

Report of the Expert Workshop for the Americas on the Prohibition of Incitement to National, Racial or Religious Hatred, Santiago de Chile, 12-13 October 2011 (unedited)

I. Introduction

1. The expert workshop for the Americas on the prohibition of incitement to national, racial or religious hatred was opened at 9:45 a.m. on Wednesday, 12 October 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 hate speech broadcast in the mass media can trigger the worst of crimes, including genocide, it was legitimate to restrict well-defined and narrowly limited classes of speech to safeguard against such transgressions.

3. The High Commissioner for Human Rights stressed that freedom of expression and freedom of religion were mutually dependent and reinforcing. Freedom of religion cannot exist if freedom of expression is not respected. Likewise, freedom of expression is essential to creating an environment in which a constructive discussion about religious matters, including criticism of religion, could be held.

4. While freedom of expression was not absolute and may be restricted, the High Commissioner for Human Rights emphasized that any limitations must remain within strictly defined parameters. The right to freedom of expression implies that it should be possible to scrutinise, openly debate, and criticise – even in a manner many consider harsh and unreasonable – belief systems, opinions, and institutions, including religious ones, as long as this does not advocate hatred which incites to violence, hostility or discrimination against an individual or group of individuals. In relation to sanctions, 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.

5. In conclusion, the High Commissioner for Human Rights 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. In this context, she reminded that, while the concept of freedom of expression has been well-established for many centuries, in many parts of the world freedom of expression unfortunately remains a distant dream, facing resistance from those who benefit from silencing dissent, stifling criticism, or blocking discussion on challenging social issues.

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

6. The meeting was opened by the moderator, Mr. Eduardo Bertoni, 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

7. Mr. Eduardo Bertoni introduced a study that he had prepared on the prohibition of incitement to national, racial or religious hatred in the Americas.¹ He explained the research methodology used as well as challenges relating to the collection of information as a result of the dispersion of available information, and especially of information pertaining to court rulings.

8. The study analyses the regulatory standards that are followed in the direct or indirect implementation of the stipulations of article 20 of the International Covenant on Civil and Political Rights (ICCPR) in the domestic legislation of countries of the Americas. The study found that although a fair share of the States of the American continent have promulgated criminal regulations in this regard, during recent decades there has been a tendency to draw up public policies outside criminal legislation in order to combat incitement to hatred and discrimination, especially on racial grounds. The study shows, moreover, that the contents of article 20 of the ICCPR are somehow being “re-interpreted” so as to integrate them into a model that lies outside the scope of criminal law.

9. The study also contains an analysis of a number of judicial rulings on the prohibition of incitement to hatred and concludes that, barring the cases of the United States of America and Argentina, case law in those few countries of the Americas that have adopted a punitive model for expressions of hatred does not establish the real or potential occurrence of subsequent damages as a prerequisite for the imposition of a punishment.

10. Lastly, the study also analyses the efforts made within the framework of the Organisation of American States—which to date have borne no fruit—to adopt a legally binding instrument that would tackle the problem of racism and all forms of discrimination and intolerance.

IV. Work of the expert mechanisms

A. 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,² 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. He referred to discussions on the concept of “defamation of religions” and to the Durban Review Conference. He flagged that the debate regarding “defamation of religions” has subsided because there is positive engagement on these topics. Mr. La Rue stressed that defamation is related to honour and reputation of individuals, whereas religions or other schools of thoughts should be open to debate, even in an offensive manner. To avoid a chilling effect on freedom of expression, incidents of defamation against individuals should not trigger criminal but only civil action.

12. Mr. La Rue underlined how freedom of expression constitutes a facilitating right for other universal human rights and how it therefore needs to be seen in absolute openness. Articles 19 and 20 of the ICCPR need to be understood as a whole, as confirmed by the United Nations Human Rights Committee, including in its recent general comment no. 34. Mr. La Rue also highlighted that the Internet does not draw a new set of rights and principles but that the existing rules are applied to new media and new technologies. Internet should be the public space and any restrictions must be clearly defined by law, necessary and proportional. Restrictions are also established by international human rights instruments, for instance as outlined in article 20 of the ICCPR and in specific provisions on the prevention of genocide, or under the Optional

¹ http://www.ohchr.org/Documents/Issues/Expression/ICCPR/Santiago/SantiagoStudy_en.pdf

² <http://www.ohchr.org/Documents/Issues/Expression/ICCPR/Santiago/JointSRSubmissionSantiago.pdf>

protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography, or article 4 of the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD). Restrictions, however, need to be clearly defined and respect the test included in article 19, paragraph 3, of the ICCPR. Mr. La Rue stressed that legitimate restrictions should not be used as an excuse for States to limit criticism.

13. In the Americas there are important precedents, and Mr. La Rue referred to the Inter-American Convention on Human Rights and to the jurisprudence of the Inter-American Court of Human Rights, including to the case of *Olmedo Bustos v. Chile*. In the Americas, more than the religious debate, issues of discrimination on the basis of race and ethnicity, including the situation of indigenous peoples, are prominent. Mr. La Rue found that criminal law should be kept as a last resort, i.e. when real and present danger of violence is involved. However, beyond that, the State has the obligation to proactively foresee administrative standards or civil actions and build a culture of peace through the education system. In the Northern part of the Americas, one sees the political challenge of avoiding stereotyping and religious profiling when fighting against extremism and terrorism.

14. Mr. Heiner Bielefeldt referred to some examples of extreme manifestations of hatred, e.g. the disruption of religious minorities' funerals, and underlined that it is disconcerting that often the majority does not speak out against such acts even when they are perpetrated by only a small group. Such extreme manifestations are often orchestrated by political entrepreneurs and require to be countered publically. He underlined furthermore that beliefs and religions as such cannot be protected in their honour and reputation and in this regard referred to the consensus resolution 16/18 in the Human Rights Council which replaced the previous resolutions on "defamation of religions". He stressed the interlinked nature of freedom of religion and freedom of expression both in normative and practical terms. Indeed, in order to have a high degree of enjoyment of freedom of religion, a high degree of freedom of expression is required. Furthermore, in order to address manifestations of hatred, counter-speech and the expression of disagreement is essential. Mr. Bielefeldt reiterated Mr. La Rue's argument on using criminal law only as a last resort. In addition, Mr. Bielefeldt flagged that freedom of religion or belief implied the right to choose and change one's religion and also involved room for competition, including through non-violent provocation. Whereas superiority claims in the context of ethnicity are per se offensive and condemnable, religious superiority claims might be considered differently. The criteria for defining religious hatred may differ from those defining racial hatred and the difficult question of what precisely constitutes religious hatred, at any rate, cannot be answered by simply applying definitions found in the area of racial hatred.

15. Mr. Toby Mendel commented on the issue of broadcast regulation and suggested to place it in the wider context of media regulation. In terms of substantive content, his research found that on issues of defamation and privacy there is not much difference between normative standards and self-regulation. However, for what concerns hate speech there is a huge difference between legal standards on the one hand and administrative or self-regulatory instruments on the other hand. Mr. Mendel agreed that criminal law should be used only in extreme cases but underlined however that even when such legislation is used only in a limited number of cases, its mere existence is important as a normative statement of societal values.

16. Ms. Martins shared the view that the lack of available jurisprudence may also relate to the lack of confidence in domestic procedures and institutions or a strong lack of information about available types of recourse. She also stressed the importance of implementing policies with regard to non-discrimination/equality and monitoring their implementation.

17. Mr. Tad Stahnke referred to the need to understand the seeming lack of implementation of hate speech laws in the Americas which might be the result of the difficult tension between guaranteeing freedom of expression and considering restrictions thereto.

18. Mr. Bertoni underlined the need to better craft arguments for first applying policies before choosing to criminalise. Moreover, there seems to be an internal

contradiction in that it is on the one hand suggested not to use penal codes but on the other hand to criticize that not many criminal cases have been adjudicated.

19. Mr. Francisco Cali Tzay queried what the limits of freedom of expression are and under which extreme circumstances criminal law should be applied. In this regard he referred to manifestations of extreme intolerance against indigenous peoples which are becoming routine in Guatemala and for which the punishment is a mere fine.

20. Sir Clare Roberts underlined how difficult it is to draft legislation on the prohibition of incitement to hatred and queried whether there is a need to include *mens rea*.

21. Mr. Santiago Carton elaborated on the protection offered under the Inter-American Convention on Human Rights, in particular its article 13, and underlined the importance of putting measures in place to fight structural discrimination. He queried to what extent the freedom of expression may complicate the fight against structural discrimination.

22. In response, Mr. La Rue indicated that in his view, freedom of expression ends where another fundamental right starts. In particular, restrictions should be applied when the exercise of one's freedom of expression is considered, in light of the context, to bring on an intended, foreseeable and serious damage. Mr. La Rue also referred to the example of child pornography to underline the importance of prosecuting those who produce child pornography.

23. Mr. Amerigo Incalcaterra, Regional Representative of the High Commissioner for Human Rights, submitted that the access to justice and to recourse needs to be better analyzed and referred to a number of countries of the region in this regard. He also flagged the misuse of legislation by politicians in order to penalize certain conduct with a view to apply pressure on certain negotiations and he mentioned in particular anti-terrorism laws in this regard.

24. Ms. Martins introduced an additional consideration namely that certain groups, such as LGBTs, themselves call for protection against discrimination through criminal sanctions.

25. Mr. Mendel flagged that often when prosecution for incitement to hatred is successful, it will have been pursued under other criminal provisions than those on incitement to hatred, for example incitement to murder. This is so because in such instances there will be a tangible act to criminalise. In any event, in addition to prosecution there needs to be a broad-based societal program for combating inequality and structural discrimination.

26. One observer underlined the importance of ensuring an independent and impartial judiciary as a prerequisite to the application of article 20 of the ICCPR. On combating structural discrimination, she queried under which conditions criminal law would not satisfy the necessity and least restrictive means test under article 19, paragraph 3, of the ICCPR. She also referred to the recent general comment no. 34 of the Human Rights Committee on freedoms of opinion and expression and flagged that because of lack of jurisprudence on article 20 of the ICCPR and the disparate practice worldwide, it might be premature to also undertake a general comment on this article.

27. Another observer referred to administrative sanctions on the media and queried whether this has had a chilling effect on media activities. Mr. Mendel replied saying that there are special regimes for regulating broadcasting which go beyond legislation in force and indeed beyond article 20 of the ICCPR. The observer also recalled the position of the United States of America that there needs to be a causal link between the speech and the effect it is advocating for. Moreover, she underlined the importance of respecting the careful drafting of article 20 of the ICCPR which she interpreted as requiring the element of intent. With regard to structural discrimination, there needs to be a multi-faceted response which can include criminalisation. Lastly, she cautioned against using prohibitions as it can mask underlying causes and indeed further violations as well.

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

28. Mr. Mendel presented his paper which argues that the provisions on hate speech on the one hand in ICERD and on the other in ICCPR are inconsistent and make it impossible for States parties to implement both provisions truthfully.³ In his view, article 20, paragraph 2, of the ICCPR requires States to prohibit certain forms of speech but this constitutes the maximum amount of speech States are allowed to proscribe as tested by article 19, paragraph 3, of the ICCPR. Moreover, article 20 of the ICCPR includes important safeguards to freedom of expression such as the requirement of intent. Article 4 of the ICERD on the other hand, requires States to prohibit the mere dissemination of ideas based on hatred or racial superiority. This provision does not require intent or advocacy. In his view therefore, what is required to be banned under article 4 of the ICERD would not pass the test set out under article 19, paragraph 3, of the ICCPR. One possible way of reconciling both provisions is to make use of the clause of “with due regard to the principles embodied in the Universal Declaration of Human Rights and the rights expressly set forth in article 5 of this Convention” contained in article 4 of the ICERD although this may seem opportunistic to do so.

29. Mr. Cali Tzay argued that there is no contradiction between the provisions of ICERD and of the ICCPR and that if there were, this would lead to greater discrimination against minorities and lower the standard of protection.⁴ Certain expression may not make the enjoyment of other human rights impossible but might still have an impact on one’s dignity. Therefore, ICERD and the ICCPR need to be read as complementing each other and, in his view, CERD’s general comment 15 on article 4 ICERD has solved many issues in this regard. Also, in certain circumstances collective rights – such as those contained in the Declaration on the Rights of Indigenous Peoples – can override individual rights such as on freedom of expression.

30. Mr. Mendel stressed that one needs to establish the appropriate balance between protecting freedom of expression and prohibiting certain forms of incitement to hatred. Banning too much speech for reasons of fighting inequality may lead to backlashes and is therefore not an appropriate tool for promoting equality. Moreover, there are many examples of States misusing provisions when these are too broad or flexible. In addition, stopping people from talking about certain issues, even when this is done from a racist perspective, is not a sustainable way of resolving negative attitudes in society.

31. Mr. Canton added that the system of protection for freedom of expression under the Inter-American system is stronger than that at the international level. There is indeed a lack of compatibility between article 5 of the ICERD and article 20 of the ICCPR, but this does not constitute a controversy. Indeed, in his view, the ICERD provisions could be seen as a *lex specialis* to the ICCPR.

32. Mr. Bertoni commented saying that the idea of more speech to counter hate speech may in certain instances itself create victims and damages. Moreover, there is often no real freedom of speech for certain sectors of society because they have no access to procedures or indeed to the media. For such groups, the State needs to intervene and regulate. Mr. Canton argued that the idea of more free speech to counter hate speech might indeed not function well in all countries. Mr. La Rue referred to the phenomenon in Guatemala whereby indigenous groups are not prevented to use for instance the media but do not actively exercise their right to do so, there are for instance no indigenous community radios. In such cases, he found, the State needs to be more proactive.

33. Ms. Nathalie Prouvez, Chief of the OHCHR Rule of Law and Democracy Section, commented on the issue of contradiction between the provisions of ICERD and ICCPR. She referred to CERD’s general recommendation XV which outlines,

³ <http://www.ohchr.org/Documents/Issues/Expression/ICCPR/Santiago/TobyMendel.pdf>

⁴ <http://www.ohchr.org/Documents/Issues/Expression/ICCPR/Santiago/CaliTzay.pdf>

inter alia, that with every right come certain special duties and responsibilities. Moreover, she underlined the extent to which ICERD as a whole provides all the tools needed to combat racial hatred, including in the fields of teaching, education, culture and the promotion of tolerance.

34. Mr. Mendel argued that article 4 of the ICERD was not *lex specialis* to article 20 of the ICCPR. He suggested that, as part of the solution for reconciling the perceived discrepancies between the ICERD and ICCPR regimes, there could be more institutional discussion between the two relevant treaty bodies. He referred to the Camden Principles which, while recognising that certain forms of speech should be prohibited, focuses on providing more speech to counter incitement to hatred and promote equality. More speech should be the dominant response. In this context, Mr. Bielefeldt referred to the phenomenon of right wing movements hijacking the agenda of freedom of expression and he criticized that they stage themselves as free speech heroes.

35. One observer noted that although human rights are crafted against the background of dignity, there is no human right to dignity or not to be offended. If dignity itself was protected this might constitute a slippery slope as checks and balances may not be rigorous and subjective. On the issue of more free speech as a response, she referred to the necessity to back these up with policies and also cautioned not to give a high level platform when prosecuting offenders.

V. Law and judicial practices

36. Ms. Martins presented the contribution from her non-governmental organisation, Article XIX, with regard to thresholds for the prohibition of incitement to national, racial or religious hatred in respect of article 20 of the ICCPR.⁵ Regarding the situation in the Americas, Ms. Martins mentioned that the domestic legislation in the region is a patchwork with variations on how key concepts are defined and applied; resulting therefrom she found that laws and jurisprudence were unevenly applied and inconsistent; also cases seem to be decided on the basis of vague methodologies and in an ad hoc manner lacking discipline and rigor. The legal framework and jurisprudence should be guided by some overarching principles: (1) recognition of the specific language used in article 20 of the ICCPR; (2) recognition that the three-part test under article 19 of the ICCPR applies to action taken under article 20 of the ICCPR; and (3) the need for a technical and robust definition of key terms (hatred, discrimination, violence, hostility), for which the Camden Principles may provide guidance. Ms. Martins also informed of the seven-fold test designed by Article XIX to assist courts in adjudicating cases of incitement to hatred and parliaments in drafting legislation and elaborated on the elements underpinning this test (severity, intent, extent, content, imminence, likelihood/probability, and context). All seven tests would need to be satisfied in order to speak of a prohibited form of incitement to hatred.

37. Sir Clare Roberts presented his paper which goes into the thought processes of certain courts in the Caribbean when confronted with cases of incitement to hatred.⁶ He flagged the importance of ensuring adequate judicial training and sensitisation on human rights norms and standards. Sir Roberts used the case of Trinidad and Tobago and also Guyana. Furthermore, he indicated how the talk-show format is becoming more and more popular in the Caribbean as a main forum for actors in society to voice their views, even when these are offensive or reach the level of hate speech. Furthermore, Sir Roberts indicated how also a civil procedure – for damages – can have a chilling effect on freedom of expression given the height of the fines imposed at times. On the issue of social networks, he referred to an example in Trinidad and Tobago where threats had been uttered by a teenage girl against the Prime Minister via YouTube, which has led to a tracking of social media.

38. Ms. Martins added that in Brazil the statute on racial equality foresees a wide array of available recourse, including administrative sanctions as well as

⁵ <http://www.ohchr.org/Documents/Issues/Expression/ICCPR/Santiago/PaulaMartins.pdf>

⁶ <http://www.ohchr.org/Documents/Issues/Expression/ICCPR/Santiago/ClareKRoberts.pdf>

reconciliatory meetings with the prosecutor which may serve as a source of inspiration when considering other measures than those of legislative or criminal nature.

39. A discussion ensued around, among other things, the seven-fold test proposed. Mr. Bielefeldt queried how the test also covers “speech acts” in addition to simple expressions. Mr. Stahnke underlined that limitations to freedom of expression should be the exception, not the rule, and that there should be a high threshold for applying them. In addition, an independent and impartial judicial system is a prerequisite for applying limitations, including when following the seven-fold test. On the questions of intent, he mentioned that abuse of blasphemy laws often revolves around the lack of consideration for the content of the speech. Furthermore, he suggested better developing the issue of “hostility” in the seven-fold test and specifying whether an actual consequence is needed in this regard. Mr. Mendel argued that it would be counter-productive to limit the interpretation to situations where a tangible act has been produced. He also queried why the test should be restricted to statements made in public as an act of defamation in private nevertheless is punishable. Mr. Ricardo Lombana underlined the importance of the criterion of intent and that of the identity of the individual who is making the statement. He also stressed, basing himself on his experience in Panama, that applying such a test would be contingent on the judiciary having received significant training and awareness-raising. Mr. Lombana furthermore underlined the need to consider extra-judicial and extra-criminal solutions as well policies for preventing discrimination.

40. One observer referred to the reservation that the Government of the United States of America has made under article 20 of the ICCPR and against this backdrop she stressed how the test applied in the United States of America relates to “imminent violence”, assessing how likely the consequence of a given speech is. She furthermore shared the view that any action taken under article 20 of the ICCPR should respect the test for restrictions contained in article 19, paragraph 3, of the ICCPR and that for article 20 of the ICCPR to be applied there needs to be effect and intent present in the situation.

VI. Institutions and different types of policies

41. Mr. Santiago Canton gave a presentation about the Inter-American system for the protection of human rights, with a specific focus on freedom of expression and incitement to hatred.⁷ He emphasized that there is an extensive protection for freedom of expression in light of the history in the region. While the Inter-American Court of Human Rights has not yet decided on hate crime cases, some incidents of hate speech have been dealt with at the domestic level, however, other cases have not been prosecuted. Mr. Canton also referred to an incident in Paraguay, where a radio station had called people to go out in the street, giving names and addresses of politicians who should be killed.

42. A discussion ensued regarding the meaning of the provisions of article 13 of the IACHR as well as on the differences between the Spanish and English versions of this provision. Mr. Bielefeldt raised a question on the wording of article 13, paragraph 5, of the IACHR and on its position on the relationship between racial hatred and religious hatred. Sir Roberts commented on the preparations for the draft Inter-American Convention against discrimination which tries to cover all types of discrimination; this means that the real focus, i.e. racial discrimination, became diluted. Nevertheless the process has value as it keeps the important issue of racism on the front burner. Mr. Mendel stated that he found that the IACHR, in respect of incitement to hatred, was much broader than even article 4 of the ICERD. With regard to the grounds to prohibit hate speech, he recalled that article 20, paragraph 2, of the ICCPR constitutes a closed list, while under article 19, paragraph 3, other prohibitions such as on the grounds of for example gender would be allowed. Mr. Canton reminded that no prior censorship is allowed apart from article 13, paragraph 4, of the IACHR, i.e. for the sole purpose of regulating access to public entertainments for the moral protection of childhood and adolescence

⁷ <http://www.ohchr.org/Documents/Issues/Expression/ICCPR/Santiago/SantiagoCanton.pdf>

43. Mr. Lombana presented his paper sharing experiences in media self-regulation, in particular from the Ethics Committee of the Journalism National Council in Panama. Bodies such as these (and as present not only in Panama but also for instance in Chile and Peru) are private, non-binding, without state intervention, with their own rules of procedure to monitor, interpret, deliberate and evaluate the ethical treatment given to information by journalists and media. The Ethics Committee in Panama has consolidated itself as a forum for deliberation – by inter alia journalists, media owners, and civil society – of ethical practices of the media, but is also starting to be a space for discussion of broader issues of national importance. The Committee bases its work not only on a declaration of principles which consolidates the values and principles shared by all its members, but also uses other sources such as its own jurisprudence, expert and academic opinions, broadly accepted journalism principles, and inter-American human rights standards specifically on freedom of expression. Mr. Lombana highlighted the following main characteristics of the Ethics Committee: first, its heterogeneous and representative composition (owners, journalists, universities, civil society and the Ombudsman Office); second, work on the basis of a set of common principles recognised as necessary for a democratic society; third, its preventive and condemnatory capacity including the mandatory publication of its resolutions; fourth, its structure for monitoring and observing; fifth, its relationship with academic partners; and sixth, its partnership with the Ombudsman. Mr. Lombana posited that ethics committees could be incorporated in the non-legal toolbox for fighting hate speech and discrimination. Such mechanisms may function not only as forum for discussion but may also be entitled to publically condemn journalists and media companies.

44. A discussion ensued with questions regarding degree of government involvement in the work of the Ethics Committee in Panama, regarding the risk of avoiding excessive political correctness, regarding compliance with the recommendations of the Committee, and regarding the modalities for its publication of decisions. Mr. Mendel added that such media regulatory bodies can be self-regulatory, statutory, or co-regulatory and may regulate journalists, print media and/or broadcast media. Debate has been sparked in the region since in some countries there has recently been greater government involvement in such bodies. Caution needs to be exercised so that the work of media regulatory bodies does not go beyond the standard of article 20 ICCPR.

45. Mr. Stahnke gave a presentation on confronting incitement to hatred through means other than legal restrictions on expression.⁸ He argued that there is very little data on the implementation and effectiveness of legal measures prohibiting incitement and that the effort to create new international norms on “defamation of religions” has proven to be extremely divisive and controversial at the international and national levels. As documented by Human Rights First in a recent report, the implementation of national laws prohibiting blasphemy, injury to religious feelings and other forms of religious defamation has resulted in systematic abuses constituting severe violations of human rights. At the same time, hatred and bias motivated violence continue to be serious public policy problems, afflicting the United States and other states in the Americas as well as all other regions of the globe. Mr. Stahnke suggested measures for reducing incitement to hatred and responding to hatred such as making bias-motivated violence a criminal offense or enhancing the penalty for an underlying violent offense. In addition, he recommended that governments, political leaders and public officials should (a) condemn and counteract speech that incites violence against or promotes acts that curtail the enjoyment of rights by particular individuals and groups on account of their religion, race, national origin, etc.; (b) combat bias-motivated violence and other forms of public and private discrimination; (c) reduce fear among targeted individuals and communities and diffuse community tensions; (d) promote communication among affected communities, law enforcement, political leadership and civil society; and (e) advance intercultural and interreligious understanding. Mr. Stahnke provided a sample of cases from New York City, Florida and California, where hate had been confronted through non-legal means, to underline the importance of inter-cultural and inter-religious dialogue for diffusing community

⁸ <http://www.ohchr.org/Documents/Issues/Expression/ICCPR/Santiago/TadStahnke.pdf>

tensions and encouraging cooperation between affected communities and local politicians as well as law enforcement.

46. Mr. Bielefeldt found it important to not reduce speech to only an instrument but to see it as pillar of democracy by reclaiming the debate from right-wing groups which have recently come to cast themselves as the protagonists of the free speech debate. Moreover, also when condemning hate speech there need to be criteria about when to do so because otherwise one might slide into excessive political correctness. Mr. Stahnke replied saying that criteria should be first, when violence is involved, and second, when there is some impact that curtails the rights of others.

47. A representative of the Joint Office on the Prevention of Genocide and the Responsibility to Protect, which is part of the United Nations Department of Political Affairs, spoke about the activities of her Office and elaborated on how hate speech is relevant to their activities. She informed that this Office has been created by the Secretary-General in response to the atrocities committed in Rwanda and the Balkans. The Office's methodology is based on collecting information from different sources on incidents of massive and serious violations of human rights and international humanitarian law that might lead to genocide. The Office uses an analytical framework – that deals specifically with the prevention of genocide – which works on the basis of indicators, some of which clearly mention hate speech as an early warning sign. The framework is an analytical tool used to produce information on a given situation to be shared with the Secretary-General and/or relevant (non-)UN partners which could play an important role in devising preventive strategies for the given situation. The representative furthermore elaborated on a project with regard to hate speech currently being pursued by her Office. The starting point of the project was the realisation that there is no institution – at the global level – to monitor hate speech in situations that are at risk of further deteriorating into genocide or atrocity crimes. Furthermore, as incitement to genocide and atrocity crimes are considered to be precursors to the escalation of violence, it is crucial to monitor the occurrence of hate speech. The project has so far produced indicators which aim to help in determining which forms of hate speech can constitute incitement to genocide or to atrocity crimes.

48. Mr. Bielefeldt queried on the role of the structural shape of society, such as the lack of inter-group communication or historical traumas, in the risk analysis presented in addition to the nature of the perpetrator and the audience. Mr. Stahnke questioned what the role of the Special Advisor on the Prevention of Genocide is in terms of engaging directly with Governments and international media on a situation that risks degenerating.

VII. Suggestions for effective action

49. Mr. Heiner Bielefeldt recalled the possible synergies of various human rights and flagged in that regard that applying anti-discrimination measures requires the enjoyment of freedom of expression with a view to empowering individuals and groups.

50. Mr. Cali Tzay underlined that freedom of expression needs to be analysed in the context of all human rights as reflected in various instruments at both the global and the regional level.

51. Mr. Lombana stressed that the assessment of whether the threshold has been reached for prohibiting certain forms of speech, the quality of the author of the speech – whether a public official or not – should be taken into account.

52. Ms. Martins stated that a response is needed to the questions of how efficient anti-discrimination measures are in preventing hate speech and secondly, of how to prevent misuse of measures against incitement to hatred. In addition, she flagged that although legislation is not always the best possible response to hate speech, the mere existence of legislation on hate speech may be important as a normative statement of values. In any event, any legislative response should be complemented by a wide array of policies. In order to remedy the lack of clarity on how to implement existing standards, she referred to the seven-fold test proposed by Article XIX and to training for the judiciary.

53. Mr. Mendel stressed that incitement to hatred was only to a limited extent a legal phenomenon but instead mostly a social phenomenon. It is important in this regard to give greater prominence to positive measures on freedom of expression in the field of policies.

54. Sir Clare Roberts underlined the importance of moving the discussion into the daily realities of the policy-making process at the local level and of disseminating the various ideas among civil society, the press and inter-governmental bodies. He recommended that the whole discussion on hate speech be brought on the agenda of national human rights bodies in the various countries and be injected into training programmes for the judiciary and prosecutors.

55. Mr. Stahnke recommended that non-legal means are avenues that need to be better emphasised and to better address responses to structural discrimination. There is no single approach in the Americas safe for the high threshold for restricting freedom of expression. The various expert workshops on the prohibition of incitement to hatred have tried to fill a gap of information about practice. One needs to find ways of injecting such information into the work of the international human rights mechanisms. Also, the seven-fold test by Article XIX constitutes a good set of elements for further consideration.

56. Mr. La Rue recommended better interaction and dialogue between the global system for protection and the various regional mechanisms in the area of freedom of expression and the prohibition of incitement to hatred. He also emphasised the importance of prevention and non-legal responses. It will be important to record such good practices in coordination with expert mechanisms such as the human rights treaty bodies. It is crucial to increase the possibility of coordination between some special procedures mandate holders, the treaty bodies, as well as other UN entities such as the Joint Office on the Prevention of Genocide and the Responsibility to Protect.

57. One observer cautioned against the assertion that certain forms of speech in and out of itself themselves constitute discrimination, which is all the more of relevance in an age where many Governments accuse individuals of misusing the exercise of their freedom of expression via social media. She also underlined the important symbolic value of having legislation in place and of legislative measures constituting the last resort. Governments should not sit idle in the face of hate speech but should speak out against incidents, offer protection for victims, engage in cross-cultural dialogue, invest in education but she also underlined that regulating hate speech does not remove the sources of hatred. Lastly, she referred to the initiative taken by the United States in the context of the Istanbul process which was initiated by her Government and the Organisation of Islamic Cooperation.

58. Another observer stressed the importance of creating the conditions for the exercise of freedom of expression to play a crucial role in combating incitement to hatred and structural discrimination. One other observer highlighted the importance attached by the Special Advisor on the Prevention of Genocide to prevention measures to counter structural discrimination.

VII. Closing remarks and closing of the session

59. The moderator summarised the outcomes of the workshop (see annex containing the Chair's wrap-up). He closed the meeting on Thursday, 13 October 2011, at 5:00 p.m.

Annex

Chair's wrap-up of the OHCHR expert workshop on the prohibition of incitement to national, racial or religious hatred in the Americas (Santiago de Chile, 12-13 October 2011)

GENERAL

The Americas make up a geographic space currently composed of 35 States, all of them members of the United Nations and of the Organization of American States. Thereof, 31 States are parties to the International Covenant on Civil and Political Rights (ICCPR), 33 are parties to the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD), and 24 are parties to the American Convention on Human Rights (ACHR).

Participants of the expert workshop discussed laws, jurisprudence and policies with regard to incitement to national, racial or religious hatred, inter alia, in Antigua and Barbuda, Argentina, Bolivia, Brazil, Canada, Chile, Guatemala, Panama, Paraguay, Trinidad and Tobago, the United States and Venezuela.

REGIONAL LEGAL FRAMEWORK

Article 13(5) of the ACHR provides that: "Any propaganda for war and any advocacy of national, racial or religious hatred that constitute incitements to lawless violence or to any other similar action against any person or group or persons on any grounds including those of race, colour, religion, language, or national origin shall be considered offenses punishable by law."

It was noted that although article 13(5) of the ACHR and article 20(2) of the ICCPR are similar, the scope of application of article 13(5) of the ACHR is limited to advocacy of hatred that constitutes "incitements to lawless violence or to any other similar action", rather than "incitement to discrimination, hostility or violence".

In addition, participants noted the lack of clarity of article 13(5) of the ACHR owing to the fact that the English version refers to "offenses *punishable* by law" while the Spanish version provides "estará *prohibida* por la ley" (emphasis added).

LEGISLATION AND JURISPRUDENCE

An analysis of domestic legislation in the Americas has led to the identification of five different approaches to implementing the international prohibition of incitement to national, racial or religious hatred at the national level. These approaches can be fitted into two general models.

- 1) The *punitive or sanctioning model*, including the following three regulatory approaches:
 - (a) Criminal codes that include clauses prohibiting incitement to hatred;
 - (b) Secondary criminal legislation containing clauses prohibiting incitement to hatred, to genocide or to discrimination;
 - (c) Administrative regulations governing the media and containing clauses prohibiting incitement to hatred.
- 2) The *non-sanctioning model*, including the following two regulatory approaches:
 - (d) Constitutional provisions prohibiting discrimination, either explicitly or implicitly;
 - (e) Other types of legislation prohibiting incitement to hatred.

When discussing the implementation of article 20(2) of the ICCPR at the national level, it was highlighted that any incitement-related restriction should comply with the requirements under article 19(3) of the ICCPR.

Furthermore, it was suggested that the following seven elements should be carefully considered when determining whether an act constitutes incitement under article 20(2) of the ICCPR:

- *Severity* of the hatred at issue;
- *Intent* of the speaker;
- *Content* or form of the speech;
- *Extent* of the speech, its reach and the size of its audience;
- *Likelihood* or probability of harm occurring;
- *Imminence* of the acts called for by the speech; and
- *Context*.

While many voiced support for this suggested seven-part test, possible overlaps between some of the thresholds were noted. In addition, some participants warned against the complexity of the test and therefore raised doubts as to its usefulness for judges who may require further training and sensitization.

It was noted that, throughout the region, case law on the prohibition of incitement to hatred is not readily available. This may be explained by the absence of accessible archives, but also by the mere lack of recourse to courts owing to limited awareness among the general public regarding anti-discrimination legislation, and a lack of trust in the judiciary.

POLICIES

It was stressed that since the 1990's, the Americas have witnessed a marked preference for a non-legislative approach through in particular the adoption of public policies and the establishment of various types of institutions. It was further emphasized that mechanisms and legislation to combat and punish acts of incitement to hatred may not suffice to alter historical and deeply rooted patterns of intolerance and structural discrimination in countries of the region.

A number of participants highlighted that criminal law measures should be the exception and that States should act at many other levels, including through prevention and promoting tolerance through education and public statements of state officials.

Participants agreed that members of legislative bodies and Government leaders, including at the local level, should be held politically accountable for bigoted expressions that encourage discrimination and violence and create a climate of fear for minorities and indigenous peoples. In addition, political leaders, Government and other officials serving in public office should send immediate, strong, public and consistent messages countering campaigns of intolerance, hatred and discrimination.

Participants recognised that in the Americas, hostile and intolerant messages regularly appear in the newspapers, other media and via new communication technologies. Caution was, however, urged when considering applying restrictions on the media, due to the important role they play in democratic societies. Whilst it was recognised that the press must not overstep certain boundaries, it is nevertheless incumbent on it to impart information and ideas on political issues just as on other areas of public interest. It was highlighted that even in the absence of restrictive legislation, administrative regulations and sanctions applied to media organisations may also have a chilling effect on freedom of the press and freedom of expression.

MAIN FINAL OBSERVATIONS AND SUGGESTED FURTHER ACTION

The application of article 20(2) of the ICCPR should remain the exception rather than the rule and in case of limitations to freedom of expression a high threshold for such

restrictions should be applied. Addressing the root causes of a problem will be always more effective than imposing sanctions on the perpetrators.

An independent and impartial judiciary as well as respect for the rules of due process were seen as a prerequisites when prohibiting certain forms of expression to prevent the misuse of laws on incitement to hatred.

A number of participants were of the view that the Committee on the Elimination of Racial Discrimination and the Human Rights Committee should liaise and discuss with a view to addressing State obligations under articles 19 and 20 of the ICCPR and article 4 of the ICERD.

Based on the experience in countries of the region, participants agreed on the need to implement a wide range of policy tools and other measures to combat structural discrimination, to guarantee the right to equality and take positive steps to promote tolerance and diversity, to facilitate equitable access to the means of communication, and to guarantee the right of access to justice. In addition, participants highlighted the importance of policies empowering minorities and indigenous peoples to exercise their right to freedom of expression.

Incitement to hatred in society should be countered by effective measures, particularly in the fields of teaching, education, culture and information, with a view to combating prejudices and to promoting understanding and tolerance.

Participants recommended raising the capacity to train and sensitize the police, prosecutors and judges, as well as other official bodies and civil society groups to counter advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence.

Participants also welcomed self-regulatory bodies and initiatives taken by the media, including codes of conduct and ethics committees.

Furthermore, participants stressed the important role of independent national human rights institutions and other specialized bodies to combat discrimination. They also emphasized the need to establish or empower the appropriate existing bodies to diffuse community tensions as well as foster collaborative approaches and improve lines of communication between local government, local law enforcement, civil society groups and community leaders to ensure effective responses to violence and incitement to hatred.