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RACISM, RACIAL DISCRIMINATION, XENOPHOBIA AND RELATED FORMS OF INTOLERANCE, FOLLOW-UP AND IMPLEMENTATION OF THE DURBAN DECLARATION AND PROGRAMME OF ACTION

**Written statement^{*} submitted by the Center for Inquiry-International (CFI),
a non-governmental organization in special consultative status**

The Secretary-General has received the following written statement which is circulated in accordance with Economic and Social Council resolution 1996/31.

[13 February 2009]

^{*} This written statement is issued, unedited, in the language(s) received from the submitting non-governmental organization(s).

The European Court of Human Rights and the Interpretation of ‘Advocacy of Religious Hatred that Constitutes Incitement to Discrimination, Hostility or Violence’

Introduction: From defamation to incitement

1. In her recent activities, the Special Rapporteur on freedom of religion or belief, Ms. Asma Jahangir, has taken up the question of freedom of expression and advocacy of religious hatred that constitutes incitement to discrimination, hostility and violence, the latter concept being regarded as a constructive alternative to the discourse on the ‘defamation of religions.’¹

2. The question arises how ‘incitement’ should be understood in this context. At an October 2008 expert seminar convened under the auspices of the UN High Commissioner for Human Rights, it was suggested by the Special Rapporteur and others that the Human Rights Committee should revisit its General Comment No. 11 (1983) on Article 20 of the International Covenant on Civil and Political Rights (ICCPR).² In her present Report, the Special Rapporteur cautions against “excessive or vague legislation on such religious issues, which may create tensions and problems rather than solving them” and points out that such legislation has often “fostered more polarization rather than protect religious minorities.”³

Difficulties with the European Court’s treatment of religiously offensive speech

3. Stakeholders may well look to the European Court of Human Rights and its case law applying the European Convention for the Protection of Human Rights and Fundamental Freedoms as one guide to determining the proper balance between freedom of expression, freedom of religion or belief, and equality of citizens in international human rights law.

4. The articles of the Convention that deal expressly with religion are Article 9 and Article 14. Article 14 is a guarantee against religious discrimination in the enjoyment of the rights and freedoms set forth in the Convention. Article 9 provides for freedom of thought, conscience and religion.

5. Article 10 provides for freedom of expression, recognizing in paragraph 2 that its exercise is subject to restrictions

¹ On the shift from ‘defamation of religions’ to incitement, see Report of the Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance, on combating defamation of religions (Mr Doudou Diène), U.N. Doc. A/HRC/9/12, para. 45, 65. See also the Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, Ambeyi Ligabo, UN Doc. A/HRC/7/14, 7 March 2008.

² Report of the United Nations High Commissioner for Human Rights and Follow-Up to the World Conference on Human Rights, Addendum, Expert seminar on the links between articles 19 and 20 of the International Covenant on Civil and Political Rights: “Freedom of expression and advocacy of religious hatred that constitutes incitement to discrimination, hostility or violence,” Geneva, 2-3 October 2008, A/HRC/10/31/Add.3 16 January 2009; Human Rights Committee, General Comment 11, Article 20 (Nineteenth session, 1983), Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, U.N. Doc. HRI/GEN/1/Rev.1 at 12 (1994).

³ Report of the Special Rapporteur on freedom of religion or belief, on promotion and protection of all human rights, civil, political, economic, social and cultural rights, including the right to development (Ms. Asma Jahangir), A/HRC/10/8, 6 January 2009, para. 14.

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 the rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.

Over the last fifteen years, the Court has interpreted these provisions (in a problematic way, in our opinion) so as to uphold the criminalization of religiously offensive expression by some states.

6. In *Otto-Preminger Institute v Austria*, the Court ruled in favor of the Austrian government's banning and confiscation of a film deemed offensive to Catholics.⁴ In *Wingrove v The United Kingdom*, it upheld the decision of the British Board of Film Classification to refuse certification to a film on the grounds that it could be considered blasphemous by Christians.⁵

7. The Court's grounds for upholding Austria's restriction of speech in *Preminger* are problematic. It claimed that Austria had not violated Article 10 protection because its intervention had legitimate aims; namely, to prevent disorder and protect the right of religious exercise as guaranteed by Article 9, on the assumption that religiously offensive speech "can be such as to inhibit those who hold such beliefs from exercising their freedom to hold and express them."⁶ This empirical claim, that Catholics are made less free by the existence of blasphemous movies, seems highly implausible given the fact that in this case the Catholics were in the majority. The Court adduced no empirical evidence in support of this claim.⁷

8. Elsewhere, the *Preminger* opinion invokes a much more expansive "right of citizens not to be insulted in their religious feelings"⁸ and a "right to respect for religious beliefs as guaranteed by Article 14."⁹ But it is unclear what grounds these more expansive rights. Article 9 guarantees freedom of religious exercise, not freedom from insult. Article 14 guarantees nondiscrimination for individual believers, not "respect" for beliefs. The Court's support for blasphemy laws amounts to either a specific but unsupported empirical claim or an amorphous *sui generis* right that is not well-grounded in the jurisprudence of the religion articles.

Protection against incitement must not discriminate against nonbelievers

9. Convention case law suggests that religiously offensive expression must be addressed in a manner that does not constitute discrimination against religious nonbelievers. The Court has affirmed the value of pluralism and religious dissent in *Kokkinakis v Greece*, in which they held

⁴ *Otto-Preminger Institute v Austria* (1994) 19 ENRR 34, E Com HR.

⁵ *Wingrove v The United Kingdom* (1996) 24 EHRR 1, E Ct HR.

⁶ *Ibid.*, para. 47

⁷ Interestingly, the European Commission of Human Rights has ruled that the absence of a blasphemy law (specifically with regard to Islam) does not necessarily result in infringement on the right to religious freedom. See *Choudhury v. United Kingdom* (1991), Application No. 17439/90.

⁸ *Otto-Preminger Institute v Austria*, para. 48.

⁹ *Ibid.*, para. 45.

that the right of Jehovah's Witnesses to manifest their religion entails a right to proselytize.¹⁰ The free interplay of ideas on religious matters may include criticism and even hostility: "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."¹¹

10. The UN Special Rapporteur on freedom of religion or belief has noted that laws protecting religious citizens *qua religious* are inherently discriminatory against atheists, non-theists, and religious skeptics, in that they protect religion as opposed to belief or conscience.¹² The Convention's Article 9 protection against religious discrimination should be understood to preclude any provision against incitement that would extend a protection to believers that is not extended to nonbelievers and religious dissenters.

Interpreting 'incitement': Intent and actual risk of harm

11. The concept of incitement is not clearly defined in international law. ICCPR Article 20(2) includes a criterion of intent, in its focus on *advocacy*. In *Jersild v Denmark*, the European Court considered the Danish government's conviction of a journalist in connection with a television program that broadcast racist statements. The Court found that Denmark had violated the journalist's freedom of expression because the racist remarks appeared in the context of a program intended to educate the public about social and political issues—there was no intent to foment racial hatred.

12. We can also ask what must *result* from speech in order for it to be considered incitement. In one case taken up by the European Court (*Erbakan v. Turkey*), restriction of speech on grounds of incitement required an actual risk of harm or imminent danger for society.¹³ Elsewhere, however, a variety of much weaker tests have been employed; for example, the criterion that offending statements are "of a nature as to raise or strengthen" racial hatred; or such that one can "reasonably anticipate" a causal relationship between the statements and an environment of racial hatred.¹⁴ The problem with these weaker tests is that, absent some showing of actual risk, they do not demonstrate that restrictions on speech are necessary *to protect the rights of others*. So, it seems that the Court's understanding of incitement often exceeds that which would be

¹⁰ *Erbakan v. Turkey*, 6 July 2006, Application No. 59405/00. The Court commented on Article 9 in these words: "freedom of thought, conscience and religion is one of the foundations of a 'democratic society' within the meaning of the Convention. It is, in its religious dimension, one of the most vital elements that go to make up the identity of believers and their conception of life, but it is also a precious asset for atheists, agnostics, skeptics and the unconcerned. The pluralism indissociable from a democratic society, which has been dearly won over the centuries, depends on it." (para. 17).

¹¹ *Otto-Preminger v Austria*, para. 47.

¹² See Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, Ambeyi Ligabo, UN Doc. A/HRC/7/14, 7 March 2008.

¹³ *Erbakan v. Turkey*, 6 July 2006, Application No. 59405/00, para. 68. In the original: "un risque actuel" and "un danger imminent pour la société."

¹⁴ See *Faurisson v. France*, UN Doc. CCPR/C/58/D/550/1993 (1996); *Malcolm Ross v. Canada*. UN Doc. CCPR/C/70/D/736/1997 (2000).

permitted under Article 10(2) of the Convention and Article 19(3) of the ICCPR.¹⁵

A model: The U.K. Racial and Religious Hatred Act of 2006

13. The United Kingdom's Racial and Religious Hatred Act of 2006 provides an example of a more satisfactory resolution of the values of freedom of expression and equality of citizens. After considering but rejecting an earlier draft of the law, which would have criminalized expression that was considered *abusive* or *insulting*, the House of Commons accepted a final version that criminalized only *threatening* expression. It also applied only to acts intended to create hatred, not to mere recklessness. In addition, the Act contains a provision to reinforce freedom of expression:

Nothing in the Part shall be read or given effect in a way which prohibits or restricts discussion, criticism or expressions of antipathy, dislike, ridicule, insult or abuse of particular religions or the beliefs or practices of their adherents, or of any other belief system or the beliefs or practices of its adherents, or proselytizing or urging adherents of a different religion or belief system to cease practicing their religion or belief system.¹⁶

In keeping with its obligations under international law, the U.K. protects its individual citizens—no matter what their religious persuasion—from intentional incitement that places them in danger of harm. Meanwhile, it has repealed its ancient blasphemy law, which for many had become an emblem of religious bias at the heart of the country.

Recommendations

14. To all stakeholders seeking guidance in interpreting incitement in the case of religiously offensive speech, we recommend the following:

- 1) Rather than consulting the European Court's problematic opinions on national blasphemy legislation, draw on the tradition found in *Jersild* and *Erbakan*, which suggests that the following are necessary and jointly sufficient conditions for establishing incitement: (a) intention to encourage discrimination, hostility, or violence; (b) actual risk or imminent danger of harm.
- 2) Ensure that any protection of religious believers against incitement must equally protect nonbelievers who may be the targets of hateful expression on the basis of their disbelief or dissenting belief.
- 3) Stipulate that protections against incitement must not restrict proselytizing, discussion, criticism or expressions of antipathy, dislike, ridicule, insult or abuse.

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¹⁵ Even more far-reaching is the International Convention on the Elimination of all Forms of Racial Discrimination (CERD), which entered into force in 1969. General Assembly Resolution 2106A(XX), 21 December 1965, entered into force 4 January 1969. It not only prohibits incitement to racial discrimination and acts of racially motivated violence, but also the dissemination of ideas based on racial hatred or racial superiority. Many of the states party to CERD have registered their reservations and concerns that CERD is inconsistent with Article 19's guarantee of free expression.

¹⁶ Racial and Religious Act of 2006, S 291.