

“Freedom of expression and incitement to racial or religious hatred”

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Joint statement by Mr. Githu Muigai, Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance; Ms. Asma Jahangir, Special Rapporteur on freedom of religion or belief; and Mr. Frank La Rue, Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression

We are pleased to be here with you and participate in this important panel discussion. We would like to take this opportunity to share with you the joint position we have identified as Special Rapporteurs. These common views come from past consultations we had since taking up our respective mandates. Today’s panel discussion touches upon our three mandates since it involves the rights and freedoms enshrined in the following four provisions of international human rights law:

- Article 18 of the International Covenant on Civil and Political Rights (ICCPR) on freedom of conscience, thought and religion;
- Article 19 of the ICCPR on freedom of opinion and expression;
- Article 20 of the ICCPR on 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 incitement to racial discrimination as well as acts of violence or incitement to such acts.

We have repeated time and again that all human rights are universal, indivisible and interdependent and interrelated. Yet nowhere is this interdependence more obvious than in the discussion of freedom of expression and incitement to 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. While the exercise of freedom of expression could in some extreme cases affect the right to manifest the religion or belief of certain identified individuals, it is conceptually inaccurate to present “defamation of religions” *in abstracto* as a conflict between the right to freedom of religion or belief and the right to freedom of opinion or expression.

In recent years, there have been challenges with regard to the dissemination of expressions which offend certain believers. This is not a new phenomenon and historically has concerned countries in all regions of the world and various religions and beliefs. The events of 11 September 2001 have however exacerbated tensions in inter-community relations. In that context, a clear distinction shall be made between three types of expression: (1) expressions that constitute an offence under international law; (2) expressions that are not criminally punishable but may justify a civil suit; and (3) expressions that do not give rise to criminal or civil sanctions but still raise a concern in terms of tolerance, civility and respect for the religion or beliefs of others. Nonetheless, let us strongly emphasize that freedom of expression and the demands of a pluralist, tolerant, broad-minded and democratic society need to be taken into consideration in all cases being examined. Freedom of expression has to be understood in the positive sense. We have to guarantee freedom of expression equally for all as a form to combat racism and discrimination. We also have to generate, with the exercise of this freedom, an atmosphere of respect and understanding between peoples, cultures and religions.

Whereas the debate concerning the dissemination of expressions which may offend certain believers has throughout the last ten 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 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. 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 are fairly neutral.

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 from the ICERD that any doctrine of superiority based on racial differentiation is scientifically false, morally condemnable, socially unjust and dangerous. However, there is not necessarily an analogy to be drawn with regard to religious issues. Indeed, several religions are characterized by truth claims – or even by superiority claims – which have been traditionally accepted as part of their theological grounds. Consequently, the elements that constitute a racist statement may not be the same as those that constitute a statement “defaming a religion” as such. To this extent, the legal measures, and in particular the criminal measures, adopted by national legal systems to fight racism may not necessarily be applicable to “defamation of religions”.

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. However, defining which acts might trigger article 20 of the ICCPR remains difficult. 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.

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

The notion of incitement to *hostility* may, however, be more prone to subjective approaches, very much depending on the perspective taken. Indeed, the alleged perpetrator of hate speech, the alleged victim, the average man on the street or a judge may come up with completely different definitions of what constitutes – or not – incitement to hostility. We have to bear in mind that whoever interprets the concepts of hostility, there always remains a risk of subjectivity. In comparison to racial issues, which tend to be more clear-cut, the degree of subjectivity may be even higher when religious sentiments and sensitivities are invoked. Eventually, only a mature and

informed public opinion can fully guarantee racial and religious harmony and it is important to be able to build on a set of objective legal criteria.

The OHCHR expert seminar on articles 19 and 20 of the ICCPR, which was held here in Geneva in October 2008, identified some objective criteria in order 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 in order to prevent a chilling effect;
- The adjudication of such limitations should be made by an independent and impartial judiciary.

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 being sufficient to bring about real changes in mindsets, perceptions and discourse. To tackle the root causes of intolerance, a much broader set of policy measures are necessary, for example in the areas of intercultural dialogue or education for tolerance and diversity. In addition, this set of policy measures should also include strengthening freedom of expression. Indeed, 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' hearts and minds, changing what they think and not merely what they do.