



General Assembly

Distr.
GENERAL

A/HRC/2/6
20 September 2006

Original: ENGLISH

HUMAN RIGHTS COUNCIL
Second session
Agenda item 2

**IMPLEMENTATION OF GENERAL ASSEMBLY RESOLUTION 60/251 OF
15 MARCH 2006 ENTITLED “HUMAN RIGHTS COUNCIL”**

**Incitement to racial and religious hatred and the promotion of tolerance:
report of the High Commissioner for Human Rights**

Summary

In its decision 1/107 of 30 June, 2006, the Human Rights Council expressed “concern over the increasing trend of defamation of religions, incitement to racial and religious hatred and its recent manifestations,” and requested the “Special Rapporteur on freedom of religion or belief and the Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance as well as the United Nations High Commissioner for Human Rights to report to the next session on this phenomenon, in particular its implications for article 20, paragraph 2, of the International Covenant on Civil and Political Rights”. This report summarizes the preliminary outcome of research conducted by the Office of the High Commissioner for Human Rights on the subject. The report focuses on the international human rights dimension and reviews the status of the law and the scope of, as well as limits on, action to regulate the defamation of religions and incitement to racial and religious hatred.

The preliminary conclusion of the report is that more effort is needed, possibly within the international human rights machinery, more specifically to define the parameters of the law in this area in order to facilitate more coherent and effective implementation at the national level in a manner that can promote tolerance, while enhancing safeguards for the freedom of expression and other fundamental freedoms.

Contents

	<i>Paragraphs</i>	<i>Page</i>
Introduction		4
I. DEFAMATION OF RELIGIONS AND INCITEMENT TO RACIAL AND RELIGIOUS HATRED	8 – 11	5
II. THE LEGAL FRAMEWORK	12 – 33	6
A. Status of the law in international instruments	13 – 22	6
B. The jurisprudence of treaty bodies and other mechanisms	23 – 27	7
C. Regional jurisprudence	28 – 33	9
III. THE INTERPRETATION AND IMPLEMENTATION OF THE LAW	34 – 67	10
A. The notion of incitement	36 – 41	11
B. The context of race and religion	42 – 46	12
C. Freedom of expression	47 – 59	13
D. The scope of sanctions and remedies	60 – 67	15
IV. PRACTICAL ISSUES OF IMPLEMENTATION	68 – 70	16
V. THE RESPONSIBILITY TO PROMOTE TOLERANCE AND UNDERSTANDING	71 – 78	17
VI. CONCLUSION AND RECOMMENDATIONS	79 – 84	18

Introduction

1. This report is submitted pursuant to Human Rights Council decision 1/107 of 30 June, 2006, which expressed “concern over the increasing trend of defamation of religions, incitement to racial and religious hatred and its recent manifestations”, and requested the “Special Rapporteur on freedom of religion or belief and the Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance as well as the United Nations High Commissioner for Human Rights to report to the next session on this phenomenon, in particular its implications for article 20, paragraph 2, of the International Covenant on Civil and Political Rights”.

2. The report presents initial findings, conclusions and recommendations from very preliminary research conducted by the Office of the High Commissioner for Human Rights. In the short time available between the decision of the Human Rights Council in June and this session, OHCHR has only been able to undertake a preliminary review of the status of international law and regional and national jurisprudence and practice which is presented here. As proposed below, substantial additional work is needed to flesh out in more detail the full scope of the current state of the law and practice on this complex issue, and to explore the range of available policy options to deal with the global challenge of fostering tolerance and understanding globally.

3. While international human rights law, as well regional and national jurisprudence and practice, permits States to curb speech and other forms of manifestations that have the potential to foster racial and religious hatred and violence, there is no consensus on critical elements of the law and practice varies considerably. Global experience, from the Nazi atrocities to the genocide in Rwanda and more recent episodes, demonstrates how speech and the media in general can be abused to promote hatred, discord and even violence. It is precisely for this reason that many of the international human rights instruments and mechanisms have focused attention on the issue.

4. Curbing speech that incites hatred and violence generally involves restrictions and curtailment on the freedom of speech and other human rights and freedoms that are at the core of the international human rights framework. The challenge has, therefore, been how to deal with the nefarious effect of hate speech without jeopardizing freedom of speech, the free exchange of ideas and thought, and other freedoms that form the very foundation of human rights. For this reason, international law and most regional and national jurisprudence generally regard any action to limit or sanction speech as an exceptional measure to be applied in strictly defined circumstances on the basis of clearly identified criteria.

5. Consensus has not fully emerged on the precise boundary and parameters of this exception. Among the key issues, there is a great deal of uncertainty about: (a) the notion of incitement itself and how to assess its applicability in practical situations; (b) the precise circumstances under which incitement may be prohibited; and (c) the scope of permissible sanctions and remedies that may be employed. There is also particular concern about impact of the potential prohibition of hate speech on freedom of expression. While freedom of speech is certainly not absolute, international law as well as most regional and national jurisprudence, requires a careful balancing of any limitations on speech or other forms of expression. Clarity on the objectives of the law and its contours is essential in attaining this balance.

6. The extent to which article 20, paragraph 2, of the International Covenant on Civil and Political Rights (ICCPR) can be used as the basis for actions to counter hate speech and intolerance needs further investigation. There is also need for a policy dialogue to balance the various competing demands, and for guidance in order to agree on a coherent response that can guide States in fulfilling their obligations to curtail incitement of hatred and violence, while at the same time ensuring the integrity of the international human rights system.

7. The report starts with a brief statement on the state of racial and religious intolerance, noting the need to undertake a more comprehensive study to document the extent of the problem as the basis for an effective international legal and policy response. The second part of the report reviews the state of the law and practice on incitement to racial and religious hatred, and how it is interpreted and applied by relevant monitoring mechanisms. The third part of the report discusses in more detail the main legal and policy issues that arise from the analysis of the jurisprudence with respect to the implementation of the law. In the fourth part, the report identifies some of the challenges of interpreting and implementing the law. The report then discusses possible alternative responses to the phenomenon of racial and religious hatred and intolerance, with an emphasis on how to promote tolerance. The final part of the report draws some preliminary conclusions from the review of the law and proposes steps for the consideration of the Human Rights Council.

I. DEFAMATION OF RELIGIONS AND INCITEMENT TO RACIAL AND RELIGIOUS HATRED

8. It has not been possible for OHCHR, in the short time available to produce this report, to undertake the kind of extensive exercise that is necessary to document the extent to which there may be an increase in incidences of defamation of religions and incitement to racial and religious hatred and how these incidences are manifested.

9. However, several highly publicized episodes over the last few years have highlighted the need to focus attention on measures to foster tolerance and understanding, and to reinforce global efforts to promote and protect all the human rights of all people. These include incidences of vandalism directed against places of worship, including mosques, churches and synagogues, reported cases of attacks on individuals because of their religious beliefs, and restrictions and other punitive measures that are applied on the basis of race and religion. At a time of particularly high sensitivities, these have led to social tensions and discord.

10. In response, many Governments have initiated measures to strengthen legal protection for victims of the abuses that stem from such episodes. Some have introduced new legislation to sanction these actions, while others have reinforced existing law and introduced new punitive measures. At the international level, as well, concern has been raised about some of these developments – including those by special rapporteurs of the Commission on Human Rights and now the Human Rights Council. The Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance, the Special Rapporteur on freedom of religion or belief, and the Special Rapporteur for the promotion and protection of the right to freedom of opinion and expression, have expressed their concern about intolerance and the absence of respect for other religions.

11. As part of any initiative to review the status of the law in this area, it will be important to undertake a comprehensive review of trends and patterns to establish if indeed there is an increase in incidences of religious defamation and incitement to racial and religious hatred, where and how it is manifested, to what specific causes it might be attributed, and the magnitude of the individual and social harm that it might cause. The information from this exercise would help to inform the review and evaluation of the effectiveness of the existing law, as well as the focus of any future policy dialogue.

II. THE LEGAL FRAMEWORK

12. This part of the report reviews the status of the law on incitement, beginning with relevant provisions in international human rights instruments and their interpretation by the respective mechanisms.

A. Status of the law in international instruments

13. Many international and regional human rights instruments and institutions deal with various aspects of incitement and advocacy of racial and religious hatred and intolerance. These include the Universal Declaration of Human Rights (UDHR), the Convention against Genocide, the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD), and ICCPR.

14. The rationale for prohibiting hate speech is partly grounded in the goal of promoting substantive equality among human beings, including freedom from discrimination.

15. In that regard, several provisions of the Universal Declaration have been interpreted to permit State action to prohibit hate speech or speech that is considered inflammatory or to incite hatred although the UDHR does not expressly address incitement and advocacy. Thus, the legal authority to proscribe hate speech has been inferred from article 1 of the UDHR, which provides that “All human beings are born free and equal in dignity and rights”, article 2, which provides for equal enjoyment of the rights and freedoms proclaimed in the UDHR “without distinction of any kind, such as race, colour, (and) sex” and article 7, which more explicitly provides for protection against discrimination and incitement to discrimination.

16. Article 29 of the Universal Declaration, on the other hand, refers to the duties that everyone holds to the community, and recognizes that certain limitations on rights may be necessary and legitimate to secure, among other things, “due recognition and respect for the rights and freedoms of others.”

17. The Genocide Convention of 1948¹ goes further and in Article 3 (c) explicitly includes “public incitement to commit genocide” among punishable acts.

18. The International Convention on the Elimination of All Forms of Racial Discrimination² is the first and the most far reaching international treaty to deal directly with the issue of hate speech. Article 4 of ICERD provides that:

States Parties undertake to adopt immediate and positive measures designed to eradicate all incitement to, or acts of, such discrimination and, to this end, 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, *inter alia*:

(a) Shall declare an offence punishable by law all dissemination of ideas based on racial superiority or hatred, incitement to racial discrimination, as well as all acts of violence or incitement to such acts against any race or group of persons of another colour or ethnic origin, and also the provision of any assistance to racist activities, including the financing thereof;

19. The ICCPR,³ on the other hand, uses more restrictive language. Article 20, paragraph 2, of the ICCPR provides that: “Any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law”.

20. The Statute of the International Criminal Tribunal for the Former Yugoslavia (ICTY Statute),⁴ as well as the Statute of the International Criminal Tribunal for Rwanda (ICTR Statute),⁵ repeat articles 2 and 3 of the Genocide Convention verbatim.⁶ The Rome Statute of the International Criminal Court (ICC Statute)⁷ replicates article 3(c) of the Genocide Convention and provides for liability for anyone who, “directly and publicly incites others to commit the crime” of genocide.⁸

21. Hate speech is restricted because of its intrinsic ability to hurt and its perceived influence to incite hatred and even violence. For example, the *travaux préparatoires* history of the Genocide Convention highlight that the perpetration of genocide could, “in all cases be traced back to the arousing of racial, national or religious hatred”,⁹ and this was part of the rationale for including incitement to genocide among the punishable acts of genocide. Likewise, in 2005, the Committee on the Elimination of Racial Discrimination (CERD) adopted a Declaration on the Prevention of Genocide¹⁰ and a Decision on follow-up to the declaration on the prevention of genocide: indicators of patterns of systematic and massive racial discrimination,¹¹ both of which draw a link between hate speech and incitement to genocide and identify as indicators of genocide the systematic and widespread use and acceptance of speech or propaganda promoting hatred and/or inciting violence against minority groups, particularly in the media, and statements by political leaders/prominent people that express support for affirmation of superiority of a race or an ethnic group, dehumanize and demonize minorities, or condone or justify violence against a minority as indicators of genocide.

22. Despite their uniform acceptance of the idea of limitation, the international instruments discussed above vary in scope and in their interpretation of key elements of the law. ICERD as discussed earlier is the most far-reaching and seems to allow for a wide range of responses to incitement and advocacy which it also defines fairly liberally. Other instruments take the more cautious and narrow approach of ICCPR. Furthermore, interpretation of ICCPR suggests that there may be a “tension” between several of its provisions, in particular between article 20, paragraph 2, and the rights to freedom of religion and belief and the right to freedom of expression, guaranteed by articles 18 and 19, respectively.

B. The jurisprudence of treaty bodies and other mechanisms

23. The relevant international human rights mechanisms, including the Human Rights Committee, CERD, the Special Rapporteur on freedom of religion or belief, the Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related

intolerance, and the independent expert on minorities have dealt with different aspects of issues involving allegations of blasphemy or advocacy of racial and religious hatred. In this section, the report highlights some of the main observations and conclusions.

1. The Human Rights Committee

24. The Human Rights Committee has addressed the issue of incitement to racial and religious hatred during the examination of several recent reports, and in a number of recent concluding observations has noted it as a major concern. Notable recent examples include:

(a) In connection with a report of **Italy**,¹² the Human Rights Committee expressed concern about “reported instances of hate speech, including statements attributed to certain politicians, targeting foreign nationals, Arabs and Muslims, as well as the Roma”. The Committee accordingly requested Italy to “recall regularly and publicly that hate speech is prohibited under law and take prompt action to bring those responsible to justice”. The Committee recommended that the State Party provide it with statistical data concerning complaints, prosecutions and judicial decisions on the issue in order to monitor the situation;

(b) Concerning **Switzerland**,¹³ the Human Rights Committee expressed concern about the increasing “incidents of racial intolerance.” It called upon Switzerland to “ensure rigorous enforcement of its laws against racial incitement and discrimination”. The Committee also suggested that the State Party strengthen the mandate of its Federal Commission against Racism so as to allow it to initiate legal action;

(c) With respect to a report of **Germany**,¹⁴ the Human Rights Committee addressed the relationship between anti-terrorism policies and human rights, and expressed concern about the consequences of anti-terrorism measures on persons of foreign extraction, “because of an atmosphere of latent suspicion against them”. The Committee accordingly recommended that the German authorities “undertake an educational campaign through the media to protect persons of foreign extraction, in particular Arabs and Muslims, from stereotypes associating them with terrorism, extremism and fanaticism”;

(d) In connection with the report of **Egypt**,¹⁵ the Committee expressed concern about the publication in the Egyptian press of “some very violent articles against Jews”, which it deemed to constitute “advocacy of racial and religious hatred and incitement to discrimination, hostility and violence”. The Committee requested the State Party to “take whatever action to punish such acts”.

25. The jurisprudence of the Human Rights Committee has also addressed the issue of incitement in connection with several individual complaints submitted under the first Optional Protocol to the ICCPR, including *Faurisson v. France* (Communication No. 550/1993, 8 November 1996). This case involved prosecution under France’s 1990 Gayssot Act which made it a crime to contest the existence of certain crimes against humanity under which Nazi leaders were convicted by the International Military Tribunal at Nuremberg in 1946, and *Ross v. Canada* (Communication No. 736/1997, 18 October 2000) which alleged a denial of the right to express religious views provided for in article 19 of ICCPR. In both cases, the Human Rights Committee endorsed limitations on the exercise of free speech on the grounds that the restrictions were consistent with the ICCPR.

2. Committee on the Elimination of Racial Discrimination

26. The issue of incitement to racial and religious hatred has also been addressed by the Committee on the Elimination of Racial Discrimination (CERD). Although incitement to religious hatred may *prima facie* appear to fall outside the mandate of the Committee, CERD has affirmed that cases of “intersectoriality of ethnic and religious discrimination” are of relevance to it.¹⁶ The following examples illustrate how the Committee has addressed the issue of incitement to racial and religious hatred.

(a) Regarding the **Islamic Republic of Iran**,¹⁷ CERD expressed concern over the uncertainty of actual enforcement of domestic law criminalizing incitement to racial discrimination. As a result, the Committee has expressed its wish to receive “information on the effective implementation of legislation concerning the eradication of all incitement to, or acts of, racial discrimination”;

(b) With respect to **Nigeria**,¹⁸ CERD noted with concern that feelings of hostility amongst and between some ethnic and religious groups are prevalent in the country. It expressed further concern about “the absence of an explicit penal provision in the State party’s legislation prohibiting organizations and propaganda activities that advocate racial hatred”.¹⁹ The Committee recommended that the State party “endeavour, by encouraging genuine dialogue, to improve relations between different ethnic and religious communities with the view to promoting tolerance and overcoming prejudices and negative stereotypes”;

(c) In relation to **Guatemala**,²⁰ CERD deplored the lack of domestic legislation on racial discrimination and incitement to such acts and called upon the State Party to “adopt specific legislation classifying as a punishable act any dissemination of ideas based on notions of superiority or racial hatred, incitement to racial discrimination, and violent acts directed against indigenous peoples and persons of African descent”;

(d) In relation to **Sweden**,²¹ CERD welcomed amendments to Fundamental Law of Freedom of Expression, which aim at facilitating “the bringing of legal action in cases of racial agitation”;

(e) CERD also noted with satisfaction that “serious acts of racial hatred or incitement to racial hatred are criminal offences in most of **Australian** States and Territories”,²² and that **Slovakia** had adopted an “Action Plan for the Prevention of All Forms of Discrimination, Racism, Xenophobia, Anti-Semitism and Other Expressions of Intolerance for the Periods 2002-2003 and 2004-2005”.²³

27. International tribunals, including the 1946 Nuremberg Military Tribunal, the International Tribunal on the Former Yugoslavia and the International Criminal Tribunal for Rwanda have also passed judgment on key aspects relating to the issue.

C. Regional jurisprudence

28. The European Convention on Human Rights (ECHR),²⁴ the American Convention on Human Rights (ACHR)²⁵ and the African Charter on Human and Peoples’ Rights (ACHPR)²⁶ have all been interpreted to permit State action to prohibit hate speech and the advocacy of hatred on the basis of religion and race. All three include provisions relating to equality and non-

discrimination and also guarantee the right to freedom of expression. But they also vary in significant ways in the way they deal with the issues and in striking the balance between the prohibition of hate speech and the right to freedom of expression.

29. The European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR)²⁷ does not have a specific provision prohibiting incitement to racial and religious hatred. But general limitation clauses in article 9 (freedom of thought, conscience and religion), article 10 (freedom of expression) and article 11 (freedom of assembly and association) allow for limitations of these rights in the interest of preservation of social and public order, protection of health and morals as well as rights of others.

30. The European Court of Human Rights has read these limitation clauses to permit the prohibition of incitement to racial and/or religious hatred. For example, article 17 of ECHR stipulates that the provisions of the Convention may not be interpreted as granting the right to engage in any activity aimed at the destruction of any of the rights it proclaims, or at limiting them further than is provided for in the Convention. This has been relied upon by the European Court of Human Rights as justifying hate speech laws but not as necessarily requiring them.²⁸

31. The **African Charter on Human and Peoples' Rights**²⁹ (ACHPR), similarly, has no express reference to racial and religious hatred. Nevertheless, several provisions of ACHPR that provide for limitations on people's right to receive and disseminate information, as well its recognition of duties as well as rights, which include requirements that rights should be exercised with due regard for the rights of others (art. 27), and to respect others and to maintain relations aimed at promoting respect and tolerance (art. 28), could be relied upon to justify hate-speech laws.

32. Only the **American Convention on Human Rights**³⁰ (ACHR) specifically provides for the banning of hate speech in its article 13(5), which 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 illegal action against any person or group of persons on any grounds including those of race, colour, religion, language, or national origin shall be considered as offenses punishable by law".

33. Like the international instruments, the regional instruments leave many issues unexplained and do not provide much detail on specific interpretations and how to reconcile apparent inconsistencies among their provisions.

III. THE INTERPRETATION AND IMPLEMENTATION OF THE LAW

34. Although the international human rights instruments as well as regional instruments and national jurisprudence clearly establish that incitement to racial and religious hatred can be proscribed and sanctioned, the interpretation and implementation of the law has been highly uneven and problematic. Many of the key concepts are not uniformly defined and there is a lot of ambiguity about critical issues such as the objectives of the law, the extent of the public harm that should warrant limitations on essential freedoms, the limit that can appropriately be placed on freedom of expression and other freedoms, and the nature and scope of sanctions and remedies that can be applied against offending speech.

35. Clear guidelines and coherence are important to ensure effective implementation of the law and the promotion of tolerance which should be the goal of the law. On the other hand, the risk of undermining human rights in general increases when there is no consensus and common understanding of the essential elements of the law. This is an area where the Human Rights Council can make an important contribution to guide the national implementation of the law in a manner that can promote tolerance without undermining other human rights.

A. The notion of incitement

36. Despite the apparent widespread agreement that certain categories of harmful speech or speech that provoke harmful consequences can be legally proscribed, the notion of incitement and other key concepts are not well defined. The international and regional instruments generally do not provide any definitions and the relevant monitoring bodies have encountered difficulties in articulating suitable definitions for purposes of implementation. For example, the Human Rights Committee has avoided a definition of hate speech or incitement and instead focused on the potential harm of speech on the rights of others and whether it was necessary to prevent that harm (see, e.g. *Ross v. Canada*³¹ and *Faurisson v. France*³² both of which focused on the impact of the statements in raising anti-Semitic feelings).

37. Attempts to define hate speech have not generated much consensus. For example, the Council of Europe's Recommendation on hate speech has proposed a broad definition of "hate speech" that encompasses "*all forms of expression which spread, incite, promote or justify racial hatred, xenophobia, anti-Semitism or other forms of hatred based on intolerance, including: intolerance expressed by aggressive nationalism and ethnocentrism, discrimination and hostility against minorities, migrants and people of immigrant origin*".³³ This is very inclusive and may raise more questions than it solves. Similarly, the ICTR's definition of hate speech in the *Nahimana Case* as "*stereotyping of ethnicity combined with its denigration*" is also unsatisfactory, because the two elements, stereotyping and denigration, are not self-defining.

38. The notion of incitement is generally used to connote at least three different ideas: (a) incitement to an illegal act that takes place (e.g. genocide, violence, discrimination); (b) incitement to an illegal act that does not take place but creates in the mind of the recipient the requisite desire to commit an illegal act; and (c) creating a certain state of mind – racial hatred, racism – without a link to any particular illegal act. The first two are probably the least problematic from a practical standpoint as illustrated by the genocide cases.

39. The international and regional human rights instruments embrace somewhat different notions of incitement. For example, article 20, paragraph 2, of ICCPR and article 13, paragraph 5, of the ACHR ban the advocacy of hatred. Thus, in order to convict someone under either provision it is necessary to prove advocacy with the intent to sow hatred. On the other hand, article 4(a) of ICERD prohibits the mere dissemination of ideas based on superiority and racial hatred. Under ICERD, the dissemination of the idea itself is what attracts sanction without any further or requirement about its intent or impact.³⁴ This may seem a subtle difference but it is significant in determining the scope of the law.

40. Moreover, the instruments also apply different terminologies to describe the nature of the offense, but presumably reflecting similar notions. Article 20, paragraph 2, of ICCPR prohibits "any advocacy of national, racial or religious hatred that constitutes *incitement to discrimination, hostility or violence*". On the other hand, the equivalent provision in article 4(a) of ICERD to

“dissemination of ideas based on racial superiority or hatred”. Hatred and hostility would appear to refer to very similar notions even though, unlike discrimination or violence, neither concept can be precisely defined. Both the Human Rights Committee and CERD have understood their respective terms to include a passive state of mind rather than a specific act. In other words, the proscribed result is the fact of harbouring hostility towards a target group and it is not essential that this state of mind be acted upon.

41. It is difficult to extract firm conclusions on the rules governing hate speech from the cases. From the perspective of international law, the question of what constitutes incitement to genocide or to other proscribed results recognized under hate speech provisions requires consideration of a number of issues, including intent, causation or nexus between the speech and the proscribed result, context, tone and truth. On the other hand, the recent cases from the International Criminal Tribunal for Rwanda illustrate the conceptual and policy difficulties that arise from these definitional problems.

B. The context of race and religion

42. The legal debate is complicated by the sensitivity that attaches to discussions of issues of race and religion. For example, heightened concern with racism is sometimes offered as an explanation for the broader scope of article 4(a) of CERD, which prohibits the mere dissemination of ideas based on racial hatred or superiority, regardless of any impact. In contrast, article 19, paragraph 3, of ICCPR, which encompasses incitement in other contexts, permits restrictions on freedom of expression only to the extent necessary to protect the public interest in question.

43. This point is illustrated by the *Jersild* case in which the European Court of Human Rights held that the airing of a television programme that included hate speech statements by racist extremists was protected speech because the producer’s intention was to generate public debate on the issue. It seems clear from the decision that the actions of the journalist would not fall within the scope of article 20, paragraph 2, of ICCPR, primarily because they did not constitute advocacy of hatred. The Court also noted that the context made it unlikely that the statements would have incited violence, discrimination or hostility.

44. Although the European Court held that its decision was compatible with ICERD, it is quite conceivable that Mr. Jersild’s conviction would have been compatible with that instrument because article 4(a) prohibits the mere dissemination of ideas based on racial hatred. CERD’s report to the General Assembly noted that some members welcomed this decision as the clearest statement yet, in any country, that the right to protection against racial discrimination took precedence over the right to freedom of expression. Other members thought that in such cases the facts needed to be considered in relation to both rights.³⁵

45. With respect to religion, the general view is that the guarantee of freedom of expression protects even very strong criticism of religion.³⁶ Free speech may not, however, protect statements whose goal is simply to promote hatred against particular religious adherents. In *Giniewski*, the European Court of Human Rights seemed to support this approach, holding that the impugned speech was not a gratuitous attack on religion but, rather, part of a clash of ideas (“*débat d’idées*”).³⁷

46. Blasphemy laws, generally intended to ensure respect for the deeply held views of religious adherents, have posed a different set of issues. The European Court of Human Rights has upheld restrictions to freedom of expression on this basis,³⁸ but the limited focus has been on “expressions that are gratuitously offensive to others and thus an infringement of their rights and which do not contribute to any form of public debate capable of furthering progress in human affairs³⁹.”

C. Freedom of expression

47. The right to freedom of expression is not absolute and both international law and most national constitutions recognize that limited restrictions may be imposed on this right to safeguard overriding public and/or private interests. International law lays down a clear test by which the legitimacy of such restrictions may be assessed. Specifically, article 19, paragraph 3, of ICCPR provides that:

3. The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:

(a) For respect of the rights or reputations of others;

(b) For the protection of national security or of public order (*ordre public*), or of public health or morals.

48. Concern about the impact of rules on incitement on freedom of expression has been expressed throughout the drafting history of the various international instruments as well as in their texts and in the jurisprudence of the various bodies tasked with their application. These play a key role in defining the limits of incitement to genocide and hate speech under international law.

49. International law on incitement involves balancing two competing claims and imperatives of human rights: equality and free speech. Equality is a fundamental human right and philosophically foundational to all human rights and the protection of human dignity. Freedom of expression is similarly foundational, largely due to its functional role in protecting other rights and underlying social values. Both equality and free speech are key underpinnings of democracy and participation. International and national courts alike frequently stress the particular importance of speech in public participation and discourse and, therefore, the need for high standards of protection.⁴⁰

50. The interface between freedom of expression and the prohibition of incitement is treated in somewhat different ways in the various instruments as well as by scholars. Both the UDHR and the ICCPR guarantee the freedom of expression in very similar terms.⁴¹

51. The Human Rights Committee has specifically stated that article 20, paragraph 2, is compatible with article 19.⁴² Although ICERD does not guarantee the right to freedom of expression, it requires that measures taken pursuant to article 4 have due regard for the principles set out in the UDHR, which include equality, non-discrimination and freedom of expression. Article 5 of ICERD also provides for equality before the law in the enjoyment of a large number of rights, including freedom of expression.

52. Freedom of expression is also protected in all three regional human rights instruments. The guarantee in the ECHR is very similar to that of the ICCPR, albeit with a slightly longer list of aims in service of which expression may be restricted. The guarantee in the ACHR is also structurally very similar, although it additionally contains a number of explicit protections for freedom of expression, such as a prohibition on prior censorship and on using indirect means to restrict expression.⁴³ The guarantee in the ACHPR is rather weaker on its face, allowing simply for restrictions “within the law”, although subsequent interpretation of this by the African Commission on Human and Peoples’ Rights has substantially narrowed the potential scope of this provision.⁴⁴

53. International courts have made it clear that the test for restrictions on freedom of expression is a very strict one which imposes a high standard of justification on States.⁴⁵ First, the restriction must be provided for by law. This implies not only that the restriction finds a basis in law but also that the law is accessible and “formulated with sufficient precision to enable the citizen to regulate his conduct”.⁴⁶ The first part of the test – the requirement of being provided for by law – would apply to laws on incitement to genocide and hate speech in the same way as any laws restricting freedom of expression. In other words, such laws must be accessible and precise.

54. However, international courts have held that even a somewhat vague set of primary rules may be clarified by judicial interpretation.⁴⁷ In *Ross*, the Human Rights Committee recognized the “vague criteria of the provisions” but held that they were nevertheless provided for by law, noting that the Supreme Court of Canada had considered all aspects of the case and found a sufficient basis for the original decision in Canadian law.

55. Furthermore, the interference must pursue one or more of the aims listed in article 19, paragraph 3, of ICCPR. This list of aims is exclusive and it is clear that restrictions on freedom of expression serving other aims are not legitimate. Third, the restriction must be necessary to protect those aims. “Necessary” implies that there is a “pressing social need” for the restriction, that the reasons given by the State to justify the restriction are “relevant and sufficient” and that the restriction is proportionate in the sense that the benefits outweigh the harm.⁴⁸ It is under this part of the test that the vast majority of freedom of expression cases, including those involving hate speech, are decided.

56. As highlighted during the drafting of the ICCPR, there is a potential conflict between Article 19, paragraph 3, of the ICCPR which guarantees freedom of expression but permits restrictions on this freedom under specific conditions, and Article 20, paragraph 2, which imposes an obligation to restrict speech.⁴⁹ The two articles were kept separate since they dealt with different objectives, however, it was decided that they should go next to each other to emphasize the close relationship between them.⁵⁰

57. In *Ross*, the Human Rights Committee held that a restriction on the author’s freedom of expression aimed at protecting against racism had to be justified by reference to the test set out in Article 19, paragraph 3, of ICCPR.⁵¹ This reflects the natural conclusion that any law seeking to implement the provisions of article 20, paragraph 2, of ICCPR must not overstep the limits on restrictions on freedom of expression set out in article 19, paragraph 3. Conversely, article 19, paragraph 3, must be interpreted in a manner that respects the terms of article 20, paragraph 2.

58. The primary difficulty in resolving the potential incompatibility between article 19, paragraph 3, and article 20, paragraph 2, is in relation to the necessity part of test for restrictions on freedom of expression. In large part, this is a question of what constitutes incitement, dealt with earlier.

59. It is also significant that the right to hold opinions is not subject to restriction, article 19, paragraph 3, being applicable only to article 19, paragraph 2, and not to Article 19, paragraph 1, protecting opinions. This means that everyone is free to hold any opinions they wish, even racist and genocidal opinions. It is only where opinions are articulated that international law may permit restrictions.

D. The scope of sanctions and remedies

60. When and how far a State may act to prohibit incitement is uncertain, and options range from banning the media to criminal sanctions. Article 20, paragraph 2, of ICCPR requires that the included speech be “prohibited by law”, whereas article 4 of CERD and article 13, paragraph 5, of ACHR require included speech to be an “offence punishable by law”.

61. In practice, most States have some form of criminal hate speech provisions, although many of these do not extend to all forms of speech specified in article 4(a) of ICERD. The more stringent language of ICERD has led most CERD members to support a primarily criminal law approach,⁵² although civil or administrative regimes may also be said under certain circumstances to impose punishment. For example, the European Commission Against Racism and Intolerance (ECRI) has adopted a policy recommendation on legislation to combat racism which spells out quite clearly what they consider different branches of law should cover in this area. While they recognize an important role for the civil and administrative law, they also recommend that certain forms of hate speech should be subject to criminal sanction.⁵³

62. General Comment No. 11 of the Human Rights Committee⁵⁴ refers to a law which makes it clear that the activities are “contrary to public policy” and which provides for an “appropriate sanction” in case of a violation. The notion of “sanction” suggests criminal or administrative law, but civil law remedies could also be understood to satisfy this standard.

63. International courts have sought to the limit application of criminal sanctions to restrict speech because these are deemed very intrusive.⁵⁵ In many countries, it is possible to bring a civil suit for compensation for discrimination, for example in the workplace, including where this is propagated by means of speech. The Council of Europe Recommendation on hate speech, for example, calls for greater attention to civil law remedies leading to compensation for hate speech.⁵⁶ The same Recommendation refers to the possibility of providing for a right of reply and/or retraction for hate speech.

64. Various administrative measures may be used to address racist speech. For example, many countries have administrative systems for addressing discrimination. Indeed, several of the cases discussed above are based on the application of measures by administrative anti-discrimination bodies at the national level.⁵⁷ These systems allow for the application of administrative measures in response to speech that amounts to discrimination, as well, of course, as other forms of discrimination.

65. Legal measures may be supplemented by a number of non-legal measures, including self-regulatory measures by media bodies, media outlets or journalists' associations to prevent the dissemination of harmful speech. In many countries, media sectors, in particular newspapers and journalists, have formed self-regulatory bodies to promote professional standards and in some cases to provide the public with a complaints system for reporting which fails to meet minimum standards. In many cases, these standards include rules relating to reporting on matters involving race.

66. The International Federation of Journalists, for example, has adopted a Declaration of Principles on the Conduct of Journalists.⁵⁸ Principle 7 states that:

The journalist shall be aware of the danger of discrimination being furthered by the media, and shall do the utmost to avoid facilitating such discrimination based on, among other things, race, sex, sexual orientation, language, religion, political or other opinions, and national or social origins.

67. Awareness-raising, directed at both the media specifically and the general public, is another important social means of addressing racist speech. In its General Recommendation No. 29, focusing on descent-based discrimination, CERD called on States Parties to "take measures to raise awareness among media professionals of the nature and incidence of descent-based discrimination".⁵⁹

IV. PRACTICAL ISSUES OF IMPLEMENTATION AND ENFORCEMENT

68. As noted above, incitement may be to a particular illegal act – violence or discrimination – or simply to a state of mind. The notion of "hatred" is extremely vague and not defined either in international instruments or in the decisions of international courts. It is therefore problematic from the perspective of the provided by element of prescription by law in the test for restrictions on freedom of expression.

69. Unlike incitement to an act, it is almost impossible to prove whether hatred *per se* is or is not likely to result from the dissemination of certain statements. Regular evidentiary techniques may be employed to assess the risk of a particular illegal act occurring but these do not work well in assessing the risk of a purely psychological outcome. International courts have tended to avoid the issue and, instead, either simply conclude, perhaps after a cursory scan of the context, that the statements would be prone to have this result, or they focus on other factors, such as intent.

70. In this context, international law provides little with respect to the crucial question of how the law is to be implemented. This is a critical area because of its relevance to how the balance is struck between the need to protect equal rights of groups, on the one hand, and safeguarding freedoms of speech and association, for example.

V. THE RESPONSIBILITY TO PROMOTE TOLERANCE AND UNDERSTANDING

71. One of the main rationales for prohibiting hate speech and advocacy of hatred is to safeguard the rights of minorities and affected people. Yet, the effectiveness of hate speech prosecutions in curbing the underlying concern, racial or religious hatred, may, at least in some contexts, be doubted. Indeed, it may be conceivable that the prohibition of speech may, in fact, provide platforms to amplify hate speech to the extent that those convicted of propagating hate speech are viewed as martyrs rather than criminals by their fellow racists. In this regard, prosecution can provide a far more effective platform for those espousing racist views than would otherwise be available to them.

72. On the other hand, there is a counter-argument that the prohibition of incitement should not be viewed exclusively from the point of view of their effectiveness because there is an intrinsic value in such action as an expression of public disapproval. In this sense, the action serves as a statement of support for victims. In other words, democratic societies must condemn speech which is inherently inimical to equality to maintain their own commitment to that very value and cannot remain passive.⁶⁰

73. Related to the question of effectiveness is the potential for abuse of the law on incitement to suppress unpopular speech or stifle dissent.⁶¹ This is particularly problematic where freedom of expression is suppressed and the power of the truth is weak. In such a climate, hate speech laws are ineffective and may even be counterproductive.⁶² Indeed, even in far less polarized contexts, such laws may be used to suppress minority viewpoints.

74. Giving voice to minorities is also an important way to combat racism. Racism is often based on a portrayal of minority groups as one-dimensional others who have collective shortcomings such as stupidity, ignorance, greed or whatever. Such distortions are based on ignorance about these minorities and ensuring their presence in the media, particularly the broadcast media, is an important way of combating such ignorance.

75. Media diversity in the sense of ensuring minority access can be promoted in a number of ways, including through the broadcast licensing process and by providing subsidies to minority print media. In South Africa, for example, article 2(a) of the Independent Communications Authority of South Africa Act (ICASA Act) states one of the three objects of the Act to be to, “regulate broadcasting in the public interest and to ensure fairness and a diversity of views broadly representing South African society”.⁶³

76. Civil society and, in particular, the media, have an important role to play in combating racism. While such a role should not be enforced by law, it nevertheless represents an important social duty for these actors. As the three special mandates for freedom of expression – the United Nations Special Rapporteur on freedom of opinion and expression, the OSCE Representative on Freedom of the Media and the OAS Special Rapporteur on Freedom of Expression – have stated:

Media organisations, media enterprises and media workers – particularly public service broadcasters – have a moral and social obligation to make a positive

contribution to the fight against racism, discrimination, xenophobia and intolerance.⁶⁴

77. Often, public service broadcasters are specifically required to give voice to minorities, an appropriate obligation given that, as public bodies, they should represent the whole population. The Canadian Broadcasting Corporation, for example, is required, among other things, to “reflect the multicultural and multiracial nature of Canada”.⁶⁵

78. Finally, resolution 2005/40 of the Commission on Human Rights on the elimination of all forms of intolerance and discrimination based on religion or belief :

- To take all necessary steps and appropriate action to combat hatred, intolerance and acts of violence, intimidation and coercion motivated by intolerance;
- To promote and encourage understanding, tolerance and respect in all matters relating to freedom of religion or belief; and
- To make appropriate efforts to encourage those engaged in teaching to cultivate respect for all religions or beliefs, thereby promoting mutual understanding and tolerance.

VI. CONCLUSION AND RECOMMENDATIONS

79. The international human rights architecture is anchored on fundamental imperatives of equality and non-discrimination. Intolerance in general, and xenophobia and incitement to racial and religious hatred and violence in particular, imperil this very foundation of international human rights. It is therefore both appropriate and timely that the Human Rights Council should focus attention on the issue at this time of increased global tensions and sensitivities.

80. There is clearly consensus on the broad outlines of the law relating to incitement and advocacy of racial and religious hatred and violence. The provisions of the international human rights instruments, particularly ICCPR and ICERD, as well as the three regional instruments, provide a good basis on which the legal and policy responses to the problem of intolerance more generally, and the incitement of hatred and violence in particular, can be constructed.

81. The implementation of this body of law is challenging, however, because many of the essential details remain undefined. These include lack of clarity on key concepts such as incitement, hatred and hate speech. Clearly, this is one area where attention might be focused to try to elaborate a sufficiently precise legal regime to provide guidance to States in developing national responses. Issues surrounding the freedom of expression raise a particular concern in this regard.

82. It appears that some national jurisprudence is far richer than the international on the many dimensions of the law and policy on incitement. Courts in many countries have developed very detailed jurisprudence on a number of the key issues and built a large body of cases from which to draw principles and rules of interpretation. The situation is not even, however, and there are many other countries where the law in this area is still fairly rudimentary. The international system could learn much from the relevant national experiences.

83. A juridical response is undoubtedly immensely significant in countering the impact of hate speech and of incitement to hatred and violence, but it cannot be the only or even main response. Incitement is a reflection of the growing global challenge of managing pluralism and fostering harmony. It is, therefore, crucial that the Human Rights Council reflect on the relevant political and social dimensions of the issue, as well search for lasting solutions to better knowledge and understanding across cultures and religions in the pursuit of a more tolerant world.

84. Uniform, consistent application of the law is essential to ensure the effectiveness of international efforts to counter intolerance. Key elements of the law need to be more concisely interpreted and defined in order to facilitate national efforts to comply with international obligations, and specific criteria should be developed to establish the essential boundary for freedom of expression. Further critical reflection is also required on the scope of actions that a State may take to curb speech. State practice across different legal systems will likely provide substantial guidance on these issues. It will therefore be necessary to undertake more work to document and analyze national as well as regional jurisprudence and the vast literature on the subject. In this regard, the Human Rights Council may consider the following possible actions:

- (a) Request the treaty bodies, particularly the Human Rights Committee and CERD, to develop general comments on the areas of the law that need further definition;
- (b) Mandate the relevant Special Rapporteurs to study national practice and experiences in order to document best practices;
- (c) Commission expert studies to further analyze and develop appropriate doctrine in the area; and
- (d) Organize public dialogue to draw attention to the problem of intolerance and promote better understanding.

Notes

¹ General Assembly resolution 260 A (III), 9 December 1948, entered into force 12 January 1951.

² General Assembly resolution 2106 A(XX), 21 December 1965, entered into force 4 January 1969.

³ General Assembly resolution 2200 A (XXI), 16 December 1966, entered into force 3 January 1976.

⁴ Security Council resolution 827 (1993), 25 May 1993.

⁵ Security Council resolution 955 (1994), 8 November 1994. See Article 2.

⁶ Article 4.

⁷ Adopted in Rome, 17 July 1998, entered into force 1 July 2002.

⁸ Article 25(3)(e).

⁹ N. Ruhashyankiko, “Study on the prevention and punishment of the crime of genocide”, (E/CN.4/Sub.2/416, para. 109).

¹⁰ Adopted on 7 October 2005; see CERD/C/66/1.

¹¹ Adopted on 14 October 2005; see CERD/C/67/1.

¹² Concluding observations of the Human Rights Committee (CCPR/C/ITA/CO/5, 24 April 2006, para. 12).

¹³ Concluding observations of the Human Rights Committee (CCPR/CO/73/CH, 10 November 2001, para. 8).

¹⁴ Concluding observations of the Human Rights Committee (CCPR/CO/80/DEU, 4 May 2004, para. 20).

¹⁵ Concluding observations of the Human Rights Committee (CCPR/CO/76/EGY, 28 Nov 2002, para. 18).

¹⁶ Concluding observations of the Committee on the Elimination of Racial Discrimination (CERD/C/NGA/CO/18, 1 November 2005, para. 20).

¹⁷ Concluding observations of the Committee on the Elimination of Racial Discrimination (CERD/C/63/CO/6, 10 December 2003, para. 12).

¹⁸ Concluding Observations of the Committee on the Elimination of Racial Discrimination (CERD/C/NGA/CO/18, 1 November 2005, para. 14).

¹⁹Ibid., para. 17.

²⁰ Concluding observations of the Committee on the Elimination of Racial Discrimination (CERD/C/GTM/CO/11, 15 May 2006, para. 13).

²¹ Concluding observations of the Committee on the Elimination of Racial Discrimination (CERD/C/64/CO/8, 10 May 2004, para. 4).

²² Concluding observations of the Committee on the Elimination of Racial Discrimination (CERD/C/AUS/CO/14, 14 April 2005, para. 3).

²³ Concluding observations of the Committee on the Elimination of Racial Discrimination, CERD/C/65/CO/7, 10 December 2004, para. 4 (i).

²⁴ Adopted 4 November 1950, entered into force 3 September 1953.

²⁵ Adopted 22 November 1969, entered into force 18 July 1978.

²⁶ Adopted 26 June 1981, entered into force 21 October 1986.

²⁷ Signed by member States of the Council of Europe, at Rome, on 4 November 1950.

²⁸ The Draft Proposal for a Framework Decision on combating racism and xenophobia of the Council of the European Union, which deals with hate speech rather than incitement to genocide, specifically provides for the inclusion of aiding and abetting incitement to hatred – Article 2(1) – and even instigation of incitement in some contexts – Article 2(2). See Doc. 8994/1/05.REV 1, 27 May 2005.

²⁹ Adopted by the Assembly of the Heads of State and Government of the Organization of African Unity in Nairobi, on 27 June 1981.

³⁰ Signed by States members of the Organization of American States at San José, Costa Rica on 22 November 1969.

³¹ 18 October 2000, Communication No. 736/1997, paras. 11.5-6.

³² 8 November 1986, Communication No. 550/1993, paras. 9.6-9.7.

³³ Appendix, under Scope.

³⁴ There was apparently no consensus in the General Assembly on this provision and it was adopted by vote – 54 against, 25 in favour and 23 abstentions. See Lerner, p. 46.

³⁵ Report of the Committee, *Official Records of the General Assembly*, Forty-Fifth Session, Supplement No. 18 (A/45/18), p. 21, para. 56. This was in fact cited by the European Court of Human Rights in the *Jersild* case. See para. 21.

³⁶ See, generally, *Giniewski* and, in particular, para. 52.

³⁷ *Giniewski v. France*, 31 January 2006, Application No. 64016/00, para. 50.

³⁸ See, for example, *Otto-Preminger-Institut v. Austria*, 20 September 1994, Application No. 13470/87 and *Wingrove v. United Kingdom*, 25 November 1996, Application No. 17419/90. See also *Giniewski*, para. 52.

³⁹ *Otto-Preminger-Institut*, para. 49.

⁴⁰ See, for example, *Castells v. Spain*, 24 April 1992, Application No. 11798/85 (European Court of Human Rights), *Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism*, Advisory Opinion OC-5/85 of 13 November 1985, Series A, No. 5 (Inter-American Court of Human Rights) and UN Human Rights Committee General Comment 25, issued 12 July 1996. This is also recognised by the ICTR in *Nahimana*, para. 1006.

⁴¹ Article 19 of the UDHR provides that “Everyone has the right to freedom of opinion and expression; this right includes the right to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers.”

⁴² General Comment 11: Prohibition of propaganda for war and inciting national, racial or religious hatred (Art. 20), 29 July 1983.

⁴³ See Articles 13(2) and (3).

⁴⁴ See *Media Rights Agenda and Others v. Nigeria*, 31 October 1998, Nos. 105/93, 128/94 and 152/96. See also the *Declaration of Principles on Freedom of Expression in Africa*, adopted by the African Commission on Human and Peoples’ Rights at its 32nd Session, 17-23 October 2002.

⁴⁵ The European Court of Human Rights, for example, interpreting a similar rule in Article 10 of the ECHR, has stated: “Freedom of expression ... is subject to a number of exceptions which, however, must be narrowly interpreted and the necessity for any restrictions must be convincingly established.” See *Thorgeirson v. Iceland*, 25 June 1992, Application No. 13778/88, para. 63.

⁴⁶ See *The Sunday Times v. United Kingdom*, 26 April 1979, Application No. 6538/74, para. 49 (European Court of Human Rights).

⁴⁷ See, for example, *Goodwin v. United Kingdom*, 27 March 1996, Application No. 17488/90 (European Court of Human Rights), para. 33.

⁴⁸ See *Lingens v. Austria*, 8 July 1986, Application No. 9815/82, paras. 39-40 (European Court of Human Rights), again interpreting a similar rule in the Article 10 of the ECHR.

⁴⁹ See Bossuyt, M., *Guide to the “Travaux Préparatoires” of the International Covenant on Civil and Political Rights* (Dordrecht: Martinus Nijhoff Publishers, 1987), pp. 398-411.

⁵⁰ See Bossuyt, p. 406.

⁵¹ Para. 11.1.

⁵² See Mahalic and Mahalic, p. 94.

⁵³ General Policy Recommendation N° 7: On National Legislation to Combat Racism and Racial Discrimination, adopted 13 December 2002.

⁵⁴ Prohibition of propaganda for war and inciting national, racial or religious hatred (Art. 20), 29 July 1983.

⁵⁵ See, McGoldrick, D. and O'Donnell, T., "Hate-speech laws: consistency with national and international human rights law" (1998) 18 *Legal Studies* 453, suggesting that the predominant means of addressing hate speech is through civil remedies. See p. 457.

⁵⁶ Recommendation R(97)20 of the Committee of Ministers of the Council of Europe on 'Hate Speech', 30 October 1997, Principle 2. See also the European Commission Against Racism and Intolerance's General Policy Recommendation N° 7: On National Legislation to Combat Racism and Racial Discrimination, adopted 13 December 2002.

⁵⁷ See, for example, *Ross and Dogan*.

⁵⁸ Adopted by the Second World Congress of the International Federation of Journalists (IFJ) at Bordeaux on 25-28 April 1954 and amended by the 18th IFJ World Congress in Helsingör on 2-6 June 1986.

⁵⁹ General Recommendation 29: Article 1, paragraph 1 of the Convention (Descent), 1 November 2002, para. 20.

⁶⁰ "Freedom of Speech and Racism" (1987) 8 *Cardozo Law Review* 445, p. 456.

⁶¹ See Simon, J., "Of Hate and Genocide: In Africa, Exploiting the Past" January/February 2006 *Columbia Journalism Review* 9.

⁶² Kamatali makes this specific point but also the more general one that, in weak States, it is extremely difficult to promote an appropriate balance between freedom of expression and restrictions, given the limited capacity to apply the law and to apply it fairly. See pp. 57-58.

⁶³ Act No. 13 of 2000.

⁶⁴ Joint Statement on Racism and the Media, 27 February 2001.

⁶⁵ Broadcasting Act, S.C. 1991, c. 11, section 3(m)(viiii). See also Hungarian Act 1 of 1996 on Radio and Television Broadcasting, Article 2(26), which requires the public broadcaster to carry minority programming.

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