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**UNITED NATIONS, HUMAN RIGHTS,
FREEDOM OF RELIGION OR BELIEF**

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Separation of Religion or Belief and State

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PROHIBITION OF INCITEMENT TO NATIONAL, RACIAL OR RELIGIOUS HATRED

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Joint submission by

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I. Introduction

The topic of the 2011 expert workshops on the prohibition of incitement to national, racial or religious hatred is highly relevant for our three mandates as Special Rapporteurs, i.e. on racism, racial discrimination, xenophobia and related intolerance, freedom of religion or belief and freedom of opinion and expression. We welcome the organization by the Office of the High Commissioner for Human Rights of these expert workshops and the possibility for us to contribute to these important discussions.

The expert workshops touch upon the rights and freedoms enshrined in the following provisions of international human rights instruments:

- Article 18 of the Universal Declaration of Human Rights (UDHR) and of the International Covenant on Civil and Political Rights (ICCPR) on freedom of thought, conscience and religion;
- Article 19 of the UDHR and of the ICCPR on freedom of opinion and expression, respectively;
- Article 20 of the ICCPR on the prohibition of any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence; and

– Article 4 of the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD) on the eradication of incitement to racial discrimination as well as acts of violence or incitement to such acts.

In the present written submission, we first explore some legislative and judicial practices in the workshop’s region, Africa, and policies conducive to effectively prohibit and prevent advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence (chapter II). We then provide some concluding remarks concerning the protection of individuals against incitement to national, racial or religious hatred (chapter III).

[Human Rights Council Resolution 16/18: Combating intolerance, negative stereotyping and stigmatization of, and discrimination, incitement to violence, and violence against persons based on religion or belief. Previously under Human Rights Council Resolution 16/38]

[A-HRC-16-L.38 - Resolution Combating Intolerance, Stereotyping, Discrimination & Incitement to Violence Against Persons Based on Religion or Belief](#)

Chapter II (last paragraph)

We also note the positive development of the adoption, without a vote, by the Human Rights Council of resolution 16/18, entitled “Combating intolerance, negative stereotyping and stigmatization of, and discrimination, incitement to violence, and violence against persons based on religion or belief”. In this resolution, the Human Rights Council “condemns any advocacy of religious hatred that constitutes incitement to discrimination, hostility or violence, whether it involves the use of print, audio-visual or electronic media or any other means” (operative paragraph 3). It also “recognizes that the open public debate of ideas, as well as interfaith and intercultural dialogue at the local, national and international levels can be among the best protections against religious intolerance, and can play a positive role in strengthening democracy and combating religious hatred, and convinced that a continuing dialogue on these issues can help overcome existing misperceptions” (operative paragraph 4). Furthermore, the resolution notes the speech given by Secretary-General of the Organization of the Islamic Conference, Ekmeleddin Ýhsanođlu, at the 15th session of the Human Rights Council and draws on his call on States to take several actions to foster a domestic environment of religious tolerance, peace and respect (operative paragraph 5 (a) to (h)). Finally, the Human Rights Council “calls for strengthened international efforts to foster a global dialogue for the promotion of a culture of tolerance and peace at all levels, based on respect for human rights and diversity of religions and beliefs, and decides to convene a panel discussion on this issue at its seventeenth session within existing resources” (operative paragraph 9). We very much appreciate that the Human Rights Council has – after years of debate – ultimately found a way to unanimously address these worrying phenomena without referring to concepts or notions that would undermine international human rights law. In this context we would like to emphasize the principle that individuals rather than religions per se are the rights-holders.

III. Concluding remarks

We have repeated on a number of occasions that all human rights are universal, indivisible and interdependent and interrelated. Nowhere is this interdependence more obvious than in the discussion of freedom of expression and incitement to national, racial or religious hatred.

The right to freedom of expression constitutes an essential aspect of the right to freedom of religion or belief and therefore needs to be adequately protected in domestic legislation. Freedom of expression is essential to creating an environment in which a critical discussion about religion can be held. For freedom of thought, conscience and religion to be fully realized, robust examination and criticism of religious doctrines and practices – even in a harsh manner – must also be allowed. In recent years, there have been challenges with regard to the dissemination of expressions which offend certain believers. This is not a new phenomenon and historically has concerned countries in all regions of the world and various religions and beliefs. The events of 11 September 2001, have exacerbated tensions in inter-community relations. In that context, a clear distinction should be made between three types of expression:

- expressions that constitute an offence under international law;
- expressions that are not criminally punishable but may justify a civil suit; and
- expressions that do not give rise to criminal or civil sanctions but still raise a concern in terms of tolerance, civility and respect for the religion or beliefs of others.

Notwithstanding this, let us strongly emphasize that freedom of expression and the demands of a pluralist, tolerant, broad-minded and democratic society need to be taken into consideration in all cases being examined. Freedom of expression has to be understood in the positive sense and is one of the essential foundations of a democratic and pluralistic society. We also have to generate, with the exercise of this freedom, an atmosphere of respect and understanding between peoples, cultures and religions.

We have to guarantee freedom of expression equally for all as a form to combat racism and discrimination. The Durban Review Conference Outcome Document reaffirms the positive role that the exercise of the right to freedom of opinion and expression, and the full respect for the freedom to seek, receive and impart information, can play in combating racism, racial discrimination, xenophobia and related intolerance, in line with relevant provisions of international human rights law, instruments, norms and standards.

Whereas the debate concerning the dissemination of expressions which may offend certain believers has throughout the last twelve years evolved around the notion of “defamation of religions”, we welcome the fact that the debate seems to be shifting to the concept of “incitement to national, racial or religious hatred”, sometimes also referred to as “hate speech”.

Indeed, the difficulties in providing an objective definition of the term “defamation of religions” at the international level make the whole concept open to abuse through excessive application or loose interpretation. At the national level, domestic blasphemy laws can prove counter-productive, since this could result in the de facto censure of all inter-religious and intra-religious criticism. Many of these laws afford different levels of protection to different religions and have often proved to be applied in a discriminatory manner. There are numerous examples of persecution of religious minorities or dissenters,

but also of atheists and non-theists, as a result of legislation on religious offences or overzealous application of laws that use a prima facie neutral language. Moreover, the right to freedom of religion or belief, as enshrined in relevant international standards, does not include the right to have a religion or a belief that is free from criticism or ridicule.

Whereas some have argued that “defamation of religions” could be equated to racism, we would like to caution against confusion between a racist statement and an act of “defamation of religion”. We fully concur with the affirmation in the preamble of the International Convention on the Elimination of All Forms of Racial Discrimination that “any doctrine of superiority based on racial differentiation is scientifically false, morally condemnable, socially unjust and dangerous”. However, invoking a direct analogy between concepts of race or ethnicity on the one hand and religion or belief on the other hand may lead to problematic consequences. Religious adherence, membership or identity can be the result of personal choices the possibility of which constitutes an essential component of the human right to freedom of religion or belief. For this reason, freedom of religion or belief also covers the rights to search for meaning by comparing different religions or belief systems, to exchange personal views on questions of religion or belief, and to exercise public criticism in such matters. For this reason the criteria for defining religious hatred may differ from those defining racial hatred. 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.

It is necessary to anchor the debate on these issues in the relevant existing international legal framework, provided for by the ICCPR. Whereas the ICCPR provides for freedom of expression, it also clearly defines limitations to it, e.g. in articles 19 and 20. Furthermore, article 20 (2) of the ICCPR requires States to prohibit expressions if they amount to advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility and violence. We would like to underline that any measure to implement article 20 of the ICCPR will have to withstand the clear test that article 19 (3) imposes for restrictions on freedom of expression.

Defining which acts might trigger article 20 (2) of the ICCPR remains difficult. What does “advocacy” mean? Who is targeted by the advocacy of hatred? What constitutes incitement to violence, hostility or discrimination? Where do we draw the line between criticism – even if deemed offensive – and hate speech? From a legal perspective, each set of facts is particular and can only be assessed and adjudicated, whether by a judge or another impartial body, according to its own circumstances and taking into account the specific context. An independent judiciary and respect for the rules of due process are therefore essential pre-conditions when prohibiting certain forms of expression.

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

The notion of incitement to hostility may, however, be more prone to subjective approaches, very much dependent upon the perspective taken. Indeed, the alleged perpetrator of hate speech, the alleged victim, the average man on the street or a judge, may come up with completely different definitions of what constitutes – or not – incitement to hostility. We should bear in mind that whoever interprets the concepts of hostility, there always remains a risk of subjectivity. As elaborated above, the criteria for defining religious hatred or hostility cannot be simply deduced from the criteria applicable to racial hatred or hostility. It is at least conceivable that some provocative expressions which, if directed to some person.s ethnic characteristics would doubtless amount to hostility, may find a different assessment when applied to questions of religion or belief.

The OHCHR expert seminar on articles 19 and 20 of the ICCPR, held in Geneva in October 2008, identified some objective criteria to prevent arbitrary application of national legal standards pertaining to incitement to racial or religious hatred:

- The public intent of inciting discrimination, hostility or violence must be present for hate speech to be penalized;
- Any limitations on freedom of expression should be clearly and narrowly defined and provided by law. In addition, they must be necessary and proportionate to the objective they propound to achieve, i.e. prohibiting hate speech;
- Limitations should not threaten the exercise of the right itself. The least intrusive means insofar as freedom of expression is concerned should be used to prevent a chilling effect;
- The adjudication of such limitations should be made by an independent and impartial judiciary.

In addition, the Camden Principles on Freedom of Expression and Equality provide useful guidance for the interpretation of international law and standards, inter alia with regard to incitement to hatred. We would like to reiterate its Principle 12 which clarifies that the terms hatred and hostility refer to “intense and irrational emotions of opprobrium, enmity and detestation towards the target group”, that the term advocacy is to be understood as “requiring an intention to promote hatred publicly towards the target group” and that the term incitement refers to “statements about national, racial or religious groups which create an imminent risk of discrimination, hostility or violence against persons belonging to those groups”.

We should never lose sight that our ultimate goal is to find the most effective ways through which we can protect individuals against advocacy of hatred and violence by others. Hate speech is but a symptom, the external manifestation of something much more profound which is intolerance and bigotry. Therefore, legal responses, such as restrictions on freedom of expression alone, are far from sufficient to bring about real changes in mindsets, perceptions and discourse. To tackle the root causes of intolerance, a much broader set of policy measures are necessary, for example in the areas of intercultural dialogue or education for tolerance and diversity. This set of policy measures should also include strengthening freedom of expression.

The strategic response to hate speech is more speech: more speech that educates about cultural differences; more speech that promotes diversity; more speech to empower and give voice to minorities, for example through the support of community media and their representation in mainstream media. More

speech can be the best strategy to reach out to individuals, changing what they think and not merely what they do.

The Tandem Project a non-governmental organization (NGO) founded in 1986 to build understanding, tolerance, and respect for diversity of religion or belief, and to prevent discrimination in matters relating to freedom of religion or belief. The Tandem Project has sponsored multiple conferences, curricula, reference material and programs on Article 18 of the International Covenant on Civil and Political Rights- Everyone shall have the right to freedom of thought, conscience and religion – and the 1981 United Nations Declaration on the Elimination of All Forms of Intolerance and Discrimination Based on Religion or Belief.

In 1968 the United Nations deferred work on a legally-binding treaty on religious intolerance as too complex and sensitive and passed a non-binding declaration in its place. The Tandem Project believes until a core legally-binding human rights Convention on Freedom of Religion or Belief is adopted international human rights law will be incomplete. It may be time to begin to consider reinstating the 1968 Working Group to better organize and bring all matters relating to freedom of religion or belief under one banner, a core international human rights legally-binding treaty.