appendix

Rabat Plan of Action on the prohibition of advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence[1]

Conclusions and recommendations emanating from the four regional expert workshops organized by OHCHR in 2011, and adopted by experts at the meeting in Rabat, Morocco, on 5 October 2012

I. Preface

1. In 2011, the Office of the United Nations High Commissioner for Human Rights (OHCHR) organized a series of expert workshops, in various regions, on incitement to national, racial or religious hatred as reflected in international human rights law. During the workshops, participants considered the situation in the respective regions and discussed strategic responses, both legal and non-legal, to incitement to hatred.

2. The workshops were held in Europe (Vienna, 9 and 10 February 2011), Africa (Nairobi, 6 and 7 April 2011), the Asia Pacific region (Bangkok, 6 and 7 July 2011) and the Americas (Santiago de Chile, 12 and 13 October 2011).[2] In doing so, OHCHR aimed to conduct a comprehensive assessment of the implementation of legislation, jurisprudence and policies regarding advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence at the national and regional levels, while encouraging full respect for freedom of expression as protected by international human rights law. This activity focused on the relationship between freedom of expression and hate speech, especially in relation to religious issues – a matter that has unfortunately created friction and violence among and within diverse communities, and which has come increasingly under focus.

3. The expert workshops in 2011 generated a wealth of information as well as a large number of practical suggestions for better implementation of the relevant international human rights standards.[3] To take stock of the rich results of the 2011 series of workshops, OHCHR convened a final expert workshop in Rabat, Morocco, on 4 and 5 October 2012, to conduct a comparative analysis of the findings of the four workshops; identify possible action at all levels and reflect on the best ways and means of sharing experiences.

4. The four moderators and the experts who participated in all four regional workshops, including the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, the Special Rapporteur on freedom of religion or belief, and the

[1] Article 20, paragraph 2 of the International Covenant on Civil and Political Rights states that "any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law." Throughout this document, such incitement will be referred to as "incitement to hatred".

[2] The four regional expert workshops and the Rabat meeting brought together some 45 experts from different backgrounds, and more than 200 observers participated in the debates.

[3] The High Commissioner's message to the four expert workshops as well as the background studies, expert papers, contributions from stakeholders and meeting reports are available at www.ohchr.org/EN/Issues/FreedomOpinion/Articles1920/Pages/Index.aspx

Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance, a member of the Committee on the Elimination of Racial Discrimination and a representative of the non-governmental organization, Article XIX, attended the Rabat workshop.

5. In line with the practice of the regional workshops, Member States were invited to participate as observers and were encouraged to include experts from their capitals in the delegations. Relevant United Nations departments, funds and programmes as well as relevant international and regional organizations, national human rights institutions and civil society organizations (including academia, journalists and faith-based organizations) could also participate as observers.

6. The following outcome document reflects the conclusions and recommendations agreed upon by the experts who participated in the Rabat workshop.

II. Context

7. As the world is ever more inter-connected and as the fabric of societies has become more multicultural in nature, there has been a number of incidents in recent years, in different parts of the world, which have brought renewed attention to the issue of incitement to hatred. It should also be underlined that many of the conflicts worldwide in past decades have also – to varying degrees – contained a component of incitement to national, racial or religious hatred.

8. All human rights are universal, indivisible and interdependent and interrelated. Nowhere is this interdependence more obvious than in the discussion of freedom of expression in relation to other human rights. The realization of the right to freedom of expression enables vibrant, multi-faceted public interest debate giving voice to different perspectives and viewpoints. Respect for freedom of expression has a crucial role to play in ensuring democracy and sustainable human development, as well as in promoting international peace and security.

9. Unfortunately, individuals and groups have suffered various forms of discrimination, hostility or violence by reason of their ethnicity or religion. One particular challenge in this regard is to contain the negative effects of the manipulation of race, ethnic origin and religion and to guard against the adverse use of concepts of national unity or national identity, which are often instrumentalized for, inter alia, political and electoral purposes.

10. It is often purported that freedom of expression and freedom of religion or belief are in a tense relationship or even contradictory. In reality, they are mutually dependent and reinforcing. The freedom to exercise or not exercise one's religion or belief cannot exist if the freedom of expression is not respected, as free public discourse depends on respect for the diversity of convictions which people may have. Likewise, freedom of expression is essential to creating an environment in which constructive discussion about religious matters could be held. Indeed, free and critical thinking in open debate is the soundest way to probe whether religious interpretations adhere to or distort the original values that underpin religious belief.

11. It is of concern that perpetrators of incidents, which indeed reach the threshold of article 20 of the International Covenant on Civil and Political Rights, are not prosecuted and punished. At the same time members of minorities are de facto persecuted, with a chilling effect on others, through the abuse of vague domestic legislation, jurisprudence and policies. This dichotomy of (1) non-prosecution of “real” incitement cases and (2) persecution of minorities under the guise of domestic incitement laws seems to be

pervasive. Anti-incitement laws in countries worldwide can be qualified as heterogeneous, at times excessively narrow or vague. Jurisprudence on incitement to hatred has been scarce and ad hoc, and while several States have adopted related policies, most of them are too general, not systematically followed up, lacking focus and deprived of proper impact assessments.

12. Holding the four workshops in different regions of the world and the wrap-up workshop in Rabat was a very timely and useful initiative. They enjoyed the full participation of relevant treaty body experts and special procedures mandate holders.

III. Implementing the prohibition of incitement to hatred

13. Against this background, the following conclusions and recommendations constitute the synthesis of this long, transparent and deep reflection by experts. The conclusions – in the area of legislation, judicial infrastructure, and policy – are intended to better guide all stakeholders in implementing the international prohibition of any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence.

A. Legislation

Conclusions

14. Under international human rights standards, which are intended to guide legislation at the national level, expression labelled as "hate speech" can be restricted under articles 18 and 19 of the International Covenant on Civil and Political Rights on different grounds, including respect for the rights of others, public order or sometimes national security. States are also obliged to "prohibit" expression that amounts to "incitement" to discrimination, hostility or violence (art. 20, para. 2, of the Covenant and, under some different conditions, art. 4 of the International Convention on the Elimination of All Forms of Racial Discrimination).

15. Discussions in the various workshops demonstrated the absence of a legal prohibition of incitement to hatred in many domestic legal frameworks worldwide, while legislation that prohibits incitement to hatred uses variable terminology and is often inconsistent with article 20 of the Covenant. The broader the definition of incitement to hatred is in domestic legislation, the more it opens the door for arbitrary application of the laws. The terminology relating to offences on incitement to national, racial or religious hatred varies from country to country and is increasingly vague, while new categories of restrictions or limitations to freedom of expression are being incorporated in national legislation. This contributes to the risk of misinterpretation of article 20 of the Covenant and additional limitations to freedom of expression that are not contained in article 19 of the Covenant.

16. Some countries consider incitement to racial and religious hatred as offences, while others consider incitement to hatred along racial/ethnic lines only as offences. Some countries also recognize prohibition of incitement to hatred on other grounds. National provisions vary between civil law and criminal law: in many countries, incitement to hatred is a criminal offence, while in some countries, it is an offence under both criminal and civil law or under civil law only.

17. At the international level, the prohibition of incitement to hatred is clearly established in article 20 of the International Covenant on Civil and Political Rights and article 4 of the International Convention on the Elimination of All Forms of Racial

Discrimination. In its general comment No. 34 (2011) on freedoms of opinion and expression, the Human Rights 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 of the ICCPR. 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" (para. 48).

18. Article 20 of the Covenant requires a high threshold because, as a matter of fundamental principle, limitation of speech must remain an exception. Such threshold must take into account the provisions of article 19 of the Covenant. Indeed the three-part test (legality, proportionality and necessity) for restrictions also applies to cases involving incitement to hatred, in that such restrictions must be provided by law, be narrowly defined to serve a legitimate interest, and be necessary in a democratic society to protect that interest. This implies, among other things, that restrictions are clearly and narrowly defined and respond to a pressing social need; are the least intrusive measure available; are not overly broad, so that they do not restrict speech in a wide or untargeted way; and are proportionate so that the benefit to the protected interest outweighs the harm to freedom of expression, including with respect to the sanctions they authorize.[4]

19. At the national level, blasphemy laws are counterproductive, since they may result in de facto censure of all inter-religious or belief and intra-religious or belief dialogue, debate and criticism, most of which could be constructive, healthy and needed. In addition, many blasphemy 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 what constitutes religious offences or overzealous application of laws containing 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.

Recommendations

20. In terms of general principles, a clear distinction should be made between three types of expression: expression that constitutes a criminal offence; expression that is not criminally punishable, but may justify a civil suit or administrative sanctions; expression that does not give rise to criminal, civil or administrative sanctions, but still raises concern in terms of tolerance, civility and respect for the rights of others.

21. Bearing in mind the interrelationship between articles 19 and 20 of the International Covenant on Civil and Political Rights, States should ensure that their domestic legal framework on incitement to hatred is guided by express reference to article 20, paragraph 2, of the Covenant ("…advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence…"), and should consider including robust definitions of key terms such as hatred, discrimination, violence, hostility, among others. In

[4] See Article XIX, *Camden Principles on Freedom of Expression and Equality*, (London, April 2009), principle 11.

this regard, legislation can draw, inter alia, from the guidance and definitions[5] provided in the Camden Principles.[6]

22. States should ensure that the three-part test – legality, proportionality and necessity – for restrictions to freedom of expression also applies to cases of incitement to hatred.

23. States should make use of the guidance provided by international human rights expert mechanisms, including the Human Rights Committee and the Committee on the Elimination on Racial Discrimination and their general comment No. 34 (2011) and general recommendation No. 15 (1993) respectively, as well as the respective special procedures mandate holders of the Human Rights Council.

24. States are encouraged to ratify and effectively implement the relevant international and regional human rights instruments, remove any reservations thereto and honour their reporting obligations thereunder.

25. States that have blasphemy laws should repeal them, as such laws have a stifling impact on the enjoyment of freedom of religion or belief, and healthy dialogue and debate about religion.

26. States should adopt comprehensive anti-discrimination legislation that includes preventive and punitive action to effectively combat incitement to hatred.

B. Jurisprudence

Conclusions

27. An independent judicial infrastructure that is regularly updated with regard to international standards and jurisprudence and with members acting in an impartial and objective manner, as well as respect for the rules of due process, are crucial for ensuring that the facts and legal qualifications of any individual case are assessed in a manner consistent with international human rights standards. This should be complemented by other checks and balances to protect human rights, such as independent national human rights institutions established in accordance with the Paris Principles.

28. There is often very low recourse to judicial and quasi-judicial mechanisms in alleged cases of incitement to hatred. In many instances, victims are from disadvantaged or vulnerable groups and case law on the prohibition of incitement to hatred is not readily available. This is due to the absence or inadequacy of legislation or lack of judicial assistance for minorities and other vulnerable groups who constitute the majority of victims of incitement to hatred. The weak jurisprudence can also be explained by the absence of accessible archives, but also lack of recourse to courts owing to limited awareness among the general public as well as lack of trust in the judiciary.

[5] Pursuant to principle 12, national legal systems should make it clear, either explicitly or through authoritative interpretation, that the terms ‘hatred’ and ‘hostility’ refer to intense and irrational emotions of opprobrium, enmity and detestation towards the target group; the term ‘advocacy’ is to be understood as requiring an intention to promote hatred publicly towards the target group; and 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.

[6] These Principles were prepared by ARTICLE 19 on the basis of multi-stakeholder discussions involving experts in international human rights law on freedom of expression and equality issues. The Principles represent a progressive interpretation of international law and standards, accepted State practice (as reflected, inter alia, in national laws and the judgments of national courts), and the general principles of law recognised by the community of nations.

29. It was suggested that a high threshold be sought for defining restrictions on freedom of expression, incitement to hatred, and for the application of article 20 of the International Covenant on Civil and Political Rights. In order to establish severity as the underlying consideration of the thresholds, incitement to hatred must refer to the most severe and deeply felt form of opprobrium. To assess the severity of the hatred, possible elements may include the cruelty or intent of the statement or harm advocated, the frequency, quantity and extent of the communication. In this regard, a six-part threshold test was proposed for expressions considered as criminal offences:

(a) **Context**: Context is of great importance when assessing whether particular statements are likely to incite discrimination, hostility or violence against the target group, and it may have a direct bearing on both intent and/or causation. Analysis of the context should place the speech act within the social and political context prevalent at the time the speech was made and disseminated;

(b) **Speaker**: The speaker's position or status in the society should be considered, specifically the individual's or organization's standing in the context of the audience to whom the speech is directed;

(c) **Intent**: Article 20 of the International Covenant on Civil and Political Rights anticipates intent. Negligence and recklessness are not sufficient for an act to be an offence under article 20 of the Covenant, as this article provides for "advocacy" and "incitement" rather than the mere distribution or circulation of material. In this regard, it requires the activation of a triangular relationship between the object and subject of the speech act as well as the audience.

(d) **Content and form:** The content of the speech constitutes one of the key foci of the court's deliberations and is a critical element of incitement. Content analysis may include the degree to which the speech was provocative and direct, as well as the form, style, nature of arguments deployed in the speech or the balance struck between arguments deployed;

(e) **Extent of the speech act**: Extent includes such elements as the reach of the speech act, its public nature, its magnitude and size of its audience. Other elements to consider include whether the speech is public, what means of dissemination are used, for example by a single leaflet or broadcast in the mainstream media or via the Internet, the frequency, the quantity and the extent of the communications, whether the audience had the means to act on the incitement, whether the statement (or work) is circulated in a restricted environment or widely accessible to the general public;

(f) **Likelihood, including imminence:** Incitement, by definition, is an inchoate crime. The action advocated through incitement speech does not have to be committed for said speech to amount to a crime. Nevertheless, some degree of risk of harm must be identified. It means that the courts will have to determine that there was a reasonable probability that the speech would succeed in inciting actual action against the target group, recognizing that such causation should be rather direct.

Recommendations

30. National and regional courts should be regularly updated about international standards and international, regional and comparative jurisprudence relating to incitement to hatred because when confronted with such cases, courts need to undertake a thorough analysis based on a well thought through threshold test.

31. States should ensure the right to a fair and public hearing by a competent, independent and impartial tribunal established by law.

32. Due attention should be given to minorities and vulnerable groups by providing legal and other types of assistance for their members.

33. States should ensure that persons who have suffered actual harm as a result of incitement to hatred have a right to an effective remedy, including a civil or non-judicial remedy for damages.

34. Criminal sanctions related to unlawful forms of expression should be seen as last resort measures to be applied only in strictly justifiable situations. Civil sanctions and remedies should also be considered, including pecuniary and non-pecuniary damages, along with the right of correction and the right of reply. Administrative sanctions and remedies should also be considered, including those identified and put in force by various professional and regulatory bodies.

C. Policies

Conclusions

35. While a legal response is important, legislation is only part of a larger toolbox to respond to the challenges of hate speech. Any related legislation should be complemented by initiatives from various sectors of society geared towards a plurality of policies, practices and measures nurturing social consciousness, tolerance and understanding change and public discussion. This is with a view to creating and strengthening a culture of peace, tolerance and mutual respect among individuals, public officials and members of the judiciary, as well as rendering media organizations and religious/community leaders more ethically aware and socially responsible. States, media and society have a collective responsibility to ensure that acts of incitement to hatred are spoken out against and acted upon with the appropriate measures, in accordance with international human rights law.

36. Political and religious leaders should refrain from using messages of intolerance or expressions which may incite violence, hostility or discrimination; but they also have a crucial role to play in speaking out firmly and promptly against intolerance, discriminatory stereotyping and instances of hate speech. It should be made clear that violence can never be tolerated as a response to incitement to hatred.

37. To tackle the root causes of intolerance, a much broader set of policy measures is necessary, for example in the areas of intercultural dialogue – reciprocal knowledge and interaction –, education on pluralism and diversity, and policies empowering minorities and indigenous people to exercise their right to freedom of expression.

38. States have the responsibility to ensure space for minorities to enjoy their fundamental rights and freedoms, for instance by facilitating registration and functioning of minority media organizations. States should strengthen the capacities of communities to access and express a range of views and information and embrace the healthy dialogue and debate that they can encompass.

39. Certain regions have a marked preference for a non-legislative approach to combating incitement to hatred through, in particular, the adoption of public policies and the establishment of various types of institutions and processes, including truth and reconciliation commissions. The important work of regional human rights mechanisms, specialized bodies, a vibrant civil society and independent monitoring institutions is fundamentally important in all regions of the world. In addition, positive traditional values, compatible with internationally recognized human rights norms and standards, can also contribute towards countering incitement to hatred.

40. The importance of the media and other means of public communication in enabling free expression and the realization of equality is fundamental. The traditional media

continue to play an important role globally, but they are undergoing significant transformation. New technologies – including digital broadcasting, mobile telephony, the Internet and social networks – vastly enhance the dissemination of information and open up new forms of communication, such as the blogosphere.

41. Steps taken by the Human Rights Council, in particular the adoption without a vote of resolution 16/18 on combating intolerance, negative stereotyping and stigmatization of, and discrimination, incitement to violence, and violence against persons based on religion or belief, which constitutes a promising platform for effective, integrated and inclusive action by the international community. This resolution requires implementation and constant follow-up at the national level by States, including through the Rabat Plan of Action which contributes to its fulfilment.

Recommendations to States

42. States should enhance their engagement in broad efforts to combat negative stereotypes of and discrimination against individuals and communities on the basis of their nationality, ethnicity, religion or belief.

43. States should promote intercultural understanding, including on gender sensitivity. In this regard, all States have the responsibility to build a culture of peace and a duty to put an end to impunity.

44. States should promote and provide teacher training on human rights values and principles, and introduce or strengthen intercultural understanding as part of the school curriculum for pupils of all ages.

45. States should build the capacity to train and sensitize security forces, law-enforcement agents and those involved in the administration of justice on issues concerning the prohibition of incitement to hatred.

46. States should consider creating equality bodies, or enhance this function within national human rights institutions (that have been established in accordance with the Paris Principles) with enlarged competencies in fostering social dialogue, but also in relation to accepting complaints about incidents of incitement to hatred. In order to render such functions efficient, new adapted guidelines, tests and good practices are needed so as to avoid arbitrary practices and improve international coherence.

47. States should ensure the necessary mechanisms and institutions in order to guarantee the systematic collection of data in relation to incitement to hatred offences.

48. States should have in place a public policy and a regulatory framework which promote pluralism and diversity of the media, including new media, and which promotes universal and non-discrimination in access to and use of means of communication.

49. States should strengthen the current international human rights mechanisms, particularly the human rights treaty bodies such as the Human Rights Committee and the Committee on the Elimination of Racial Discrimination, as well as the special procedures mandate holders, as they provide advice and support to States with regard to national policies for implementing human rights law.

Recommendations to the United Nations

50. The Office of the High Commissioner for Human Rights (OHCHR) should be properly resourced to adequately support the international expert mechanisms working to protect freedom of expression and freedom of religion, and prevent incitement to hatred and discrimination and on related topics. In this regard, States should support the efforts of the High Commissioner for Human Rights with a view to strengthening the human rights treaty

bodies as well as ensuring the provision of adequate resources for the special procedures mechanisms.

51. OHCHR is invited to work together with States that wish to avail themselves of its services in order to enhance their domestic normative and policy framework regarding the prohibition of incitement to hatred. In this regard, OHCHR should consider – inspired by the four regional expert workshops – developing tools, including a compilation of best practices and elements of a model legislation on the prohibition of incitement to hatred as reflected in international human rights law. OHCHR should also consider organizing regular judicial colloquia in order to update national judicial authorities and stimulate the sharing of experiences relating to the prohibition of incitement to hatred which would enrich the progressive development of national legislation and case law on this evolving issue.

52. Relevant human rights treaty bodies and special procedures mandate holders should enhance their synergies and cooperation, including through joint action, as appropriate, to denounce instances of advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence.

53. Various entities of the United Nations system, including OHCHR, United Nations Alliance of Civilizations, and the Office of the Special Advisor on the Prevention of Genocide should enhance their cooperation in order to maximize synergies and stimulate joint action

54. Cooperation and information-sharing (a) between various regional and cross-regional mechanisms, such as the Council of Europe, the Organization for Security and Co-operation in Europe, the European Union, the Organization of American States, the African Union, the Association of Southeast Asian Nations, as well as the Organisation of Islamic Cooperation, and (b) between these organizations and the United Nations Organization should be further enhanced.

55. Consider implementing, at the national level and in cooperation with States, measures to realize the recommendations addressed to States.

Recommendations to other stakeholders

56. Non-governmental organizations, national human rights institutions as well as other civil society groups should create and support mechanisms and dialogues to foster intercultural and interreligious understanding and learning.

57. Political parties should adopt and enforce ethical guidelines in relation to the conduct of their representatives, particularly with respect to public speech.

58. Self-regulation, where effective, remains the most appropriate way to address professional issues relating to the media. In line with principle 9 of the Camden Principles, all media should, as a moral and social responsibility and through self-regulation, play a role in combating discrimination and promoting intercultural understanding, including by considering the following:

(a) Taking care to report in context and in a factual and sensitive manner, while ensuring that acts of discrimination are brought to the attention of the public.

(b) Being alert to the danger of furthering discrimination or negative stereotypes of individuals and groups in the media.

(c) Avoiding unnecessary references to race, religion, gender and other group characteristics that may promote intolerance.

(d) Raising awareness of the harm caused by discrimination and negative stereotyping.

(e) Reporting on different groups or communities and giving their members the opportunity to speak and to be heard in a way that promotes a better understanding of them, while at the same time reflecting the perspectives of those groups or communities.

59. Furthermore, voluntary professional codes of conduct for the media and journalists should reflect the principle of equality, and effective steps should be taken to promulgate and implement such codes.

IV. Conclusion

60. While the concept of freedom of expression has received systematic attention in international human rights law and in many national legislations, its practical application and recognition is not fully respected by all countries worldwide. At the same time, international human rights standards on the prohibition of incitement to national, racial or religious hatred still need to be integrated into domestic legislation and policies in many parts of the world. This explains both the objective difficulty and political sensitivity of defining this concept in a manner that respects the freedom of expression.

61. The preceding conclusions and recommendations are steps towards addressing these challenges. It is hoped that they will boost both national efforts and international cooperation in this area.