

# **Report of the Expert Workshop for Asia and the Pacific on the Prohibition of Incitement to National, Racial or Religious Hatred, Bangkok, 6-7 July 2011 (unedited)**

## **I. Introduction**

1. The expert workshop for Asia and the Pacific on the prohibition of incitement to national, racial or religious hatred was opened at 9:45 a.m. on Wednesday, 6 July 2011, by Mr. Ibrahim Salama, Director, Human Rights Treaties Division, Office of the United Nations High Commissioner for Human Rights, who welcomed the participants and gave a brief opening statement.
2. A video message was delivered by Ms. Navanethem Pillay, United Nations High Commissioner for Human Rights. She noted that, as the world became increasingly interconnected, those seen as others, who did not share a community's history, traditions and values, were often perceived by that community to be predatory competitors or threats to the community's belief system. As discrimination and racial hatred were on the rise, often conveyed through hate speech broadcast in the mass media, it was legitimate to restrict well-defined and narrowly limited classes of speech to safeguard against such transgressions.
3. Freedom of expression and freedom of religion were mutually dependent and reinforcing. Criticism of religion could be constructive and yet still critical; it was not something that should be outlawed, as only free and critical evaluation in open debate could probe whether religious interpretations adhered to, or distorted, the original values that underpinned religious belief. At the same time, however, freedom of expression was not absolute and could be restricted within strictly defined parameters. In that regard, there was a need to distinguish between forms of expression that should constitute offences under criminal law in accordance with international norms, forms of expression that were not criminally punishable but might justify civil liability, and forms of expression that did not give rise to either criminal or civil sanctions but still raised concerns in terms of tolerance, civility and respect for the convictions of others.
4. In conclusion, the High Commissioner stressed that there was a need to counter the escalation of prejudice predicated on ethnic, national or religious divides and to break the vicious cycles of hatred and retribution. The current workshop, by considering possible limitations on a fundamental right, would test whether there was a genuine commitment to the full and interdependent set of human rights or whether they were merely being used as expedients in the pursuit of political agendas.

## **II. Opening of the meeting and adoption of the programme of work**

5. The meeting was opened by the moderator, Mr. Vitit Muntarbhorn, who outlined the manner in which the workshop would conduct its work. The participants adopted the programme of work before them.

## **III. Introduction of the preparatory study**

6. Mr. Vitit Muntarbhorn introduced a study that he had prepared on the prohibition of incitement to national, racial or religious hatred in Asia and the Pacific.<sup>1</sup> He noted that all Asian countries accepted the Universal Declaration of Human Rights, and had participated in the United Nations Universal Periodic Review. While an increasing number of Asia-Pacific countries are becoming parties to international human rights treaties, there is still a notable quantitative gap in terms of the number of ratifications. The only two human rights treaties to which all Asia Pacific countries are parties are the Convention on the Elimination of All Forms of Discrimination against Women and the Convention on the Rights of the Child. Despite the lack of ratification, by a number of Asia-Pacific countries, of the International Covenant on Civil and Political Rights and the International Convention on the Elimination of All Forms of Racial Discrimination, the directions laid down by these treaties with their provisions on freedom of expression and the prohibition of hate speech provide key guidance to all countries in the delicate equilibrium to be established between the rule and the exception to that rule. The ASEAN Charter had been introduced, and more Asia-Pacific countries were becoming parties to the International Convention on the Elimination of All Forms of Racial Discrimination.
7. In Asia-Pacific countries, the subject was covered in a range of legal documents, even in national constitutions, but there was a lack of consistency with international standards. There was also a dichotomy between civil and criminal law and, in some countries, between laws at the federal level and at the state level. There was a morass of national security laws, and some countries had laws that protected beliefs or ideas rather than individuals or groups,

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<sup>1</sup> [http://www.ohchr.org/Documents/Issues/Expression/ICCPR/Bangkok/StudyBangkok\\_en.pdf](http://www.ohchr.org/Documents/Issues/Expression/ICCPR/Bangkok/StudyBangkok_en.pdf)

which is particularly evident in the case of anti-blasphemy laws. Many countries had criminal codes that covered hate speech and often specific laws giving rise to civil liability, for example incitement to commit an unlawful act. There were various laws on criminal responsibility regarding incitement against individuals or groups on the basis of religion.

8. Nomenclature related to offenses on incitement was not uniform. Some offences covered incitement to racial or religious hatred while others only covered racial and/or ethnic issues. In many countries, incitement was considered criminal only, but in others it was both criminal and civil or merely civil. There were blasphemy laws in some countries, but intent was not always required. Penalties ranged from fines to imprisonment and even capital punishment. In cases coming under criminal law, the jurisprudence indicated the need for the threshold to include a public act with intent which incited hatred that might or might not lead to physical harm, an inchoate offence. Transparency was necessary to ensure that laws did not impinge on freedom of expression, and interaction with the international community was necessary to promote objectivity.

9. Mr. Muntarhorn outlined the conclusions of the preparatory study: Asia and the Pacific was witnessing increasing accession to instruments; there were national laws and a balance of civil and criminal laws; there was a promise to change laws to comply with international standards; there was an active and independent perspective coming from the courts; national rights action plans were being adopted; press codes were being formulated constructively, and they should be measured in consistency with human rights; a media society was emerging; illiberal laws in some countries were being reformed; and programmes to promote human rights and understanding were in evidence.

10. In concluding, he expressed the hope that all Asia-Pacific countries and civil society and other actors would move forward with measured reasoning and a balance between objective standards, international scrutiny and national sensibilities.

## **IV. Work of the expert mechanisms**

### **1. Presentations by the special rapporteurs and discussion**

11. Mr. Frank La Rue, the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, introduced the joint submission prepared by him and Mr. Heiner Bielefeldt, Special Rapporteur on freedom of religion or belief, and Mr. Githu Muigai, Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance.<sup>2</sup> Highlighting the importance of having three special rapporteurs with three different mandates who saw the links between their mandates, he stated that freedom of expression was an essential part of all democratic societies and played a key role in the interdependence and interrelationship of all rights. The norm should be to defend the free flow of ideas. All limitations should be established by law and judged by an independent body, never by a political body. Limitations must fall within the boundaries of international human rights law. He referred to a clear consensus in international human rights law that diversity must be protected, including by prohibiting any incitement to hatred, but not necessarily through criminal law. Prevention is more important than punishing and we must decriminalise speech to allow a free flow on conversation and dialogue. One needs to think about boundaries that could prohibit hate speech but which would not be ambiguous and would not be used to stifle expressions that might well sound offensive but are needed for legitimate debate and discussion. The role of journalists was crucial, and Mr. La Rue stated that he had been working with the International Federation of Journalists on the promotion of new codes for journalists.

12. On defamation of religions, Mr. La Rue said that defamation is a concept relating to the honour of individuals. Religions, on the contrary, are open to debate. Often debates coming from within a single religion are stifled because of assertions that certain dogma should never be questioned. All issues of spirituality should be open to debate, however, one needs to be respectful of religion, even when in disagreement, as there is a risk of stigmatising individuals and groups.

13. Mr. Lerner agreed that prevention is more important than punishing but cautioned about decriminalising incitement to hatred as criminal law was an excellent instrument to promote education.

14. Ms. Anwar stated that limitations should not be open to ambiguity or political interpretation. In referring to the example of Malaysia, she cautioned that limitations are actually used by political (non-state) actors where the so-called aggrieved party attacks the offenders while the latter are actually pushing for human rights.

15. Experts agreed that the State had a responsibility to enforce both limitations and freedoms, which made it necessary to have unambiguous laws and transparent processes to prevent abuse, which some experts stated was already happening in some countries. The responsibility of the State was to interpret narrowly and not allow

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<sup>2</sup> [http://www.ohchr.org/Documents/Issues/Expression/ICCPR/Bangkok/StudyBangkok\\_en.pdf](http://www.ohchr.org/Documents/Issues/Expression/ICCPR/Bangkok/StudyBangkok_en.pdf)

limitations to be used politically. Community broadcasting, for example, should serve the entire community, not just one group. The most significant challenge lay in dealing with the diversity of opinions.

16. Ms. Sim expressed the view that the media and civil society also had an important role in addition to the State, and drew attention to the relation between the International Covenant on Civil and Political Rights (ICCPR) and the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD), which had a much wider range of grounds for discrimination and more Asia-Pacific countries belonged to the ICERD than the ICCPR. It was agreed that civil society had a responsibility to react appropriately.

17. Mr. El Tayeb stated that legal measures should be seen as part of a wider strategy encompassing education, intra-religious and inter-religious dialogue. When looking at appropriate legal measures, distinction needs to be made between statements of defamation of religion and racist statements requiring criminalisation under article 4 of the ICERD.

18. One observer referred to the recently adopted Human Rights Council resolution regarding incitement to religious hatred and religious intolerance, and referred to the increasingly inter-state nature of offenses. He was of the view that on such a complex issue, prevention is not sufficient and there is a need to clearly define international human rights obligations and then translate these into national law.

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

19. Ms. Zonke Majodina, current Chair of the United Nations Human Rights Committee, made a presentation on the work of the Committee.<sup>3</sup> The Human Rights Committee was of the opinion that articles 19 and 20 of the ICCPR were compatible with and complemented each other. In this regard, she referred to the General Comment 34 which was currently under the discussion in the Committee. She also indicated that the Committee was of the view that any action taken under article 20 of the ICCPR must meet the test contained in article 19 and that prohibition by law is only required for those situations meeting the higher threshold of article 20 of the ICCPR. The Committee had also stated that no declaration of a state of emergency pursuant to article 4 of the ICCPR could be invoked by a State party as a reason for curtailing freedom of expression. She informed the workshop that, as long ago as the 1980s, many States parties reports failed to give information on national legislation, hampering the work of the Committee. The Committee had therefore not been able to document many violations of article 20 of the ICCPR. Ms. Majodina also added that, in the experience of the Committee, journalists and human rights defenders were often targeted on the grounds of danger or risk to national security. Moreover, some Asia-Pacific countries had broadened the limitations on freedom of expression in a manner not consistent with the ICCPR. In addition, most of the caseload relating to freedom of expression concerned political violations. It was evident that national legislation should be drafted in such a way as to clearly prohibit the incitement of hatred as contained in international human rights law.

20. Mr. Yong'An Huang, a member of the Committee on the Elimination of Racial Discrimination, gave a brief introduction on the work of the Committee.<sup>4</sup> He explained the similarities between the ICCPR and ICERD. In particular, ICERD's article 5 guarantees the right of people to equality before the law and to basic human rights such as freedom of expression. Article 4 of the ICERD instructs States parties to ban all dissemination of ideas based on racial superiority or hatred, incitement to racial discrimination; it also obliges States parties to declare illegal and prohibit organizations, and also organized and all other propaganda activities, which promote and incite racial discrimination. Mr. Huang continued to provide information about the individual complaints mechanism under Article 14 of the ICERD. He concluded by stating that all State parties needed to have legislation to ensure all citizens have the rights enshrined in the Convention, their national education for all citizens should include raising awareness of basic rights and obligations and how to keep a balance between them. Lastly, government officials at all levels should pay particular attention, in words or deeds, to the possibility of inciting hatred.

21. Responding to questions, Ms. Majodina stated that anti-terrorism legislation did impact negatively on the enjoyment of rights by many citizens but the Human Rights Committee did not receive many individual complaints in that context.

22. One observer informed the workshop that Indonesia and Norway had created a forum to discuss issues of sensitivity in connection with a code of conduct for the media, which was one step in preventing certain reports or coverage that could incite hatred. He touched on the issue of media ownership, saying that imposing limits on it ran counter to the principle of free commerce. Others expressed the view that there seemed to be too much private control of media and existing laws were possibly inadequate. The issue could be likened to that of community broadcasting but it was much more difficult to regulate the Internet. Mr. La Rue clarified his opposition to monopolies rather than opposition to privately controlled media. Expressing the need for a balance, he stated that electromagnetic frequencies

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<sup>3</sup> <http://www.ohchr.org/Documents/Issues/Expression/ICCPR/Bangkok/ZonkeMajodina.pdf>

<sup>4</sup> <http://www.ohchr.org/Documents/Issues/Expression/ICCPR/Bangkok/HuangYongan.pdf>

belonged to the State, and the State therefore needed to administrate them. Just as there was no way to control how a printing press or telephone was used, it was important to block harmful information but more important to investigate those who had produced it. The focus then fell on education, principles and ethics and the way they were taught.

23. Ms. Gelber stated that the internet can be abused and, unlike community radio, is more difficult to regulate. The law is perhaps inadequate but prevention and education strategies might stand a better chance.

24. Responding to a question from an observer on the omission of the term “democratic societies” from article 19, Mr. La Rue stated that freedom of expression was a fundamental element of any democratic society, and the omission might be due to the perception that lack of freedom of expression was a phenomenon of undemocratic societies.

25. Ms. Majodina informed the workshop that the function of general comments of the Human Rights Committee was to elaborate on the responsibilities of States, so there were references to democratic societies, and regarding a reference to abuse of the right to freedom of expression in the preface to the general comment, she explained that freedom of expression formed the basis for a wide range of other human rights, all of which were indivisible and interdependent, but they must also be accessible. If there was no public understanding of those rights, then insufficient information had been made available in line with article 19, paragraph 2, on the freedom to receive information.

## V. Law and judicial practices

26. Ms. Amy Kok Eng Sim, a senior programme officer with ARTICLE 19, an international non-governmental organization, made a presentation on a draft paper she had prepared for the workshop.<sup>5</sup> In her view, the prohibition of hate speech is an exceptional restriction of freedom of expression which must be narrowly defined and subjected to stringent tests to establish necessity. She informed the workshop that, although article 20 of the ICCPR clearly defined three types of incitement, domestic law and judicial practices in the region evinced a wide variety. Laws did not necessarily use the term “incitement”; terms used included “vilification, “promotion of hatred”, “wounding religious feelings”, “public expression of hostility”, “disharmony” or “provocation of religious strife”. The different terms did not always carry the same significance as incitement, where action was the key element. Some of the incitement legislation in the region was closely linked to ethnic and religious strife. The lack of specific tests to determine what constituted prohibited forms of incitement to hatred meant that the application of such laws in some countries had given rise to violations of freedom of expression. There was a need to have a distinction between incitement to hatred and robust expressions of opinions. It was necessary to recognize the relation between articles 19 and 20 of the ICCPR. Legislation regarding article 19 of the ICCPR must not overstep article 20 of the ICCPR. She went on to describe the seven-tier tests her organization had devised for determining incitement: (a) severity (b) intent; (c) content; (d) extent, in particular the public nature of the speech; (e) likelihood or probability of action; (f) imminence; and (g) context. Further study was required regarding the threshold for each test and the relation between the elements of the tests.

27. Following Ms. Sim’s presentation, the moderator opened the floor for discussion.

28. Ms. Gelber expressed the view that there was overlap in the tests and that the threshold for criminal prosecution should not rely on whether it works or not. If hate speech incited violence, it was not necessary to introduce the idea that there needed to be a clear and present danger of violence; it was better to focus on the likelihood of a certain act to cause violence. Regarding content and form, the test would be too difficult to be workable in a judicial sense.

29. Ms. Anwar agreed that the threshold test was very important to prevent incitement laws from being used for political reasons and she noted that often the impact of certain expressions on an audience is manufactured. Mr. Soofi raised the issue of the judiciary, asking what the State would do if a court judged that the State was non-compliant with article 19 of the ICCPR. Mr. Fu queried how jurisprudence in Asian countries differed from western countries. In Hong Kong courts, for example, the courts had decided that the danger must be imminent. Ms. Setalvad added that in India, which has the necessary legislation in place, the judiciary and the executive had failed to act against hate speech, even though judicial commissions of inquiry had made a clear connection between hate speech over several weeks and subsequent violence. Mr. Lerner argued that when there was intent or a result which implied discrimination, there was no need for both to exist, as intent could be very difficult to prove.

30. Following the experts’ contributions, observers were afforded the opportunity to speak.

31. One observer expressed the view that both intent and result were critical, as without the test of intent, a person’s speech could be interpreted in a way that had never been intended. There were some reservations about the third test in the context of artistic expression; the fear was that it might have the reverse impact. Other observers noted the following: what happened when the State itself committed an act that incited violence? Could the meaning of “remedies” be elaborated and were other measures possible for victims? One observer stated that it was important to define the basic limitations on laws implemented with reference to article 20 of the ICCPR, as a universal set of

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<sup>5</sup> <http://www.ohchr.org/Documents/Issues/Expression/ICCPR/Bangkok/AmySim.pdf>

standards was needed. Updated comments from the Human Rights Committee might provide useful guidance. Another observer opined that the issue was too complex for a single solution and that cultural complexities need to be taken into account when making an assessment. In many cases, legislators, judges and even scholars were not aware of international conventions or the concomitant obligations on States.

32. Mr. Soofi presented his paper on the linkages between religious extremism and freedom of expression or incitement to hatred provisions in human rights law and practice.<sup>6</sup> He was of the view that while international human rights law pronounces the right of freedom of expression itself, it leaves the structuring of limitations to domestic law. This results in potentially conflicting appreciations of limitations based on diversity of domestic law and internal understandings of the structures within the State. In a situation that a person in one State has issued a statement or written a text that has incited reaction in another State, this reaction can be at three different levels: reaction by the aggrieved State to the State of the alleged offender; reaction by academics or forums of one State; reaction of the masses or the public. Existing mechanisms of registering a case and having a remedy available can be a great buffer between a rash reaction of the masses and a calculated appraisal of the facts through judicial process. Mr. Soofi also highlighted that any work of intellect or thought freely expressed that may or may not be intended to injure the religious sentiments of any community or faith needs management when a transnational reaction is triggered. The obvious first step is to make efforts to prevent, in a non-coercive manner, such an incidence. The second measure it provide some kind of legal buffer, in the form of legal or other procedures and mechanisms at the disposal of the alleged victim, between the offending incident and the possible reaction. The third stage of management would be managing the aggrieved and persuading them to raise their level of tolerance to an act of an alleged offender which may be reckless or irresponsible. By way of example, Mr. Soofi added that the threshold for criticism in Islamic jurisprudence is far higher than generally known. Advocacy to violence is often attributed to the sermon maker who is leading the prayers in mosques but who is not a true scholar of Islam (alim). The alims have withdrawn themselves from the debate of tolerance for religious criticisms and as a result, the sermon giver has fully exploited this consequent gap in the jurisprudence of religious tolerance. Therefore, Mr. Soofi advocated for bringing the alims back into the debate.

33. Ms. Gohar acknowledged that religious politicization and State-sponsored radicalization had caused serious problems. Mr. El Tayeb was of the view that cultural legitimacy for international human rights law was needed. This implies that when a state ratifies certain international human rights obligations, it needs to legitimise and stimulate acceptance of these rights in the eyes of local communities.

34. Ms. Anwar stated that change would come when the Government was forced to pay a political price for continuing to legitimate extremist discourse. In that respect, she mentioned that Muslim countries had no culture of public discourse/dialogue, which was a serious problem because religion was used as a source of law.

35. There were serious deficiencies in legislative drafting in most countries. However, contradictions between domestic legislation and international law were not necessarily a problem in the view of Mr. La Rue, who opined that domestic law should be written by legislators and interpreted – in accordance with international standards - by courts which can expand these standards. While international doctrine and principles were constantly evolving, he was of the view that it was obviously not easy for States to interpret international law and translate it into domestic law, but here was precisely where the mechanisms of the United Nations should be used. Ms. Majodina added that the quasi-judicial and collective nature of treaty bodies allowed for more authoritative standing on those issues. The Human Rights Committee, for example, asked States parties how they incorporated the treaty into their domestic legislation, examined legislative provisions and actual practices.

36. One observer criticised the use of anti-blasphemy provisions in Pakistan which in his view curbed freedom of expression and communication as well as communication rights for instance by monitoring cyberspace. Another observer mentioned that there is a deficiency in terms of interpretation and that more guidance from the international human rights mechanisms is needed.

## **VI. Institutions and different types of policies**

37. Mr. Fu Hualing, Head of the Department of Law of the University of Hong Kong, presented a paper on the hate speech conundrum in China.<sup>7</sup> He identified three approaches: the political approach, which treated hate speech as a national security issue; the legal approach; and the human rights approach. The three approaches were distinguishable by their different objectives and methodologies, and they used the law and legal institutions and procedures to different degrees. The political approach had been predominant in China, where ethnic relations were a sensitive issue, but when it had ceased to be viable, the legal approach had become necessary, and the State had been forced to create mechanisms to deal with the problem. Hatred was being “individualized” in China, as there had been individual legal cases, and the Government was almost treating hate speech as criminal defamation. He expressed the hope that a

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<sup>6</sup> <http://www.ohchr.org/Documents/Issues/Expression/ICCPR/Bangkok/AhmerBilalSoofi.pdf>

<sup>7</sup> <http://www.ohchr.org/Documents/Issues/Expression/ICCPR/Bangkok/FuHualing.pdf>

rights-based approach would gradually emerge in China and other States, with the courts playing a predominant role in balancing rights under articles 19 and 20 of the ICCPR and in giving guidance regarding the parameters of free speech. Hate speech is a symptom of a larger problem which the State would need to address. A new constitutional structure that was more acceptable to the population could be instrumental in this regard.

38. Following Mr. Hu's presentation, the moderator opened the floor for discussion.

39. Ms. Gelber, Associate Professor at the University of Queensland, Australia, described the situation in Australia, which has maintained a reservation to article 20 of the ICCPR.<sup>8</sup> In 2005, Australia had revived a sedition offence as part of counterterrorism efforts, and had amended it in 2010 to create two new provisions making it a criminal offense to urge violence against any group distinguished by race, ethnicity or political opinion. Many newly enacted counterterrorism laws did however impact negatively on free speech. Ms. Gelber underlined that there was no federal protection of free speech but, rather, a common-law inference. Anti-hate provisions had existed at the State level since 1995 and at the federal level since 2010. Generally, the civil offence referred to ridicule and the criminal offence referred to threatening persons with harm or inciting others to do so. An existing State-level tort liability law was considered an abject failure. Although criminal provisions had been in place since 1989, lack of prosecutorial success meant that the vast majority of cases relied on civil law, which was extensive, but the inclusion of religion was not deemed appropriate under those laws, as it was much more difficult for the State to intervene in matters of personal opinion and most felt the State should not intervene in matters of faith. At the State level, a human rights authority could investigate and recommend remedies, but concerning the threshold, the differences between United States and European and Australian jurisprudence were noted. Ms. Gelber found that the much higher threshold of the United States was not advisable since the test would be too difficult for international standards. She also flagged the experience in Australia with recalcitrant purveyors of hate speech who used tribunals or federal courts as a platform for more hate speech. She found that the Government had not comprehensively implemented the terms of the International Covenant on Civil and Political Rights and had indicated it had no intention of doing so.

40. Mr. Djamin related the situation in Indonesia, which he said had been facing a difficult transition period since 1998.<sup>9</sup> Under the criminal law system inherited from the colonial Power, there had been laws against inciting hatred towards the Government, and that had been reflected in the penal code, but now there was a different form of hate speech. The resulting confusion necessitated caution in incorporating hate provisions in criminal law. Preventative measures might be more advisable. Progress had been made in terms of legal and constitutional frameworks, but limitations were still not clearly understood. Mr. Djamin stated that the Constitution contained blanket limitations, but new laws on hate speech and discrimination – centered on ethnicity – were an outcome of consultations with the Committee on the Elimination of Racial Discrimination. He posited that a code of ethics was necessary to prevent incitement to hatred based on religion. He informed the workshop that ASEAN had created an intergovernmental commission on human rights, which, in addition to educational and promotional responsibilities, would be tasked with developing a framework for cooperation to identify the human rights challenges in the region and a framework of protection based on articles 19 and 20 of the ICCPR.

41. Mr. Soofi raised the distinction between civil and criminal offences, as actions permissible under articles 19 and 20 of the ICCPR became the subject of torts law cases. He also pointed to the difficult situation courts are facing when domestic legislation obstructs instead of facilitates the implementation of an international treaty and in this regard he distinguished between common-law countries and civil-law countries: in common-law countries, courts paid less heed to international conventions or what the State had ratified. He was of the view that there needed to be a way for the State to persuade the courts to look at the actual text of a treaty.

42. Mr. La Rue asserted that prevention should be a system of social measures dealing with a country's conception of the way children were educated and the values that were instilled in them. Better understanding was necessary, as the drafters of the Covenant had viewed Article 19 as the broad principle and article 20 as what they considered were the most egregious violations of the use of freedom of expression. It was important to see the two articles as complementary. The higher the threshold, the more effectively legislation could be applied. The more precise the wording and conceptualization, the better.

43. Mr. Lerner meanwhile asserted that incitement occurring under the conditions established by article 20 of the ICCPR was always in need of a reply employing criminal law. He was also of the view that while freedom of expression is the rule, it is not an absolute right. It admits exceptions, indispensable in some cases, as provided for in articles 19 and 20 of the ICCPR, article III of the Genocide Convention and article 4 of the ICERD. In this regard, he posited that protection against incitement to violence and hatred should be extended equally to racial and religious groups and to individuals belonging to these groups.

44. Ms. Anwar alluded to a culture of fear and a lack of public debate obstructing the implementation of laws designed to comply with articles 19 and 20 of the ICCPR. In Malaysia, for example, the constitutional guarantees on freedom of religion have not changed but the laws defining jurisdiction had changed leading to certain instances of

<sup>8</sup> <http://www.ohchr.org/Documents/Issues/Expression/ICCPR/Bangkok/KathGelber.pdf>

<sup>9</sup> <http://www.ohchr.org/Documents/Issues/Expression/ICCPR/Bangkok/RafendiDjamin.pdf>

judgements not respecting constitutional guarantees. Freedom of religion where Muslims were concerned was treated as a Sharia matter rather than a constitutional matter, but many Sharia judges did not believe in freedom of religion grounded in their own ideology or stemming from the fear of being labelled and stigmatized as anti-Islam. Training of judges was therefore extremely important.

45. Following the discussion, observers were afforded an opportunity to speak.

46. One observer opined that, in some countries, the mindset of officials seemed to be that an international treaty should comply with national law and not the other way around. There was also the problem of politicians who tried to increase their chances of winning elections by provoking hatred of certain groups. In that regard, another observer asked about the impact of blasphemy laws on human rights and whether or not blasphemy laws themselves could be considered an act of incitement to hatred, and whether hate propaganda against religion promotes hate against adherents of that religion. Another observer alluded to State recognition of some religions and not others. The view was expressed that religions tended to restrict women's rights, as exemplified by contradictions noted in Malaysia between Islam and the Convention on the Elimination of All Forms of Discrimination against Women, and that women needed to be allowed to critique their own religions and, indeed, all the things that were most sensitive in their societies because they affected women's lives. What steps could be taken to create space for political discourse or excesses of state implementation of laws on incitement?

47. Mr. Djamin opined that prohibitions should be regulated by law, and hate speech incidents in article 20 should be prohibited by criminal law, while Mr. La Rue added that defamation cases should give rise to civil action allowing for civil remedies. Freedom of expression was not only the right of individuals, but also collectively the right of society to be informed. Mr. Djamin also raised the fact that some public officials perhaps did not realize that making statements as religious leaders was incompatible with their status as public officials.

48. Mr. Eltayeb presented his paper on "The Prohibition of Incitement to National, Racial, or Religious Hatred: the Case of West Asian Arab Countries"<sup>10</sup> and informed the workshop that many Arab countries had proclaimed Islam as the State religion and Sharia as the source of law. They had freedom of expression, but constitutions were diverse and not in conformity with international standards. The principle of non-discrimination was granted but subjected to Islamic criteria. The existence of an official State religion was seen as generally problematic. He added that blasphemy laws can in certain circumstances constitute incitement to hatred or be discriminatory when they do not accord protection to all religions.

49. Experts generally agreed that anti-blasphemy laws had a bearing on the question of incitement, but some advised caution in regard to the applicability of article 20, paragraph 2, calling for appropriate criteria for determining what constituted advocacy of religious hatred.

50. Mr. Soofi opined that constitutional provisions on blasphemy could be a trigger but were much more difficult to dislodge. Mr. Eltayeb added that if such laws were discriminatory, then they could constitute incitement. Mr. Lerner held the view that blasphemy laws were a violation of freedom of speech, thought and religion, but did not necessarily constitute incitement.

51. Ms. Azhenova gave an overview of the situation in the countries of Central Asia, which were still grappling with issues left over from the Soviet era. The large number of ethnic groups virtually facilitated interethnic racial hatred, with all countries of the region having instituted a strict ban on incitement of hatred, which was prosecutable under both criminal and civil law. Rich in valuable natural resources, Kazakhstan was experiencing significant economic disparity. Two religions—Islam and orthodox Christianity—were officially recognized, and the Kazakh Constitution prohibited discrimination and censorship. Freedom of expression was guaranteed, though some prohibitions existed on national security grounds. Freedom of the press was also guaranteed with certain restrictions. In practice, journalists could be held criminally responsible and faced punishment for covering inter-ethnic conflicts. Conflicts, sometimes fueled by avarice, had produced thousands of refugees. Although Kazakh newspapers had reported a small local war between Wahhabis and law enforcement, "jihad" was traditionally understood in Kazakhstan as a struggle against one's own bad habits.

52. Ms. Setalvad<sup>11</sup> informed the workshop that the Constitution of India guaranteed free speech but gave the states the right to make reasonable restrictions. Restrictions on free speech were embedded in the penal code and contained in the law on sedition, which had been used, in particular, against human rights defenders and journalists. A law had been introduced in 1989 with specific provisions against denigration, dehumanization and incitement to violence but had never been implemented and was considered completely ineffective. In the preceding two decades, there had been incidents of large-scale violence against religious groups, no longer just Muslims but also Christians, and there was now a bill seeking to remove protection for public servants who might incite to hatred. Several states had passed antiterrorism laws which had a negative impact on freedom of speech. In addition, the Contempt of Courts Act

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<sup>10</sup> <http://www.ohchr.org/Documents/Issues/Expression/ICCPR/Bangkok/MohamedEITayeb.pdf>

<sup>11</sup> <http://www.ohchr.org/Documents/Issues/Expression/ICCPR/Bangkok/TeestaSetalvad.pdf> and <http://www.ohchr.org/Documents/Issues/Expression/ICCPR/Bangkok/TeestaSetalvadPart2.pdf>

precluded an Indian citizen from criticizing court proceedings and even judges. Freedom of religion acts had been enacted to actually curb conversion and proselytism. The importance of education was highlighted by cases in which textbooks used to incite to hatred had been corrected by the federal Government. Although there had been some progress, judicial inaction was a major problem, and media praise for inflammatory language had prompted accusations against the mainstream media.

53. Ms. Gohar, describing the problems in Pakistan, drew attention to the difficult situation of granting religious plurality when a country is founded on the basis of a single religion. She also found that the United Nations process for ensuring that nations adhered to treaties was very bureaucratic. The difficult situation in Pakistan, where a knee-jerk reaction to extremism seemed preferable to starting a dialogue, needed the strength and support of the international community. Constitutional and legal reviews were important. Religion had become more an issue of power politics, and, within Pakistan, the large number of sects was overshadowing religion. Wahhabi Islam was acknowledged to be a growing problem.

54. Mr. Shukheir<sup>12</sup> pointed out that the right to freedom of information was well established in international law. The media could violate human rights under article 20 of the ICCPR, as had been seen in the case of the genocide in Rwanda. Freedom of expression could be limited only if there was a close nexus between the expression and substantial threat and also if the restriction was the least restrictive remedy. No one should be penalized for dissemination of hate speech unless it could be shown there was an intention to cause harm. Any penalty would then have a chilling effect on freedom of information. There was a moral obligation to seek facts without prejudice. Religious beliefs were not immune to criticism. Everything was open to examination and debate; otherwise, religion could become a tool for exploitation.

55. Ms. Anwar related her experiences with trying to create a public space to speak on matters of religion. She asserted that many human rights activists made the mistake of ignoring religion as if it were irrelevant, which did not reflect the reality in Muslim countries. In the Malaysian context, the belief that only the religious learned had the right to speak on Islam had created a culture of silence and an escalation of attempts to prove one's superiority, often at the expense of women's rights, many of whose rights were being chiseled away in the name of Islam. The stranglehold of ulama needed to be broken. If Islam was to be used as a source of law, it must be open to public debate. The only way change could be brought about was to have a large portion of the population informed and desirous of change. She went on to describe the strategies that her organization, Sisters in Islam, employed and the activities in which it engaged in order to introduce to the public an alternative discourse on the law and the source of Islamic law. Those activities included (a) documenting the unjust impact of such laws on the lives of women to sensitize lawmakers; (b) working on public education; (c) conducting training all over the country; (d) preparing information sheets and pamphlets; and (e) outreach work. Engaging with the Office of the High Commissioner for Human Rights (OHCHR) and the Committee on the Elimination of Discrimination against Women (CEDAW) had great value. In that regard, two key suggestions made to CEDAW were (1) prioritizing key issues of concern in the Committee's discussions because the Committee covered the articles in chronological order, leaving little time for later articles; and (2) modifying the language used inconsistently by Governments in the Committee to the effect that "the community is not ready for change".

56. One observer referred to the fact that the Human Rights Council had established a working group to examine the issue of discrimination against women in law and practice, which represented one way of focusing the United Nations mechanisms on those issues. The United Nations was an intergovernmental organization and the duty of the Secretariat was to serve the Member States within the framework that they created. In that regard, the fundamental link between the intergovernmental process and the special rapporteur system was noted.

## **VII. Suggestions for effective action**

57. Ms. Zonke Majodina drew the conclusion that Governments had over-interpreted articles 19 and 20 of the ICCPR in order to oppress journalists, human rights defenders and activists. In most cases, Governments had not interpreted the provisions of articles 19 and 20 of the ICCPR accurately and this ultimately prevented judges from interpreting what constituted an offense. Governments have a significant role, and there needs to be consistency in the manner in which international treaties were incorporated into domestic legislation; however, that did not relieve treaty bodies from their responsibility to give guidance for doing this and to express their views on whether it is being done properly or not.

58. Ms. Anwar stated that regarding public policy, there was much progressive policy and jurisprudence in Indonesia. She recommended reviewing the educational system for lawyers, which should not be narrow, as these will be the future state attorneys and state legal advisors. She also underlined that voices from the communities needed to be heard and that the idea that only "authority" can speak on an issue must be challenged.

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<sup>12</sup> <http://www.ohchr.org/Documents/Issues/Expression/ICCPR/Bangkok/YahiaShukkeir.pdf>



59. Mr. Fu and Ms. Sim underlined the need to have better legislation which maintains a balance between promoting freedom of expression and installing a legal deterrence against incitement to hatred.

60. Ms. Setalvad also stressed the need for a balance between articles 19 and 20 of the ICCPR. She also cautioned against curbing freedom of expression through laws on sedition, national security or counter-terrorism.

61. Mr. Djamin highlighted the importance of building the ownership of the process in the Asia-Pacific region, as the level of engagement of each Member State in the region was uneven. Engagement with other actors such as civil society organizations needed to be noted.

62. Ms. Gelber expressed the view that with respect to the threshold question on what might constitute an offence under articles 19 and 20 of the ICCPR, a General Comment by the Human Rights Committee would be helpful. She added that a number of free speech specialists did not hold the view that articles 19 and 20 of the ICCPR are beneficial for freedom of speech.

63. Mr. La Rue stated that one needs to handle religious matters with respect but also not let religion be a hindrance to freedom of expression. He found the number of positive experiences, such as from the organisation Sisters in Islam, gratifying.

64. Mr. Lerner encouraged coordination between the global and regional activities of the United Nations with regard to the prohibition of incitement. To that effect, Human Rights Council Resolution 16/18, adopted on 24 March 2011, is a constructive shift in emphasis. He also stressed that further efforts are needed in that area.

### **VIII. Concluding remarks and closure of the meeting**

65. The Moderator summarized the outcomes of the workshop (see annex containing Chair's wrap-up). The meeting rose at 16:55 hours on 7 July 2011.

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

*Chairperson's wrap-up of the Asia-Pacific workshop (6-7 July 2011)*

The Asia-Pacific region is characterized by great heterogeneity in terms of the political, economic, social, cultural, and legal contexts which might have transnational implications. The region consists of some 60 countries and territories stretching from the outer reaches of the Pacific Ocean to the geographic ridges-and-bridges between Asia and Europe.

The terminology relating to offences on incitement to national, racial or religious hatred varies in the different countries, e.g. “uttering words with deliberate intent to wound religious feelings”; “promotion of feelings of enmity and hatred”; “express feelings of hostility”; “outrage religious feelings”; “provocation of sectarian or racial division”; “excite racial hostility”; or “incite unlawful act”.

Furthermore, some offences cover incitement to racial and religious hatred while others cover only racial/ethnic issues. There is also a dichotomy between civil and criminal law. In many countries of the region, incitement to hatred gives rise to criminal offence(s); in some countries, it is both criminal and civil or merely civil.

While an increasing number of Asia-Pacific countries are becoming parties to international human rights treaties, there is the challenge of a quantitative gap in terms of the number of ratifications, which is a more pressing issue with respect to the International Covenant on Civil and Political Rights (ICCPR) rather than to the International Convention on the Elimination of Racial Discrimination (ICERD), to which there would be more ratifications to date. Despite the lack of ratification by some Asia-Pacific countries, the directions laid down by these treaties with their provisions on freedom of expression and the prohibition of hate speech provide key guidance to all countries in the delicate equilibrium to be established between the rule and the exception to that rule.

Participants stressed that a number of Asia-Pacific countries have applied the scope of article 20 of the ICCPR in a manner that does not meet the strict test under article 19 (3) of the Covenant concerning permissible limits on freedom of expression. Many Asia-Pacific national legal systems need clearly formulated provisions for the protection of freedom of expression as required by article 19, and for the prohibition against incitement to hatred, as required by article 20 (2), as both articles are complementary. In addition, most of the case law relating to freedom of expression is concerned with political violations and restrictions of freedom of expression rather than expressly prohibiting incitement to national, racial or religious hatred.

A number of participants highlighted that national laws, jurisprudence and policies in some Asia-Pacific countries do not yet complement international standards. A number of inaccuracies and ambiguities surround the issue of implementing international obligations at the domestic level; these may lead to misinterpretation and negative consequences in various contexts. International expert mechanisms, such as Treaty Bodies and Special Procedures, may thus provide valuable guidance and counter any perceived “interpretation void(s)” in this regard.

Participants recommended that national legislation and case law be drafted in a way that clearly links the prohibition of incitement to national, racial or religious hatred to freedom of expression. This would remove ambiguity in interpreting such legislation and provide a solid enabling framework for implementing the provisions most effectively.

A number of participants highlighted that the threshold for determining what constitutes incitement to hatred should be robust and high. Experts in particular appreciated the proposed seven part test detailing the following elements to be constitutive for article 20 (2) of the ICCPR: (a) severity; (b) intent; (c) content; (d) extent, in particular the public nature of the speech; (e) likelihood or probability of action; (f) imminence; and (g) context. Notions of “advocacy”, “hatred”, “violence” and “hostility” need to be tested against international standards. In addition, participants highlighted that cases of incitement to hatred are based on a triangular relationship, i.e. they involve an act directed to a third party to instigate that person to hate another person in relation to the latter’s race or other grounds such as religion.

Experts and observers emphasized that existing anti-blasphemy laws in a number of Asia-Pacific countries have a negative impact for human beings, affecting religious minorities and both inter- and intra-religious relationships. It was also highlighted that blasphemy penalties range from fines to imprisonment and even to the imposition of the death penalty and that anti-blasphemy laws can themselves be a trigger of incitement to hatred and violence. Anti-blasphemy laws purport to protect religions or related beliefs, and it is important to address them in respect to the prohibition of incitement of national, racial or religious hatred. Some of these provisions in Asia-Pacific countries protect so-called “divine religions” and hence fall behind international standards which cover theistic, non-theistic and atheistic beliefs as well as the right not to profess any religion or belief. Participants welcomed very much the recent shift from the notion of “defamation of religions” to the protection of individuals against incitement to religious hatred.

Freedom of expression is essential to creating an environment in which a critical discussion, also about religious issues, can be held. In this regard, participants stressed the importance of avoiding a “culture of silence and silencing” and emphasized that women who publicly criticize discriminatory religious tenets should not be targeted, legally or socially, for stirring up religious hatred.

An independent judicial infrastructure, with its members acting in an impartial and objective manner, is crucial for ensuring that the facts and legal qualifications of any individual case are assessed as consistent with international human rights standards. Other sectors of society need to serve as checks and balances for the independent functioning of the judiciary.

It was highlighted that while a legal response is of key importance, legislation was only part of political and social will, and a wider toolbox to respond to the challenges of hate speech. It should be complemented by alternative initiatives coming from various sectors of society geared towards a plurality of policies, practices and measures nurturing social change and public discussion. This is with a view of changing the mindset of individuals, public officials and members of the judiciary as well as rendering media organizations and religious/community leaders more ethically aware and socially responsible.

The expert workshop was held in a very constructive and fruitful atmosphere, with inspiring presentations and discussions. Participants recommended, *inter alia*:

- To increase ratification of the ICCPR and the ICERD and to review any reservations related to incitement to national, racial or religious hatred.
- To investigate, prosecute and punish any cases of advocacy of hatred that constitutes incitement to discrimination, hostility or violence as well as to provide protection to concerned individuals and related remedies.
- To repeal anti-blasphemy provisions and to initiate legislative and other reforms to fully implement international human rights standards.
- To include a gender perspective when drafting legislation and implementing measures to stimulate freedom of expression.
- To conduct human rights education and training, including for law enforcement officials and members of the judiciary.
- To encourage increased knowledge, mindset-building, awareness raising and social mobilization and skills to effectively counter hate speech and to employ creative methods for mobilizing public opinion.
- To raise awareness of media representatives, teachers and religious/community leaders on their social and moral responsibilities and roles.
- To nurture dialogue, starting already at a young age, and to create public space for inclusive cross-cultural, interreligious and intra-religious interaction.