



General Assembly

Distr.
GENERAL

A/HRC/9/25
5 September 2008

Original: ENGLISH

HUMAN RIGHTS COUNCIL
Ninth session
Agenda item 2

**ANNUAL REPORT OF THE UNITED NATIONS HIGH COMMISSIONER
FOR HUMAN RIGHTS AND REPORTS OF THE OFFICE OF THE
HIGH COMMISSIONER AND THE SECRETARY-GENERAL**

**Study of the United Nations High Commissioner for Human Rights
compiling existing legislations and jurisprudence concerning
defamation of and contempt for religions***

Summary

The present study is submitted in accordance with Human Rights Council resolution 7/19. It compiles relevant existing legislations and jurisprudence concerning defamation of and contempt for religions.

* Late submission.

CONTENTS

	<i>Paragraphs</i>	<i>Page</i>
Introduction	1 - 5	3
I. BACKGROUND	6 - 10	3
II. INTERNATIONAL NORMS AND JURISPRUDENCE	11 - 32	4
III. REPORTS AND FINDINGS OF SPECIAL RAPORTEURS	33 - 45	9
IV. REGIONAL NORMS AND JURISPRUDENCE	46 - 72	12
V. NATIONAL LAWS AND JURISPRUDENCE	73 - 79	16
VI. CONCLUSIONS	80 - 82	18

Introduction

1. In resolution 7/19 the Human Rights Council urged States to “take actions to prohibit the dissemination, including through political institutions and organizations, of racist and xenophobic ideas and material aimed at any religion or its followers that constitute incitement to racial and religious hatred, hostility or violence”.

2. In paragraph 16 of that resolution, the Human Rights Council requested the High Commissioner for Human Rights “to report on the implementation of the present resolution and to submit a study compiling relevant existing legislations and jurisprudence concerning defamation of and contempt for religions to the Council at its ninth session”. In accordance with that request, the High Commissioner submits to the Council a report on the implementation of that resolution (A/HRC/9/7), and the present study.

3. To prepare the report and the study, on 24 April 2008, the Office of the High Commissioner for Human Rights (OHCHR) sent a note verbale to Member States, regional organizations, national human rights institutions (NHRIs) and non-governmental organizations (NGOs), requesting information on the implementation of the resolution and on existing legislations and jurisprudence concerning defamation of and contempt for religions. OHCHR received contributions from nine Member States,¹ one regional organization (the Council of Europe) and five NGOs in consultative status with ECOSOC, which are summarized in A/HRC/9/7. Section V of the present study summarizes replies received from Member States regarding national legislation and jurisprudence.

4. The study presents preliminary findings from research conducted by OHCHR on international, regional and national legislations and relevant jurisprudence concerning defamation of and contempt for religions. Information on national legislation and jurisprudence is limited to the replies received.

5. Section II of the study summarizes relevant provisions of international instruments and jurisprudence related to freedom of religion, permissible restrictions on freedom of expression and religion, and incitement to religious hatred and violence. Section III refers to the conclusions and recommendations made by Special Rapporteurs and former mandate-holders, and Section IV reviews regional norms and jurisprudence on freedom of thought, conscience and religion and freedom of expression.

I. BACKGROUND

6. Resolution 7/19 follows a series of resolutions on defamation of religions adopted by the General Assembly, the former Commission on Human Rights and the Human Rights Council. The common concern in these resolutions revolve around several related themes, primarily the stereotyping and negative portrayal of religions, in particular Islam, the association of Islam with

¹ Argentina, Bahrain, Chile, Costa Rica, Cuba, Egypt, the Islamic Republic of Iran, Mauritius and Turkey.

violence and terrorism in the aftermath of the 2001 terrorist attacks in the United States of America, the dissemination of ideas based on superiority, discriminatory laws, policies and practices that have targeted minority religious groups, and physical attacks on individuals and communities and their properties and places and symbols of worship.

7. While these resolutions make reference to “defamation of religions”, it appears that they often use the term in the generic sense to describe some of the above phenomena - notably hostile statements, unfair association with violence, stigmatization, ridicule, insults against religion, attacks, “Islamophobia” - rather than in the strict legal sense. In this context the resolutions perceive defamation in conjunction with the need to combat hatred, discrimination, intimidation, coercion, etc. Thus, paragraphs 8 and 9 of resolution 7/19 urges States “to prohibit the dissemination ... of racist and xenophobic ideas and material aimed at any religion or its followers”, and calls on them to provide “adequate protection against acts of hatred, discrimination, intimidation and coercion resulting from the defamation of any religion”.

8. The notion of defamation as is known in many national legal systems is designed to protect individual reputation and image. In its general legal meaning, it refers to an inaccurate statement (oral, written) that is published through various means of communication (printed, audio-visual, electronic) and is intended to or actually causes harm to a person’s reputation. Some national laws require the additional element of negligence or malice in the making of the statement. In general, the sanction for defamation is a civil penalty, although some countries also recognize defamation as a criminal offence.

9. Some countries have blasphemy laws which envisage sanctions for profane acts (physical, oral, printed, audio-visual, electronic, etc.). Others have adopted specific defamation of religions, laws that extend the concept of defamation to protect religions and, in that sense, regard defamation of religions as essential to the protection of freedom of religion or belief.

10. In the framework of international human rights law, the combination of “defamation” with “religion” remains unclear for a variety of reasons. It is within this context that this study is framed around the following questions:

(a) To what extent the concept of defamation of religions can be derived from existing international human rights law framework;

(b) The scope of existing international human rights law related to religion - namely, the freedom of religion or belief, discrimination on the basis of religion and incitement to religious hatred and violence - and if it sufficiently addresses the phenomena with which the resolutions are concerned;

(c) The implications of “defamation of religions” to the international human rights framework, particularly the relationship to freedom of expression and other fundamental human rights.

II. INTERNATIONAL NORMS AND JURISPRUDENCE

11. Issues related to religion are addressed in several international instruments, including the United Nations Charter, the Universal Declaration of Human Rights, the International Covenant

on Civil and Political Rights (ICCPR), the International Convention on the Elimination of Racial Discrimination (ICERD), the Rome Statute of the International Criminal Court, and the 1981 Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief.

12. There is no specific treaty on issues related to religion however. Although in its resolution 1781 (XVII) the General Assembly in 1962 requested that a draft declaration and a draft convention on the elimination of all forms of religious intolerance be prepared, it is only in 1981 that the Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief was adopted. This suggests the complexity of the subject and the lack of consensus on key issues.

13. Technically speaking, the declaration is not a binding instrument, but it is considered the most comprehensive elaboration of the relevant norms contained in ICCPR and the Universal Declaration of Human Rights. The declaration addresses two broad themes, religious freedom and protection from discrimination. There is no provision regarding incitement to religious hatred and violence in the Declaration but this issue is covered in article 20 (2) of ICCPR.

Freedom of religion or belief

14. Freedom of religion or belief has received considerable attention since the founding of the United Nations. The United Nations Charter does not explicitly mention freedom of religion or belief, however its human rights provisions provide the normative framework.² Since then, many resolutions and the core human rights treaties have been adopted, which deal with freedom of religion or belief directly and indirectly.

15. Article 18 of the Universal Declaration of Human Rights outlines the parameters of freedom of religion or belief. It provides that “Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief, and freedom, either alone or in community with others and in public or private, to manifest his religion or belief in teaching, practice, worship and observance.”

16. Article 18 of ICCPR provides that “1. Everyone shall have the right to freedom of thought, conscience and religion. This right shall include freedom to have or to adopt a religion or belief of his choice, and freedom, either individually or in community with others and in public or private, to manifest his religion or belief in worship, observance, practice and teaching. 2. No one shall be subject to coercion which would impair his freedom to have or to adopt a religion or belief of his choice. 3. Freedom to manifest one’s religion or beliefs may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others.” Article 1 of the Declaration has similar language.

² Among the purposes of the Organization, as set out in article 1 of the Charter is to “promote and encourage respect for human rights and for fundamental freedoms for all without distinction as to ... religion”. Articles 13, 55 and 56 also deal with human rights.

17. In its article 5, ICERD provides that “States Parties undertake to prohibit and to eliminate racial discrimination in all its forms and to guarantee the right of everyone, without distinction as to race, colour, or national or ethnic origin, to equality before the law, notably in the enjoyment of ... (vii) the right to freedom of thought, conscience and religion”.

18. The three dimensions to freedom of religion or belief as articulated in these instruments are freedom of thought, conscience and religion. In its general comment No. 22 (1993) on article 18, the Human Rights Committee notes that freedom of thought and freedom of conscience are protected equally with freedom of religion and belief. The fundamental character of these freedoms is reflected in the fact that this provision cannot be derogated from, even in time of public emergency, as stated in article 4 (2) of ICCPR.

19. In addition to the individual right to freedom of religion or belief, the ICCPR also stipulates in article 27 that persons belonging to ethnic, religious or linguistic minorities “shall not be denied the right, in community with the other members of their group to enjoy their own culture, to profess and practice their own religion, or to use their own language”. In general comment No. 22, the Human Rights Committee points out that the prohibition of advocacy of religious hatred that constitutes incitement to discrimination, hostility and violence, under article 20 (2) constitutes an important safeguard against infringements on the rights of religious minorities and of other religious groups to exercise the rights guaranteed by articles 18 and 27, and against acts of violence or persecution directed towards those groups.

Relations of freedom of religion to freedom of expression and other fundamental human rights and freedoms

20. Paragraph 12 of Human Rights Council resolution 7/19 states that freedom of expression is not unlimited. Indeed, ICCPR envisages limitations to freedom of expression, in particular article 19 (3) which provides that certain restrictions may be imposed on freedom of expression in order to protect the rights or reputations of others, national security or public order, public health or morals. However, in general comment No. 10 (1983) on freedom of expression, the Human Rights Committee underlined that restrictions may not put in jeopardy the right itself. The limitations must be “provided by law”, they should be imposed for one of the purposes set out in subparagraphs (a) and (b) of the article, and they must be justified as being “necessary” for one of those purposes.

21. In the case of *Malcolm Ross v. Canada* (2000) the Human Rights Committee held that the dismissal of a schoolteacher from his teaching position because of anti-Semitic statements that he published while he was working as a schoolteacher constituted a restriction covered by the limitation clause contained in paragraph 3 of article 19, and therefore did not violate the author’s right to freedom of expression.

22. In *Robert Faurisson v. France* (1996), the Human Rights Committee held that the restriction of the freedom of expression of the author and his prosecution under France’s 1990 Gayssot Act which made it an offence to contest the existence of certain crimes against humanity under which Nazi leaders were convicted by the International Military Tribunal at Nuremberg in 1946 were permissible and necessary under article 19, paragraph 3 (a), of the Covenant.

Incitement to religious hatred and violence

23. In 2006, the High Commissioner for Human Rights submitted a report to the Human Rights Council on incitement to racial and religious hatred and the promotion of tolerance which outlines in detail the international legal framework with regard to incitement to religious hatred and violence (A/HRC/2/6). The report concluded that existing international and regional human rights instruments, primarily ICCPR, ICERD and the three regional instruments, indicate a broad consensus on the law relating to incitement and advocacy of racial and religious hatred and provide a good basis for “legal and policy responses to the problem of intolerance more generally, and the incitement of hatred and violence in particular” (para. 80).

24. The report points out, nevertheless, that the implementation of the relevant norms is weak, partly because of lack of clarity on key elements of the law such as the definition of incitement, hatred and hate speech. It called for further reflection on the scope of actions that a State may legitimately take to curb speech and on ways to strengthen implementation, concluding that “uniform, consistent application of the law is essential to ensure the effectiveness of international efforts to counter intolerance” (para. 84).

25. As the High Commissioner’s report points out, article 20 (2) of ICCPR explicitly prohibits any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence. This provision does not set forth a right but a limitation on other rights in particular freedom of expression and freedom to manifest religion or belief. During the *travaux préparatoires* of the Covenant, fears were expressed that the prohibition of advocacy might be abused and, thus, have a detrimental impact on the right to freedom of expression (A/2929, para. 190).

26. In 1983, the Human Rights Committee adopted general comment No. 11 on the prohibition of propaganda for war and inciting national, racial and religious hatred (art. 20), in which it expressed the view that the “required prohibitions are fully compatible with the right of freedom of expression as contained in article 19, the exercise of which carries with it special duties and responsibilities”. It further noted that article 20 (2) is “directed against any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence, whether such propaganda or advocacy has aims which are internal or external to the State concerned”.

27. The Committee also underlined that in order to make article 20 fully effective “there ought to be a law making it clear that propaganda and advocacy as described therein are contrary to public policy and providing for an appropriate sanction in case of violation”. Furthermore, in its general comment No. 22 (1993), the Human Rights Committee stated that “In accordance with article 20, no manifestation of religion or belief may amount to propaganda for war or advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence.”

28. With regard to hate speech, article 4 of ICERD stipulates that “States Parties condemn all propaganda and all organizations which are based on ideas or theories of superiority of one race or group of persons of one colour or ethnic origin, or which attempt to justify or promote racial

hatred and discrimination in any form, and 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.”

29. The Convention on the Prevention and Punishment of the Crime of Genocide of 1948 in article 3 (c) lists “direct and public incitement to commit genocide” among punishable acts. This is also repeated in article 4, paragraph 3 (c) of the Statute of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia, article 3 (c) of the Statute of the International Criminal Tribunal for Rwanda, and article 25, paragraph 3 (e) of the Rome Statute of the International Criminal Court.

Intersection of race and religion

30. The permissible limitations to freedom of expression are one of the main issues in the discourse on defamation of religions. In paragraph 13 of resolution 7/19, reference is made to general recommendation No. 15 of the Committee on the Elimination of Racial Discrimination which affirms that “the prohibition of the dissemination of all ideas based upon racial superiority or hatred is compatible with the freedom of opinion and expression” (para. 4). The resolution asserts that this is equally applicable to the question of incitement to religious hatred.

31. While having held the view that discrimination based exclusively on religious grounds did not explicitly fall within the scope of the Convention,³ the Committee on the Elimination of Racial Discrimination has on numerous occasions addressed double discrimination on the grounds of race and religion and has stressed the “intersectionality” of racial and religious discrimination.⁴ It has recommended that religious discrimination be prohibited, including against immigrant religious minorities,⁵ and reminded States that they should “ensure that all persons enjoy their right to freedom of thought, conscience and religion, without any discrimination based on race, colour, descent or national or ethnic origin, in accordance with article 5 (d) of the Convention”.⁶

³ *P.S.N. v. Denmark, A.W.R.A.P. v. Denmark* (CERD/C/71/D/36/2006, para. 6.3), referring to the *Travaux Préparatoires* of the Convention, according to which the Third Committee of the General Assembly had rejected a proposal to include racial discrimination and religious intolerance in a single instrument.

⁴ CERD/C/63/CO/11, para. 20 (10 December 2003); CERD/C/63/CO/6, para. 14 (10 December 2003); CERD/C/NGA/CO/18, para. 20 (1 November 2005); CERD/C/TZA/CO/16, para. 20 (1 November 2005); CERD/C/IRL/CO/2, para. 18 (14 April 2005); CERD/C/RUS/CO/19, paras. 16, 17 (20 August 2008).

⁵ CERD/C/63/CO/11, para. 20 (10 December 2003).

⁶ CERD/C/63/CO/6, para. 14 (10 December 2003).

32. The Committee also expressed concern about reported cases of “Islamophobia” following the 11 September attacks and recommended that States give early consideration to the extension of the crime of incitement to racial hatred to cover offences motivated by religious hatred against immigrant communities.⁷ Similarly, it recommended that the motive of religious hatred, together with racial or ethnic hatred, be taken into account as an aggravating circumstance in proceedings under the criminal law.⁸

III. REPORTS AND FINDINGS OF SPECIAL RAPPORTEURS

33. Reports and studies by special procedures of the Human Rights Council, and previously, of the Commission on Human Rights provide further insight into the normative and operational dimension of defamation of religions. In the framework of their mandates, through in situ visits, dialogue with Governments, studies and periodic reports, special procedures can help to articulate and clarify principles and contribute towards standard-setting. The mandate of the Special Rapporteur on freedom of religion and belief, in particular, was created by the Commission on Human Rights in 1986 to monitor the implementation of the Declaration and to recommend remedial measures, as appropriate. Together with the Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance, the Special Rapporteur on freedom of religion and belief has made important contributions on relevant issues, including the state of freedom of religion, tolerance, and the scope of State responsibility.

34. The former Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance repeatedly reported to the Commission on Human Rights and Human Rights Council on the issue of “defamation of religions”. In 2004, for example, he submitted a report to the sixty-first session of the Commission on Human Rights in which he referred to anti-Semitism, Christianophobia and Islamophobia as forms of discrimination.⁹

35. In 2006, the Special Rapporteur on racism and the Special Rapporteur on freedom of religion or belief submitted a joint report to the second session of the Human Rights Council, in which they noted that there are close links between the issue of defamation of religions and the right to freedom of expression, as well as discrimination and intolerance (A/HRC/2/3, paras. 8 and 17).

36. They also stated that “international human rights law protects primarily individuals in the exercise of their freedom of religion and not religions per se” (para. 27), noting that “the right to freedom of religion or belief, as enshrined in relevant international legal standards, does not include the right to have a religion or belief that is free from criticism or ridicule” and that

⁷ CERD/C/63/CO/11, para. 21 (10 December 2003).

⁸ CERD/C/DEU/CO/18, para. 26 (21 August 2008).

⁹ E/CN.4/2005/18/Add.4, paras. 13, 15, 40, 48.

“defamation of religions may offend people and hurt their religious feelings but it does not necessarily or at least directly result in a violation of their rights, including their right to freedom of religion” (paras. 36 and 37).

37. The report further emphasized that criminalizing defamation of religions can be counterproductive since “rigorous protection of religions as such may create an atmosphere of intolerance and can give rise to fear and may even provoke the chances of a backlash” (para. 42). The Special Rapporteurs recommended that the Human Rights Committee consider the possibility of adopting complementary standards on the interrelations between freedom of expression, freedom of religion and non-discrimination, in particular by drafting a general comment on article 20 of ICCPR.

38. In his report to the sixth session of the Human Rights Council (A/HRC/6/6), the Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance underlined that “fighting religious discrimination in general requires a strong focus on preventing the direct and indirect consequences of defamation of religions, including its role in legitimizing racist and discriminatory discourse” (para. 13).

39. On 22 April 2008, during the first substantive session of the Preparatory Committee for the Durban Review Conference, he suggested, *inter alia*, that based on his experience in reporting on defamation of religions, the focus of the debate on racism and religion should be shifted away from defamation of religions to incitement to racial and religious hatred. In his view, while defamation of religions is a sociological concept, incitement to racial and religious hatred is a legal concept that can be dealt with under international instruments; in the framework of human rights, incitement to racial and religious hatred is prohibited by ICCPR, ICERD and the Durban Declaration and Programme of Action, and by many national constitutions.

40. In her report on the elimination of all forms of religious intolerance submitted to the sixty-second session of the General Assembly, the Special Rapporteur on freedom of religion or belief underlined that several domestic blasphemy laws “protect only the prevailing religion in the State concerned, or they are applied in a discriminatory sense” and are used to repress minorities, dissenters, atheists and non-theists (A/62/280, para. 70). She suggested that “a useful alternative to blasphemy laws could be to fully implement the protection of individuals against advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence according to article 20 (2) of the International Covenant on Civil and Political Rights” (para. 76). She also pointed out that in view of the huge number of religions and beliefs, genuine differences of opinion between their believers may arise and that “it would be difficult and potentially dangerous to define *in abstracto* what constitutes a ‘defamation of religion’ as well as to find an impartial, independent and non-arbitrary body for adjudicating such cases” (para. 77).

41. In her report on a country visit (E/CN.4/2006/5/Add.2) the Special Rapporteur affirmed that the State has the responsibility to ensure that justice is done promptly and properly, stressing that “there cannot be a lasting solution without proper justice for the perpetrators and victims of all acts of violence on religious grounds that have occurred. A climate of impunity can only encourage those who plan to foment further violence” (para. 95). The State has the obligation to

“ensure the protection and security of religious groups which may be targeted and which should be entitled to practice their religions freely and without any obstacles, including those created by non-State actors” (para. 113).

42. In their first joint declaration in 1999, the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, the OSCE Representative on Freedom of the Media and the OAS Special Rapporteur on Freedom of Expression noted that many countries have legislation, such as criminal defamation laws, which unduly restrict the right to freedom of expression. They encouraged States to review these laws and harmonize them in accordance with their international obligations.¹⁰

43. In their joint declaration made in 2000 they noted that the abuse of restrictive defamation and libel laws had reached “crisis proportions in many parts of the world”.¹¹ They recommended minimum standards that should be followed in the development of defamation laws, among which: (a) the repeal of criminal defamation laws in favour of civil laws should be considered, in accordance with relevant international standards; (b) no one should be liable under defamation law for the expression of an opinion; and (c) civil sanctions for defamation should not be so heavy as to exert a chilling effect on freedom of expression, and should be designed to restore the reputation harmed, not to compensate the plaintiff or to punish the defendant.

44. The joint declaration made in 2000 also endorsed the ARTICLE 19 document “Defining Defamation: Principles on Freedom of Expression and Protection of Reputation”, principle 2 of which, on the legitimate purpose of defamation laws, states that such laws cannot be justified if their purpose or effect is to protect the “reputation” of objects such as the State, the nation, religious symbols, flags or national insignia, or on grounds of public order, national security, or friendly relations with foreign States or Governments.¹² The three mandate-holders issued another joint declaration in 2002, in which they reiterated that “criminal defamation is not a justifiable restriction on freedom of expression; all criminal defamation laws should be abolished and replaced, where necessary, with appropriate civil defamation laws”.¹³

45. On 19 December 2006, the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, the OSCE Representative on Freedom of the Media, the OAS Special Rapporteur on Freedom of Expression and the Special Rapporteur on Freedom of Expression of the African Commission on Human and Peoples’ Rights adopted a declaration which addressed several issues, including freedom of expression and cultural and religious tensions. The declaration noted that “governments should refrain from introducing legislation which makes it an offence simply to exacerbate social tensions. Although it is legitimate to

¹⁰ <http://www.cidh.org/Relatoria/showarticle.asp?artID=141&IID=1>.

¹¹ <http://www.cidh.org/Relatoria/showarticle.asp?artID=142&IID=1>.

¹² Article 19, Defining Defamation: Principles on Freedom of Expression and Protection of Reputation, July 2000.

¹³ <http://www.cidh.org/Relatoria/showarticle.asp?artID=87&IID=1>.

sanction advocacy that constitutes incitement to hatred, it is not legitimate to prohibit merely offensive speech”. It also recalled that “most countries already have excessive or at least sufficient ‘hate speech’ legislation”.¹⁴

IV. REGIONAL NORMS AND JURISPRUDENCE

46. The main regional human rights systems contain fairly extensive norms and jurisprudence on freedom of religion, permissible restrictions and defamation of religions, revealing many similarities but also significant differences.

The African regional human rights system

47. Article 8 of the African Charter on Human and Peoples’ Rights guarantees the freedom of conscience, the profession and free practice of religion and that “no one may, subject to law and order, be submitted to measures restricting the exercise of these freedoms”. With regard to freedom of expression, article 9 of the Charter stipulates that “every individual shall have the right to express and disseminate his opinions within the law”.

48. With regard to the permissible scope of restrictions on freedom of expression, the Declaration of Principles on Freedom of Expression in Africa¹⁵ in Principle II (Interference with Freedom of Expression) provides that “any restrictions on freedom of expression shall be provided by law, serve a legitimate interest and be necessary and in a democratic society”. Principle XIII (Criminal Measures) stipulates that “freedom of expression should not be restricted on public order or national security grounds unless there is a real risk of harm to a legitimate interest and there is a close causal link between the risk of harm and the expression”.

49. In 2006, at its 40th ordinary session, the African Commission on Human and Peoples’ Rights adopted a resolution on the situation of freedom of expression in Africa which emphasized the freedom of expression as guaranteed in article 9 of the African Charter and articles 19 of the Universal Declaration of Human Rights and ICCPR, respectively, and other treaties, resolutions, international instruments and national constitutions.

The European system

50. Article 9 of the European Convention on Human Rights (ECHR) guarantees the right to freedom of thought, conscience and religion and provides that “freedom to manifest one’s religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others”.

¹⁴ Annual Report of the Inter-American Commission on Human Rights 2006, Volume II, Report of the Office of the Special Rapporteur for Freedom of Expression, OEA/Ser.L/V/II.127 Doc.4, 3 March 2007, p. 109.

¹⁵ Res. 62(XXXII)02: Resolution on the Adoption of the Declaration of Principles on Freedom of Expression in Africa (2002).

51. Article 10 of the Convention protects the right to freedom of expression whereby the exercise of these freedoms “may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary”.

52. Freedom of expression, as guaranteed under article 10 of the Convention, is applicable not only to “information” or “ideas” which are favourably received or regarded as inoffensive or as a matter of indifference, but also those which offend, shock or disturb the State or any sector of the population. At the same time, the exercise of freedom of expression also entails duties and responsibilities.

Jurisprudence of the European Court of Human Rights

53. Several decisions of the European Court of Human Rights underline that the limitation to freedom of expression under article 10 of the Convention applies to expressions that do not merely criticize, oppose or deny religious beliefs, but inhibit those who hold such beliefs from exercising their freedom of religion.

54. According to the European Court of Human Rights, the test for determining whether restrictions of freedom of expression are “necessary in a democratic society” is if they correspond to a “pressing social need”, are proportionate to the aim to be pursued (the potential impact of the medium of expression concerned is an important factor in the consideration of the proportionality of an interference), and whether the reasons justifying the interference are relevant and sufficient.

55. With regard to the “need” for restrictions on freedom of expression and the measures that should be adopted to deal therewith, the Court has held that national authorities have a certain margin of appreciation, which is not unlimited but goes hand in hand with the supervision by the Court, whose task it is to give a final ruling on whether a restriction is reconcilable with freedom of expression as protected by article 10.

56. In *Otto-Preminger-Institut v. Austria* (1994), the European Court of Human Rights noted that “those who choose to exercise the freedom to manifest their religion, irrespective of whether they do so as members of a religious majority or a minority, cannot reasonably expect to be exempt from all criticism. They must tolerate and accept the denial by others of their religious beliefs and even the propagation by others of doctrines hostile to their faith. However, the manner in which religious beliefs and doctrines are opposed or denied is a matter which may engage the responsibility of the State, notably its responsibility to ensure the peaceful enjoyment of the right guaranteed under Article 9 (art. 9) to the holders of those beliefs and doctrines” (para. 47).

57. The European Court held that “in seizing the film, the Austrian authorities acted to ensure religious peace in that region and to prevent that some people should feel the object of attacks on their religious beliefs in an unwarranted and offensive manner” (para. 56). The Court also held

that provocative portrayals of objects of religious veneration “can be regarded as malicious violation of the spirit of tolerance, which must also be a feature of democratic society”. It pointed out that in the context of religious opinions and beliefs, those who exercise the right to freedom of expression under article 10 of the Convention have an obligation to “avoid as far as possible expressions that are gratuitously offensive to others” (paras. 47 and 49).

58. In *Wingrove v. United Kingdom* (1996), the European Court noted that the law on blasphemy did not treat on an equal footing the different religions practised in the United Kingdom (it protects only the Christian religion and, more specifically, the established Church of England), but stated that this was not the issue before the Court to rule on. The Court upheld the refusal to grant a certificate for the distribution of a film because it had a legitimate aim to protect “the rights of others”, and more specifically, to protect against seriously offensive attacks on matters regarded as sacred by Christians.

59. In *İ.A. v. Turkey* (2005), the European Court underlined that pluralism, tolerance and broadmindedness are hallmarks of a democratic society, and noted that freedom of expression applies not only to “information” or “ideas” that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb. It also noted, however, that with respect to religious belief there may be a legitimate duty to avoid expressions that are gratuitously offensive to others and profane, hence it may be considered necessary to punish improper attacks on objects of religious veneration.

60. The European Court noted that the judgements of the national organs were intended to provide protection against offensive attacks on matters regarded as sacred by Muslims and that the measure may reasonably be held to have met a “pressing social need”. The Court ruled that there had been no violation of article 10 of the Convention.

61. In *Aydın Tatlav v. Turkey* (2006), on the other hand, the European Court found a violation of article 10 by the State. It held that a criminal conviction involving the risk of a custodial sentence could have the effect of discouraging authors and editors from publishing opinions about religion that were not conformist and could therefore impede pluralism, which was indispensable for the healthy development of a democratic society.

62. In *Giniewski v. France* (2006), the European Court stated that although the applicant’s article criticized a papal encyclical and hence the Pope’s position, the analysis it contained could not be extended to Christianity as a whole. The Court again found that restrictions to freedom were not warranted under article 10 of the European Convention because the publication in question was not “gratuitously offensive” or insulting, did not incite disrespect or hatred, did not cast doubt in any way on clearly established historical facts, and did not meet the “pressing social need” imperative.

63. The European Court maintained the same position in *Klein v. Slovakia* (2007) and found a violation of article 10 of the European Convention because the sanction was not necessary, did not meet pressing social need and was not proportionate to the legitimate aim pursued.

64. In summary, according to the European Court, those who choose to exercise the freedom to manifest their religion must tolerate and accept the denial by others of their religious beliefs and even the propagation by others of doctrines hostile to their faith

(*Otto-Preminger-Institut v. Austria*). However, the cases from the European Court identify the following among the key factors to be taken into account in determining the permissible scope of limitations on hate speech grounds: provocative portrayals of objects of religious veneration “can be regarded as malicious violation of the spirit of tolerance, which must also be a feature of a democratic society”, as stated in its ruling in (*Otto-Preminger-Institut v. Austria*); it is a legitimate State objective under the Convention to protect “the rights of others” and, more specifically, to provide protection against seriously or gratuitously offensive attacks on matters regarded as sacred by a segment of the population, Christians (*Wingrove v. United Kingdom*) or Muslims (*İ.A. v. Turkey*); measures taken to protect against offensive attacks must be proportionate to the legitimate aim pursued and meet a “pressing social need” (*İ.A. v. Turkey*, *Wingrove v. United Kingdom*); and limitations of freedom of expression should not have the effect of discouraging authors and editors from publishing opinions about religion that were not conformist, and should not impede the protection of pluralism (*Aydın Tatlav v. Turkey*).

The Inter-American system

65. Three of the key human rights instruments in the Inter-American system have similar provisions relevant to the freedom of religion: the American Declaration of the Rights and Duties of Man of 1948; the American Convention on Human Rights “Pact of San José, Costa Rica”, and the Inter-American Declaration of Freedom of Expression. Article III of the American Declaration provides that “Every person has the right freely to profess a religious faith, and to manifest and practice it both in public and in private.” Article IV stipulates that “Every person has the right to freedom of investigation, of opinion, and of the expression and dissemination of ideas, by any medium whatsoever.”

66. Article 12 of the American Convention on Human Rights guarantees that “Everyone has the right to freedom of conscience and of religion. This right includes freedom to maintain or to change one’s religion or beliefs, and freedom to profess or disseminate one’s religion or beliefs, either individually or together with others, in public or in private.” It also provides that “no one shall be subject to restrictions that might impair his freedom to maintain or to change his religion or beliefs” and that “freedom to manifest one’s religion and beliefs may be subject only to the limitations prescribed by law that are necessary to protect public safety, order, health, or morals, or the rights or freedoms of others”.

67. Article 13 of the Convention guarantees the right to freedom of thought and expression, which includes the “freedom to seek, receive, and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing, in print, in the form of art, or through any other medium of one’s choice”. The exercise of the right “shall not be subject to prior censorship but shall be subject to subsequent imposition of liability, which shall be expressly established by law to the extent necessary to ensure: 1. respect for the rights or reputations of others; or 2. the protection of national security, public order, or public health or morals”. Moreover, the right of expression may not be restricted by indirect methods or means.

68. The only exception to the prohibition of prior censorship is in article 13 (4), which provides that “public entertainments may be subject by law to prior censorship for the sole purpose of regulating access to them for the moral protection of childhood and adolescence”. Paragraph 5 of that article 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 of persons on any grounds including those of race, colour, religion, language, or national origin shall be considered as offenses punishable by law”.

69. The Inter-American Declaration of Principles on Freedom of Expression adopted in 2000 elaborates on the limitations set in article 13 of the Convention. Principle 5 reiterates that “prior censorship, direct or indirect interference in or pressure exerted upon any expression, opinion or information transmitted through any means of oral, written, artistic, visual or electronic communication must be prohibited by law”. Principle 7 further provides that “Prior conditioning of expressions, such as truthfulness, timeliness or impartiality is incompatible with the right to freedom of expression recognized in international instruments.”

Inter-American Court of Human Rights

70. The Inter-American Court has stressed the prohibition of prior censorship. In *Olmedo Bustos et al. v. Chile “The Last Temptation of Christ”* (2001), the Court held that Chile had violated the right to freedom of thought and expression embodied in article 13 of the Inter-American Convention by blocking the showing of the film.

71. The Court noted that freedom of expression is not limited to the right to speak or write, but that it is also closely linked to the right to use any appropriate method to disseminate thought and allow it to reach the greatest number of persons. The Court stated that the exception to prior censorship in article 13 (4) of the Inter-American Convention is intended to regulate access for the moral protection of children and adolescents, limited to public entertainment. The impairment of the freedom of thought and expression in all other cases is inconsistent with the Convention.

72. With regard to the right to freedom of conscience and religion, the Court stated that the refusal of the authorities to screen the film did not impair or deprive anyone of their right to maintain, change, profess or disseminate their religion or beliefs with total freedom.

V. NATIONAL LAWS AND JURISPRUDENCE

73. The Constitution of Argentina, in article 14, stipulates that all the inhabitants of the Nation are entitled to publish their ideas through the press without previous censorship and to profess freely their religion. Article 19 of the Constitution determines that the private actions of men which in no way offend public order or morality, nor injure a third party, are only reserved to God and are exempted from the authority of judges; no inhabitant of the Nation shall be obliged to perform what the law does not demand nor deprived of what it does not prohibit. Furthermore, article 20 guarantees that foreigners enjoy within the territory of the Nation all the civil rights of citizens - including, among others, practising freely their religion.

74. The Constitution of Chile guarantees freedom of conscience, manifestation of all creeds and the free exercise of all cults which are not opposed to morals, good customs or public order. Moreover, the Chilean Law of Worship (No 19.638 of October 1999) establishes the norms, in accordance with the constitutional provisions, applicable to churches and religious organizations. It institutes equal legal status for religious entities.

75. The Constitution of Costa Rica establishes, in article 75, that the Roman Catholic and Apostolic Religion is the religion of the State, without preventing the free exercise of other forms of worship that are not opposed to universal morality and good customs. Article 28 of the Constitution stipulates that no one may be disturbed or persecuted for the expression of his opinions or for any act which does not infringe the law; private actions which do not harm the morals or public order, or which do not cause any damages to third parties are outside the scope of the law. However, clergymen or secular individuals cannot in any way engage in political propaganda invoking religious motives or making use of religious beliefs.

76. The Constitution of Cuba, in its article 42, prohibits discrimination on the grounds of race, skin colour, national origin, religious beliefs and any other form of discrimination harmful to human dignity. Furthermore, article 55 stipulates that the State recognizes, respects and guarantees freedom of conscience and of religion, every citizen's freedom to change religious beliefs or to not have any, and to profess, within the framework of respect for the law, the religious belief of his preference. Article 294 of the Cuban Penal Code envisages imprisonment for two years for an offence against freedom of religion committed by a public employee.

77. The Egyptian Constitution, in article 40, guarantees that all citizens are equal before the law and have equal public rights and duties without discrimination on grounds of race, ethnic origin, language, religion or creed. The Constitution also stipulates that the State shall guarantee freedom of belief and freedom of practice of religious rites. With regard to criminal law, article 160 of the Penal Code of Egypt sanctions the use of violence or threats to disrupt or interrupt the religious observances or celebrations of any community; the destruction, damage or desecration of premises dedicated to the practice of religious rites, or of symbols or other articles venerated by the members of a religious community or group of people; the violation or desecration of graves or cemeteries. Furthermore, article 161 envisages penalties for printing or publishing distorted versions of a holy book of any publicly practised religion, provided the text is intentionally deflected in a manner that alters its meaning; mimicking a religious celebration in a public place or community with a view to ridiculing it, or to be watched by an audience.

78. The Constitution of Mauritius in section 11 entitled "Protection of Freedom of Conscience" provides that except with his own consent, no person shall be hindered in the enjoyment of his freedom of conscience that includes freedom of thought and religion, freedom to change religion or belief, and freedom, either alone or in community with others and both in public and private, to manifest and propagate his religion or belief in worship, teaching, practice and observance. The Criminal Code of Mauritius contains several provisions with regard to freedom of conscience, among which, section 206 on outrage against public and religious morality and section 208 on penalties applicable to the author of outrage against religion.

79. Article 125 of the Turkish Penal Code sanctions any person who attributes an act or fact to a person in a manner that may impugn that person's honour, dignity or prestige. Paragraph 3 (b) and (c) of that article envisages penalties for committed insults because of declaring, altering or disseminating, his religious, political, social or philosophical beliefs, thoughts or convictions, or practising in accordance with the requirements and prohibitions of a religion he belongs to; or where the subject matter is deemed sacred to the religion the person belongs to. The Turkish Penal Code also sanctions persons who damage, soil buildings and associated buildings (or structures upon such) of a place of worship or the removable property therein (art. 153, paras. 1, 2). Moreover, it penalizes persons who publicly provoke hatred or hostility in one

section of the public against another section which has a different characteristic based on social class, race, religion, sect or regional difference, which creates a clear and imminent danger to public security; who publicly degrade the religious values of a section of the public (art. 216, paras. 1 and 3). Furthermore, the Law on the Establishment of Radio and Television Enterprises and Their Broadcast stipulates, in article 4 (d), that broadcasts shall not, in any manner, humiliate or insult people on grounds of language, race, colour, gender, political opinion, philosophical belief, religion, sect, or any such considerations.

VI. CONCLUSIONS

80. **The former High Commissioner, at the first session of the Human Rights Council, emphasized that “the proliferation of acts and expressions contributing to the exacerbation of cultural and religious tensions is producing new cleavages within and between communities, and has recently led to unprecedented levels of violence and destruction, on the ashes of which trust and tolerance must now be rebuilt. The use of harmful stereotypes and the perpetuation of myths that demonize, ridicule, or insult deep-rooted religious feelings and a profound sense of identity, must be denounced as vigorously as the right to champion unpopular ideas must be asserted and protected”.**

81. **There are legitimate concerns about an increase in manifestations of intolerance and discrimination based on religion or belief as well as acts of violence, including attacks against places of worship, which are threatening the enjoyment of human rights and fundamental freedoms.**

82. **Further clarity is needed with regard to the legal contours of the demarcation line between freedom of expression and incitement to religious hatred. In order to protect individuals and groups, a better understanding of the permissible limitations to freedom of expression in accordance with international human rights law needs to be developed. OHCHR will therefore organize an expert consultation entitled “Links between articles 19 and 20 of the ICCPR: Freedom of expression and advocacy of religious hatred that constitutes incitement to discrimination, hostility or violence”. The expert consultation will be held from 2 to 3 October 2008 in Geneva and is open to the participation of observers such as Member States, United Nations agencies, regional organizations and NGOs.**
