

Council of Europe
“Protecting Human Rights in Multicultural Societies”
The Hague, 12 November 2008

Statement by Mr. Githu Muigai
**UN Special Rapporteur on contemporary forms of racism, racial
discrimination, xenophobia and related intolerance**

Check against delivery

Ladies and Gentleman,

First of all, let me say that it is a great pleasure to participate in this discussion. I would like to express my sincere thanks to the Council of Europe for inviting me to this event. I hope our discussions today will help deepen our understanding of the issues at stake.

I would also like to commend the Council of Europe for its new publication on “Hate Speech”, which was released today. The in-depth study of policies, legislation and practice on hate speech will certainly help us to improve our understanding of the phenomenon and to combat it more efficiently.

Let me start my intervention by clarifying the concept of hate speech. For practical purposes, I will use this concept of hate speech as a convenient short term to describe the legal notion of advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence, as contained in Article 20 of the International Covenant on Civil and Political Rights.

Discussions over hate speech – and how to balance prohibitions thereof with freedom of expression – currently lie at the centre of debates in the UN human rights system. This debate has developed around the notion of “defamation of religions”, put forward for the first time in the Commission of Human Rights in 1999. While it predates the events of 9/11/2001 and, in particular, the publication of the caricatures of Prophet Mohammed in the Danish newspaper *Jyllands-Post* in 2006, the issue has taken a new significance after these events. More recently, the release of the movie *Fitna* earlier this year has also raised similar concerns.

At the root of the problem lie different interpretations by States regarding cases of “defamation of religions” and how they are situated vis-à-vis the international human rights regime. The key question that was originally subject of extensive debate was whether “defamation of religions” raised concrete human rights obligations to States. In addition, concerns are raised that this notion may be problematic due to its focus on religions rather than on individuals. I believe that the debate at present is currently moving from the concept of “defamation of religions” to the existing legal notion of “advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility and violence”. I welcome this gradual shift since it might help us better understand the existing legal obligations for States.

However, apart from the issue of conceptual approach to the problem there are other remaining difficulties, such as the threshold of triggers Article 20 and the application thereof.

To address these difficulties, the High Commissioner for Human Rights recently held an Expert Seminar in Geneva on the links between Articles 19 and 20 of the Covenant. The Seminar was highly successful in bringing together a number of top academics and experts on these issues, who identified the key challenges and put forward precise recommendations.

Regarding **the threshold that triggers Article 20**, a number of questions remain. What constitutes incitement to violence, hostility or discrimination? In particular, where do we draw the line between criticism – even if it is deemed offensive – and hate speech? We need solid legal answers to these questions. The appropriate body for interpretation, insofar as the Covenant is concerned, is the Human Rights Committee. This is the reason why my predecessor, along with the Special Rapporteur on freedom of religion or belief, suggested to the Committee the elaboration of a general comment on the application of Article 20, which should help us guide our legal approach to the problem. I trust that the Committee will undertake this task when it deems convenient, in an environment that is insulated from political pressure and focusing clearly on the legal questions involved.

The Expert Seminar pointed to the need of a **case by case** approach. One therefore needs to take into account, for instance, the history of violence or persecution against a particular ethnic or racial group, which can be a meaningful indicator of their vulnerability. In this view, when Article 20 of the ICCPR is triggered, this generally indicates a failure of the State to fulfil other obligations, in particular the right to non-discrimination. Article 20 would in this regard be seen as the last safeguard against incitement to hatred. Its ‘activation’ means that all previous checks failed to achieve a desirable result. This highlights the fundamental obligation that the State has in fighting racism and discrimination as broader phenomena. I will come back to this point later.

Regarding the application of **hate speech** laws, the Seminar also identified some objective criteria to avoid arbitrary application of these laws. Some of the criteria that were raised include:

- 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;
- 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 must be made by an independent judiciary;

Let me now turn to a final issue I would like to cover. I have argued above that hate speech laws are necessary and legitimate according to international standards. At the same time, I cautioned against their subjective and overly-broad application and pointed to some criteria that should be followed when applying them. However, I have not yet touched on what I consider to be the crux of the matter: the obligation of the state to actively fight racism and discrimination more broadly – i.e. not limited to hate speech legislation. This, in my view, is the most effective response we can give to the problem.

Fighting hate speech is only one of several obligations States have to fight discrimination. Article 26 of ICCPR establishes the “equal protection” obligation. In particular, it states that “the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground”, including race, colour or national origin. Article 2 of ICERD provides an even higher standard of non-discrimination, including the need to adopt positive actions.

I am convinced that the full application of this framework is the most important defence that we have to fight all manifestations of racism, including hate speech. I have argued before that hate speech is but a symptom of a more profound disease, which is racism and intolerance. We need therefore to attack these root causes, not only their external manifestation, if we are to be successful in the long-term. Racist and discriminatory policies and ideas unfortunately still exist around the world: racial profiling, institutional discrimination by law, racial or ethnic approaches to migration; non-enjoyment of economic and social rights by racial or ethnic minorities; limitations to freedom of religion or belief; lack of acceptance and tolerance to diversity; etc.

In this regard, a much broader set of policy measures are necessary, starting with the application of the existing legal framework, particularly at the domestic level. Political will to tackle racism is more urgent than ever. This set of policy measures also include strengthening freedom of expression as a key instrument in fighting the root causes of racism: it allows us to change mentalities, educate about cultural differences, empower and give voice to minorities and promote interaction as opposed to isolation. We need to form broad coalitions, starting in conferences such as this one, to translate these ideas into concrete actions. I am positive that this will be the most effective weapon against those who want to spread hatred and discrimination.

Thank you.
