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United Nations Resolutions on Religious Hate Speech: The Impact on Freedom of Expression

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INTRODUCTION

The right of freedom of expression is enshrined in major international instruments.[1] Freedom of speech is also a cornerstone of the First Amendment to the U.S. Constitution.[2] Other countries on all continents have recognized in their constitutions or in other sources of their national law the right of freedom of expression in one form or another.[3]

However, in terms of practical implementation of the protection of this fundamental right and its balancing with other rights and protections accorded to individuals and groups, there are differences among member states of the United Nations ("UN") which affect the extent to which the United Nations can take an integrated and consistent institutional approach in helping to define the scope and limits of the right of freedom of expression under international law.

This Report shall use as a case study a series of UN resolutions seeking to make "defamation of religions" a violation of international law, together with a resolution adopted by the UN Human Rights Council and subsequently by the UN General Assembly in 2011 entitled "Combating intolerance, negative stereotyping and stigmatization of, and discrimination, incitement to violence and violence against, persons based on religion or belief."[4]

The Report shall discuss evolving international law and norms that seek to define and protect freedom of expression, as affected by different national and cultural standards regarding the interrelationship among freedom of expression, defamation, hate speech, protection of religions and recognition of other core values such as human dignity and equality. The Report will also examine how the evolving international law and norms regarding the balancing of protection of freedom of expression and protection of other individual and group rights comport with the notion of the primacy of freedom of expression under the First Amendment.

The first section will describe a series of United Nations resolutions seeking to make violations of international law first "defamation of religions" and then advocacy of religious hatred that incites imminent violence based on religion or belief. A full listing of these resolutions passed between 1999 and 2013 is set forth in Appendix A. The resolutions fall broadly into two categories – (1) resolutions passed between 1999 and 2010 which explicitly referred in their text to speech characterized as defamation of religions (referred to herein as "Defamation of Religions Resolutions") and (2) resolutions passed beginning in 2011 which deleted references to defamation of religions and focused instead on speech advocating religious hatred or incitement to discrimination, violence or hostility against individuals based on their religion or belief (referred to herein as "Incitement Resolutions").

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[1] See Section II.

[2] U.S. Const. amend. I ("Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."). See Section III E.

[3] See Section III A-D.

[4] See Appendix A for a full listing of these resolutions.

The second section will provide an overview of relevant sources of international law in determining whether the Defamation of Religion Resolutions and Incitement Resolutions are considered binding under international law.

The third section will provide examples of regional and national law on defamation, blasphemy and hate speech outside of the United States and summarize the evolution of First Amendment jurisprudence with respect to freedom of speech, with particular focus on major decisions of the Supreme Court during the last several decades expanding the types of expression that are protected and limiting the exceptions to protection of freedom of expression.

The fourth section will analyze the Incitement Resolution text in detail and analyze whether it can be reconciled with the First Amendment's protection of freedom of expression.

I. Background Description of Relevant UN Resolutions

Where to draw the line between the permissible exercise of freedom of expression and the impermissible abuse of that freedom in a manner that violates the rights of dignity, equality and respect for the beliefs of others is an age-old conundrum. The answer varies among societies and legal systems, with the answer depending on the importance attached to the right of free expression versus protection of other values. For at least the last fifteen years, the United Nations has provided a global platform for trying to achieve consensus around an international norm that places some limits on free expression to protect religious beliefs.

The 57-member state Organization of the Islamic Cooperation ("OIC"), the second largest inter-governmental group in the world after the United Nations, where it has official observer status, has successfully led efforts since 1999 to pass resolutions at the United Nations to address what the OIC considers to be troubling manifestations of religious intolerance in the form of hate speech.[5]

In its first Observatory Report on Islamophobia, issued in 2008 ("OIC 2008 Report"), the OIC articulated its reasoning for having pressed forward with these resolutions. Citing such incidents as the cartoons published in Danish newspapers depicting Prophet Muhammad in what the OIC

[5] OIC Ten-Year Programme of Action to Meet the Challenges Facing the Muslim Ummah in the 21st Century, paragraph VII Combating Islamophobia, http://www.oic-oci.org/ex-summit/english/10-years-plan.htm.
Julia Yael Alfandari, Jo Baker and Regula Amnah Atteya, "Defamation of Religions: International Developments and Challenges on the Ground": SOAS International Human Rights Clinic Project (2011). SOAS School of Law Research Paper No. 09/2011.
U.S. COMM'N ON INT'L RELIGIOUS FREEDOM, ANNUAL REPORT (2013) at 304.
For general background on the OIC, see NGO Law Monitor: Organization of Islamic Cooperation, International Center for Not-for-Profit Law (2012). Available at: http://www.icnl.org/research/monitor/oic.pdf.

considered to be a "defamatory" manner, the OIC s report highlighted, in its words, "the legal implications of Islamophobia."[6]

According to the argument advanced in the OIC 2008 Report, there is an "urgent need for the international community to come up with effective legal instruments to fight this menace." The OIC 2008 Report claimed that "the right to freedom of expression should be concomitantly exercised with its inherent responsibilities and cannot be a license to cause hurt, provoke and incite hatred, or discriminate against Muslims on the basis of their faith by defaming, denigrating, or insulting the sacred religious symbols of Islam and fomenting unrest and violence in societies."[7]

From 1999 through 2010, the United Nations Human Rights Commission (reconstituted as the Human Rights Council since 2006) passed yearly Defamation of Religions Resolutions condemning, and calling for laws to proscribe, "defamation of religions." From 2005 through 2010, the United Nations General Assembly itself, the parent body of the Human Rights Council, passed its own Defamation of Religions Resolutions. No definition of defamation as applied to protection of religions is contained in these resolutions.

The Defamation of Religions Resolution passed by the United Nations Commission on Human Rights in 1999, entitled "Defamation of religions," expressed "deep concern that Islam is frequently and wrongly associated with human rights violations and with terrorism." This resolution also expressed "its concern at any role in which the print, audio-visual or electronic media or any other means is used to incite acts of violence, xenophobia or related intolerance and discrimination towards Islam and any other religion." It urged "all States, within their national legal framework, in conformity with international human rights instruments to take all appropriate measures to combat hatred, discrimination, intolerance and acts of violence, intimidation and coercion motivated by religious intolerance...."[8]

After initially focusing primarily on defamation of Islam in the 1999 resolution, the Defamation of Religion Resolutions, in order to garner more votes, were subsequently drafted by its OIC sponsors to apply more generally to all religions. The resolutions passed each year over the next decade were lengthier, with more references to "defamation."

For example, a decade after the first passage of the Defamation of Religions Resolution by the United Nations Commission on Human Rights, the UN Human Rights Council and the General

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[6] First Observatory Report on Islamophobia, Organization of Islamic Cooperation, 2008. Available online at http://www.oic-oci.org/uploads/file/Islamphobia/islamphobia_rep_may_07_08.pdf. For a perspective by the non-governmental organization Human Rights Watch on the controversial cartoons published in the Danish newspaper Jyllands-Posten on September 30, 2005, including a depiction of Prophet Muhammad with a bomb on his head, see Questions and Answers on the Danish Cartoons and Freedom of Expression, Human Rights Watch, February 15, 2006. Available at: http://www.hrw.org/legacy/english/docs/2006/02/15/denmar12676_txt.htm.

[7] *Id.* at 2. The OIC stated in its report that the term Islamophobia can be defined in its simplest terms as "an irrational or very powerful fear or dislike of Islam" and then added that it "incorporates racial hatred, intolerance, prejudice, discrimination and stereotyping. The phenomenon of Islamophobia in its essence is a religion-based resentment." (p. 8).

[8] United Nations Commission on Human Rights Resolution E/CN.4/RES/1999/82 "Defamation of Religions," April 30, 1999.

Assembly passed very similar resolutions entitled "Combating defamation of religions."[9] The General Assembly's version, Resolution 64/156, typified what the Defamation of Religions Resolutions had developed into over the years.

In one of its introductory clauses, Resolution 64/156 stated that "defamation of religions is a serious affront to human dignity leading to the illicit restriction of the freedom of religion of their adherents and incitement to religious hatred and violence." In another introductory clause, the resolution noted "with concern that defamation of religions, and incitement to religious hatred in general, could lead to social disharmony and violations of human rights, and alarmed at the inaction of some States to combat this burgeoning trend and the resulting discriminatory practices against adherents of certain religions."

Paragraph 5 noted "with deep concern the intensification of the overall campaign of defamation of religions, and incitement to religious hatred in general, including the ethnic and religious profiling of Muslim minorities in the aftermath of the tragic events of 11 September 2001." Paragraph 6 linked the fight against terrorism with "defamation of religions, and incitement to religious hatred in general" which "become aggravating factors that contribute to the denial of fundamental rights and freedoms of members of target groups, as well as to their economic and social exclusion." Paragraph 27 referred to "the correlation between defamation of religions" and "the upsurge in incitement, intolerance and hatred."

In other words, defamation of religions, hate speech and incitement to discrimination, hostility or violence were all conjoined into one unitary whole under the resolution's title "Combating defamation of religions," in order to justify legal restrictions on offensive speech as one means to combat defamation of religions. Thus, in addition to underscoring "the need to combat defamation of religions, and incitement to religious hatred in general by strategizing and harmonizing actions at the local, national, regional and international levels through education and awareness-raising,"[10] the resolution also held up as role models the legislation passed by some member states "to prevent the defamation of religions and the negative stereotyping of religious groups."[11] It reaffirmed a recommendation of the Committee on the Elimination of Racial Discrimination, "in which the Committee stipulated that the prohibition of the dissemination of all ideas based upon racial superiority or hatred is compatible with freedom of opinion and expression, is equally applicable to the question of incitement to religious hatred."[12] And it reaffirmed "the obligation of all States to enact the necessary legislation to prohibit the advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence...."[13]

The textual structure of Resolution 64/156 and similar Defamation of Religions Resolutions lends itself to the interpretation that "defamation of religions," "advocacy of religious hatred," and "dissemination of all ideas" constituting "incitement to religious hatred" as used in the text

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[9] HRC (Human Rights Council) Resolution 10/22 "Combating Defamation of Religions," March 26, 2009; General Assembly Resolution 64/156, "Combating Defamation of Religions," March 8, 2010.
[10] *Id.* at Resolution 64/156 para. 21.
[11] *Id.* at para. 16.
[12] *Id.* at 11.
[13] *Id.* at para. 14.

were all considered essentially one and the same for the purpose of applying restrictions on free expression. The emphasis was not so much on whether violence or discrimination against individuals was incited by advocacy of religious hatred, but rather on the inherently hurtful content of speech deemed offensive (i.e., defamatory) by adherents of a religion which is the subject of the offensive speech. Harmful outcomes such as violence or discrimination against the adherents are presumed to flow automatically from such speech, without the necessity of proof of either the intent of the speaker or writer or the reasonably foreseeable direct causal effects.

By 2009, disaffection with the "defamation of religions" concept was mounting at the United Nations over its ambiguity and over the concern, expressed forcefully by international human rights experts, that attempting to enforce its prohibition could overreach, thereby threatening the established right of free expression.[14]

The tally of votes in support of the Defamation of Religions Resolutions declined to the point that, after combining the negative votes and abstentions, the resolutions in their later years were passed by a plurality rather than an outright majority of votes cast.[15]

In 2011, as a result of a compromise worked out between the OIC and Western democratic nations led by the United States, the UN Human Rights Council shifted course. It dropped explicit references to "defamation of religions" in HRC Resolution 16/18, the first of what this Report refers to collectively as the Incitement Resolutions. This resolution was adopted by consensus on April 12, 2011 by the Human Rights Council.[16]

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[14] For example, see "Freedom of expression and incitement to racial or religious hatred," Joint statement by Mr. Githu Muigai, Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance; Ms. Asma Jahangir, Special Rapporteur on freedom of religion or belief; and Mr. Frank La Rue, Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, OHCHR side event during the Durban Review Conference, Geneva April 22, 2009. The statement declared the Special Rapporteurs' position that "the difficulties in providing an objective definition of the term 'defamation of religions' at the international level make the whole concept open to abuse…the strategic response to hate speech is more speech." See also "Joint Declaration on Defamation of Religions and Anti-Terrorism and Anti-Extremism Legislation," The UN Special Rapporteur on Freedom of Opinion and Expression, the OSCE Representative on Freedom of the Media, the OAS Special Rapporteur on Freedom of Expression and the ACHPR (African Commission on Human and Peoples' Rights) Special Rapporteur on Freedom of Expression and Access to Information, (Dec. 10, 2008) ("The concept of 'defamation of religions' does not accord with international standards regarding defamation, which refer to the protection of reputation of individuals, while religions, like all beliefs, cannot be said to have a reputation of their own. Restrictions on freedom of expression should be limited in scope to the protection of overriding individual rights and social interests, and should never be used to protect particular institutions, or abstract notions, concepts or beliefs, including religious ones.").

[15] For example, at the General Assembly in 2006, 111 member states voted in favor of the Defamation of Religions Resolution while 54 voted against it and 18 abstained. In 2007, 108 states voted for the Defamation of Religions Resolution while 51 voted against it and 25 abstained. In 2008 the voting tally was 85 states voted in favor, 50 states against and 42 states abstaining. In 2009, the margin of votes in favor (80) over the votes against (61) dwindled to 19, with 42 abstaining. See: http://en.wikipedia.org/wiki/Defamation_of_religion_and_the_United_Nations.

[16] "Combating intolerance, negative stereotyping and stigmatization of, and discrimination, incitement to violence and violence against, persons based on religion or belief." Human Right Council ("HRC") Resolution 16/18, April 12, 2011. The Third Committee of the UN General Assembly approved essentially the same text on November 11, 2011. A/C.3/66/L.47/Rev.1. Available at: http://www.un.org/ga/search/view_doc.asp?symbol=A/C.3/66/L.47/Rev.1.

HRC Resolution 16/18 expresses concern about "incidents of religious intolerance, discrimination and related violence, as well as of negative stereotyping of individuals on the basis of religion or belief."[17] The operative provisions of HRC Resolution 16/18, which have been reaffirmed in successive Incitement Resolutions since its original passage, are framed in terms of protecting individuals from incitement to violence, hostility or discrimination based on their religion, rather than protecting any religion per se from the expression of criticism that its adherents may deem offensive. The vague phrase "defamation of religions" was de-coupled completely from the narrower category of speech that this resolution addresses- "advocacy of religious hatred against individuals that constitutes incitement to discrimination, hostility or violence."[18]

Ambassador Ufuk Gokcen, permanent representative of the Organization of Islamic Cooperation to the United Nations, described HRC Resolution 16/18 as "a statement of great international compromise." He noted that the OIC, "which had historically supported anti-defamation legislation, fundamentally changed its position on defamation of religion. We moved away from the anti-defamation language of the previous OIC sponsored resolutions to a clearer acceptance of freedom of expression and focused on upholding the rights of the individuals against discrimination in an effort to foster international cooperation."[19]

There are no specific references in HRC 16/18 to Islam or Muslims, except for noting in paragraph 5 a speech given by the Secretary-General of the Organization of the Islamic Conference at the Human Rights Council and drawing on his "call on States to take" a number of "actions to foster a domestic environment of religious tolerance, peace and respect," including "(A)dopting measures to criminalize incitement to imminent violence based on religion or belief."[20]

Nevertheless, terms used in the resolution such as "advocacy," "religious hatred," "hostility" and "incitement" are susceptible to varying interpretations. Moreover, there are differing views on how best to implement the resolution within individual UN member states and as a norm of international law.

Thus, since the passage of HRC Resolution 16/18, there have been a series of multinational meetings to discuss ways to implement the resolution. These meetings were launched in July 2011 in Istanbul, Turkey, initiated by Ekmeleddin Ihsanoglu, Secretary-General of the OIC, with the participation of then U.S. Secretary of State Hillary Clinton and Catherine Ashton, European Union (EU) Foreign Representative. The series of meetings to discuss implementation became known as the "Istanbul Process."[21]

The first meeting to discuss implementation of HRC Resolution 16/18 in detail including legal and technical workshops, held in December 2011, was hosted by the U.S. State Department in

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[17] *Id.* at para. 2.
[18] *Id.*
[19] Ufuk Gokcen, "The Reality of Freedom of Expression in the Muslim World," HILL (Oct. 19, 2012).
[20] HRC Resolution 16/18, *supra* at para. 5(f).
[21] Turan Kayaoglu & Marie Juul Petersen, "Will Istanbul Process Relieve the Tension Between the Muslim World and the West?": The Washington Review of Turkish & Eurasian Affairs (October 2013).

Washington D.C. It was attended by representatives of twenty-six governments and several international organizations, including the OIC and European Union. Hillary Clinton, in her closing remarks, expressed the United States' strong support for HRC Resolution 16/18 as a way to break out of the divisiveness created by the prior Defamation of Religions Resolutions:

> "Now this year, the international community in the Human Rights Council made an important commitment. And it was really historic, because before then, we had seen the international community pit against one another freedom of religion and freedom of expression. And there were those in the international community who vigorously and passionately defended one but not the other. And our goal in the work that so many nations represented here have been doing, with the adoption of Resolution 1618 and then again last month in the General Assembly's Third Committee, was to say we all can do better. And this resolution marks a step forward in creating a safe global environment for practicing and expressing one's beliefs. In it, we pledge to protect the freedom of religion for all while also protecting freedom of expression. And we enshrined our commitment to tolerance and inclusivity by agreeing to certain concrete steps to combat violence and discrimination based on religion or belief. These steps, we hope, will help foster a climate that respects the human rights of all."[22]

By the time the third meeting was held in Geneva in June 2013, however, the lack of consensus over the meaning of certain terminology used in the resolution in relation to determining the appropriate boundary between permissible expression of ideas and "advocacy" of "religious "hatred" constituting "incitement" to violence began to show.

As reported by Elizabeth Cassidy, the Deputy Director for Policy and Research at the U.S. Commission on International Religious Freedom who attended this meeting as an observer, the meeting "focused less on practical implementation and more on arguments over banning offensive speech as 'incitement.'"[23]

Ambassador Michael G. Kozak, Acting Principal Deputy Assistant Secretary for Democracy, Human Rights and Labor, who represented the United States at the third Istanbul Process meeting in Geneva said that "I feel compelled to express disappointment that much of the debate we have had here on 'incitement' was essentially the same debate we have witnessed during the years before 16/18 was passed, involving the same parties and many of the same individuals....The narrative in terms reminiscent of the Cold War pits 'the West' against 'the rest.' Religious intolerance throughout the world is attributed to the failure of the West to either endorse or enforce more sweeping criminal prohibitions on speech."[24]

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[22] "Report of the United States on the First Meeting of Experts to Promote Implementation of United Nations Human Rights Council Resolution 16/18" (December 2011). Available at: http://www.humanrights.gov/wp-content/uploads/2012/04/1618FirstMeetingReport.pdf.

[23] Elizabeth Cassidy, "Fighting Religious Hatred While Protecting Free Speech," Georgetown Journal of International Affairs, (December 12, 2013).

[24] Statement by Ambassador Michael G. Kozak, Acting Principal Deputy Assistant Secretary for Democracy, Human Rights and Labor Istanbul Process For Combating Intolerance, Discrimination and Incitement to Hatred

Thus, serious questions remain unresolved on how to implement HRC Resolution 16/18's provisions in deciding when speech critical of a religion, including speech deemed to constitute "advocacy" of "religious hatred," crosses over the line into actionable incitement to bad acts such as violence or discrimination against adherents of the targeted religion. Nevertheless, the participants in the Istanbul Process plan to continue their dialogue.

II. Sources of Legal Authority under International Law for Assessing Binding Effect of the UN Defamation of Religions and Incitement Resolutions

This section surveys the main international legal instruments and other sources of international law which set forth the right to freedom of expression.

The Statute of the International Court of Justice, annexed to and made part of the Charter of the United Nations ("UN Charter") lists four sources of international law:[25]

> "a. international conventions, whether general or particular, establishing rules expressly recognized by the contesting states;
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> b. international custom, as evidence of a general practice accepted as law;
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> c. the general principles of law recognized by civilized nations;
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> d. subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law."

"International conventions" is a term that is used interchangeably with formal written treaties or agreements between or among states.[26] "Customary international law," as opposed to such formal legal instruments, "results from a general and consistent practice of states that they follow from a sense of legal obligation."[27]

This Report will focus on international conventions and customary international law, as they are likely to be the most applicable for the purpose of determining whether the Defamation of Religions Resolutions and Incitement Resolutions passed by the UN General Assembly and UN Human Rights Council have any binding legal effect as sources of international law. The judgments and opinions of relevant expert UN human rights committees or individuals, examples

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and/or Violence on the Basis of Religion or Belief (Geneva, June 21, 2013). Available at: http://geneva.usmission.gov/2013/07/09/statement-by-the-u-s-on-the-way-forward-with-the-istanbul-process-2/.

[25] Statute of the International Court of Justice. 3 Bevans 1179; 59 Stat. 1031; T.S. 993; 39 AJIL Supp. 215 (1945), Article 38 (1).

[26] Vienna Convention on the Law of Treaties ("Vienna Convention"), opened for signature May 23, 1969, Art. 2, U.N. Doc. A/CONF.39/27 (1969). See also, https://www.law.umaryland.edu/marshall/researchguides/tmllguide/chapter11.pdf.

[27] Restatement 3rd, Restatement of the Foreign Relations Law of the United States. ("Restatement") Section 102(2) and reporters' note 2. American Law Institute Publishers (1987)

of which will also be reviewed in this Report, constitute secondary evidence indicating "what the law has been found to be by authoritative reporters and interpreters."[28]

A. International Conventions

(1) *United Nations Charter*

International conventions are a primary source of international law for the states that are parties to them. An international agreement that operates as a constitution or charter of an international organization, such as the United Nations Charter, can provide the legal basis for the international organization it governs to exercise the powers conferred by such constitution or charter. In the case of the power conferred by the applicable constitution or charter "to impose binding obligations on their members by resolution, usually by qualified majorities," the Restatement explains, the "resolutions so adopted by the organization can be seen as 'secondary sources' of international law for its members."[29]

Thus, for example, the United Nations Security Council is vested with enforcement powers under Chapter VII of the United Nations Charter to "take such action by air, sea, or land forces as may be necessary to maintain or restore international peace and security....The action required to carry out the decisions of the Security Council for the maintenance of international peace and security shall be taken by all the Members of the United Nations or by some of them, as the Security Council may determine."[30] Resolutions adopted by the Security Council under its Chapter VII authority "have the effect of law for members" of the United Nations.[31]

On the other hand, the United Nations General Assembly has more limited powers under the UN Charter. It is authorized to "discuss any questions or any matters within the scope of the present Charter or relating to the powers and functions of any organs provided for in the present Charter" and to "make recommendations to the Members of the United Nations or to the Security Council or to both on any such questions or matters."[32]

Specifically, in the area of the development of international law and human rights, the UN Charter delegates to the General Assembly the responsibility to "initiate studies and make recommendations for the purpose of: a. promoting international co-operation in the political field and encouraging the progressive development of international law and its codification; b. promoting international co-operation in the economic, social, cultural, educational, and health

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[28] Id. at Section 103(2) comment a.
[29] *Id.* at Section 102 comment g.
[30] United Nations, Charter of the United Nations ("UN Charter"), October 24, 1945, 1 UNTS XVI. Chapter VII, Articles 42, 48 (1). See also Chapter V, Article 25 (The Members of the United Nations agree to accept and carry out the decisions of the Security Council in accordance with the present Charter.").
[31] Restatement *supra*, Section 102, reporters' note 3.
[32] UN Charter, *supra* Chapter IV, Article 10.

fields, and assisting in the realization of human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion."[33]

In sum, the United Nations Charter grants the General Assembly the authority to discuss a broad range of issues and make recommendations, whether in the form of resolutions or otherwise. However, there is nothing in the United Nations Charter itself that expressly grants the General Assembly any power that would render its resolutions, declarations or decisions relating to economic, social, cultural, education, health or human rights matters, or in the development of international law generally, legally binding or enforceable. The limited authority that the General Assembly does have to impose any binding obligations on the member states of the United Nations relates to the determination of the budget and the dues assessed on each member state.[34]

The UN Human Rights Council was created by the UN General Assembly "in replacement of the Commission on Human Rights, as a subsidiary organ of the General Assembly" on March 15, 2006 pursuant to UN General Assembly Resolution 60/251.[35] As a subsidiary body of the General Assembly, the Human Rights Council's authority is derived from its parent body, which, as described above, the United Nations Charter does not explicitly empower to pass legally binding resolutions.

Thus, the Defamation of Religions Resolutions and Incitement Resolutions do not derive a legally binding status based directly on a grant of authority under the UN Charter to the General Assembly or its subsidiary bodies to impose binding obligations on the member states by means of such resolutions.

(2) *Universal Declaration of Human Rights*[36]

Primary freedom of expression related provisions:

> Article 19:
> "Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers."

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[33] *Id.* at Chapter IV, Article 13 (1).
[34] *Id.* at Chapter IV, Article 17.
[35] UN General Assembly, Human Rights Council: resolution / adopted by the General Assembly, April 3, 2006, A/RES/60/251. Available at: http://www.refworld.org/docid/4537814814.html.
[36] Universal Declaration of Human Rights, Dec. 10, 1948, G.A. Res. 217 a (II), UN Doc. A/8 10 (1948) ("Universal Declaration"). Available at: http://www.un.org/en/documents/udhr/ . The Universal Declaration is not strictly binding on member states of the UN as a covenant, treaty or convention because it is technically a General Assembly resolution. However, as discussed in the next subsection, it derives its authority from having become a part of customary international law. It is included in this subsection because it is regarded as foundational to the legally binding covenant and convention that are discussed immediately thereafter.

Article 29 (2):
"(2) In the exercise of his rights and freedoms, everyone shall be subject only to such limitations as are determined by law solely for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society."

Primary freedom of religion related provision:

Article 18:
"Everyone has the right to freedom of thought, conscience and religion..."

(3) *International Covenant on Civil and Political Rights ("ICCPR")*[37]

Primary freedom of expression related provisions:

Article 19:
"1. Everyone shall have the right to hold opinions without interference.
2. Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.
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."

Article 20:
"1. Any propaganda for war shall be prohibited by law.

2. Any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law."

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[37] International Covenant on Civil and Political Rights, U.N.G.A. Res. 2200A (XXI), Dec. 16, 1966, 21 UN GAOR Supp. (No. 16) at 52, UN Doc. A16316 (1966), 999 U.N.T.S. 171, entered into force March 23, 1976 ("ICCPR"). As of December 2013, 167 countries have ratified the ICCPR, the vast majority of the 193 member states of the United Nations. The United States became a State Party in 1992 but included a reservation with its submission indicating that the U.S. does not view the ICCPR's relevant provisions limiting the scope of free expression as authorizing or requiring "legislation or other action by the United States that would restrict the right of free speech And association protected by the Constitution and laws of the United States." Available at: https://treaties.un.org/pages/viewdetails.aspx?src=treaty&mtdsg_no=iv-4&chapter=4&lang=en#EndDec

Primary freedom of religion related provision:

Article 18:
"1. Everyone shall have the right to freedom of thought, conscience and religion…"

(4) *International Convention on the Elimination of All Forms of Racial Discrimination ("ICERD")*[38]

Primary freedom of expression related provisions:

Article 4:
"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, 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;

(b) Shall declare illegal and prohibit organizations, and also organized and all other propaganda activities, which promote and incite racial discrimination, and shall recognize participation in such organizations or activities as an offence punishable by law…"

Article 5:

"In compliance with the fundamental obligations laid down in article 2 of this Convention, States Parties undertake to prohibit and to eliminate racial discrimination in all its forms and to guarantee the right of everyone, without

[38] Convention on the Elimination of All Forms of Racial Discrimination (Dec. 21, 1965, 660 U.N.T.S. 195). This is an example of other international human rights treaties that contain provisions circumscribing the right of free expression under certain circumstances, although they do not explicitly refer to advocacy of religious hatred as potentially one such circumstance. Another is the Convention on the Prevention and Punishment of the Crime of Genocide (Dec. 9, 1948, 78 U.N.T.S. 277, Article 3): "The following acts shall be punishable…(c) Direct and public incitement to commit genocide."

distinction as to race, colour, or national or ethnic origin, to equality before the law, notably in the enjoyment of the following rights:

(d) Other civil rights, in particular:

(vii) The right to freedom of thought, conscience and religion;[39]

(viii) The right to freedom of opinion and expression"

Note that advocacy of hatred is specifically required by the ICCPR to trigger a possible prohibition of freedom of expression, while not so in the ICERD, where the operative trigger is "dissemination." Both the ICCPR and the ICERD prohibit incitement to discrimination and violence (the ICCPR also includes incitement to "hostility"). However, they diverge in that the ICCPR requires prohibition only of advocacy of national, racial or religious hatred that constitutes incitement of the proscribed consequences, while the ICERD not only prohibits incitement but also any dissemination of "ideas based on racial superiority or hatred" irrespective of whether it incites anything. Whereas the ICCPR refers specifically to "religious hatred" in the section dealing with prohibition of incitement, the ICERD does not include religious hatred within the ambit of its prohibitions.

For the purposes of this Report, the International Covenant on Civil and Political Rights is the international agreement having the most direct bearing on defining the parameters of the right of free expression in relation to hate speech involving religions, particularly Article 20(2) which calls out advocacy of "religious hatred."[40] ICERD deals with racial hatred, but does not extend explicitly to religious hatred.

Article 19(2) of the ICCPR sets forth the fundamental protection of free expression: "Everyone shall have the right to freedom of expression." However, this is not an absolute right. Article 19(3) qualifies Article 19(2), allowing for restrictions that are both provided by law and are necessary for "respect of the rights or reputations of others" and for "the protection of national security or of public order (ordre public), or of public health or morals."[41]

Article 19(3) by its own terms limits permissible restrictions on the fundamental right of free expression to only those that are "provided by law" and are "necessary" to achieve the objectives specified in subsections (a) and (b).

Article 20(2) of the ICCPR links advocacy of "national, racial or religious hatred" to "incitement" of specific conduct that harms individuals. It imposes a duty on states to prohibit advocacy of hatred that meets the incitement threshold. However, Article 20(2) does not provide grounds for states to impose legal limitations on speech critical or mocking of religions unless

[39] Article V (d) (vii) is one of only two references to "religion" in ICERD. The other reference is in the preamble.
[40] Evelyn M. Assad, "To Ban or Not to Ban Blasphemous Videos," 44 GEO. J. INT'L L. 1313, 1317 (2013). ("Article 20(2) is the most frequently cited provision for justifying bans on speech that offends religious beliefs.").
[41] International Covenant on Civil and Political Rights, supra Article 19(2) and (3).

the speech rises to the level of "advocacy" of racial hatred that incites "discrimination, hostility, or violence."[42]

The UN Human Rights Committee, the body of independent experts charged with the responsibility to monitor the implementation of the ICCPR and make recommendations, has attempted to reconcile the duty of states under Article 20(2) to prohibit hate speech that leads to incitement to violence, hostility or discrimination with the requirement in Article 19(3) that any state-imposed limitation on the right of free expression must be "necessary" to achieve its legitimate purpose.[43] The Human Rights Committee construed the "necessary" criterion to mean that the limitation on free expression must be "the least intrusive instrument amongst those which might achieve the protective function and the limitations and consequences must be proportionate to the interest being protected."[44] In order to avoid any possible inconsistency in trying to comply with the two provisions, a state should only ban hate speech under Article 20(2) when there is no other reasonable alternative to preventing incitement of the type of harmful conduct that Article 20(2) is intended to address.[45]

ICCPR Article 19(3) does allow for restrictions on free expression that are "necessary" for "respect of the rights or reputations of others" or for protection of national security, public order, health or morals. However, banning speech considered to be "defamation" of a religion in order to protect the sensibilities of a particular religion's followers would appear to go beyond what is "necessary," since there is the lesser restrictive alternative of promoting religious tolerance through education, sensitivity training, inter-faith dialogue and the like. Moreover, protecting the rights and reputation of "others" implies that the objects of protection are persons individually or as constituting a community.[46] The Defamation of Religions Resolutions are designed primarily to protect religions and religious beliefs per se from offensive speech, not the reputation of persons that defamation law normally protects.

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[42] *Id.* at Article 20(2).

[43] UN Human Rights Committee., General Comment No. 34 UN Doc. CCPR/C/GC/34 (Sept. 12, 2011). The comments of the Human Rights Committee are not legally binding on the State Parties but represent secondary evidence of current views of the applicable international law by the UN body institutionally responsible for monitoring the application of the ICCPR. Thus, its recommendations carry significant weight in the general interpretations of the ICCPR's provisions, as do its decisions in specific cases brought before it, which are discussed *infra*. General Comment 34 is available at: http://www2.ohchr.org/english/bodies/hrc/docs/gc34.pdf. An explanation of the work of the Human Rights Committee is available at http://www.ohchr.org/Documents/Publications/FactSheet15rev.1en.pdf.

[44] *Id.* at para. 29.

[45] *Id.* at para. 50 ("Articles 19 and 20 are compatible with and complement each other. The acts that are Addressed in article 20 are all subject to restriction pursuant to article 19, paragraph 3. As such a limitation that is justified on the basis of Article 20 must also comply with article 19, paragraph 3…Prohibitions of displays of lack of respect for a religion or other belief system, including blasphemy laws, are incompatible with the Covenant, except in the specific circumstances envisaged in article 20, paragraph 2, of the Covenant. Such prohibitions must also comply with the strict requirements of article 19, paragraph 3…Nor would it be permissible for such prohibitions to be used to prevent or punish criticism of religious Leaders or commentary on religious doctrine and tenets of faith.").

[46] *Malcolm Ross v. Canada*, CCPR/C/70/D/736/1997. UN Human Rights Committee (October 26, 2000) at para. 11.5. Available at: http://www.refworld.org/docid/3f588efc0.html.

Proponents of anti-blasphemy and defamation of religions laws in their own countries cite the maintenance of public order (which is included as an exception to the right of free expression in ICCPR Article 19(3)) to justify their own laws and the legal restrictions on speech called for in the Defamation of Religions Resolutions.[47] Without such restrictions, so the argument goes, reprisals from those who are offended may lead to violence, endangering people's lives. However, this justification would effectively risk, in the words of an international law journal article, "turning the public order exception into a violent rioter's veto under human rights law, which would empower those who react with violence and punish those who express their unpopular views."[48] The "public morals" provision of ICCPR Article 19(3) is also an insufficient basis for justifying prohibitions of speech deemed disrespectful of religions because, among other things, it is subject to abuse by those with the power to apply their own notions of morality selectively.[49]

Thus, the Defamation of Religions Resolutions, to the extent that they call for banning speech deemed insulting to religious beliefs, do not appear to satisfy the conditions set forth in Section 19(3) of the ICCPR for invoking restrictions on freedom of expression.

On the other hand, the specific language of ICCPR Article 20(2) is mirrored in the Incitement Resolutions, beginning with HRC Resolution 16/18, which "condemns any advocacy of religious hatred that constitutes incitement to discrimination, hostility or violence." The critical issue is how to interpret and apply the incitement provisions of HRC Resolution 16/18 in the context of determining when advocacy of religious hate is deemed to go too far and should be banned pursuant to ICCPR Article 20(2). What distinguishes actionable advocacy of religious hate that incites harmful conduct from offensive speech that sharply criticizes or mocks a religion but does not advocate hatred against the followers of that religion? This Report will address these issues in the section analyzing HRC Resolution 16/18, *infra*.

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[47] Ina Parlini, The Jakarta Post, "Constitutional Court rejects blasphemy review request" (September 20, 2013. Available at: http://www.thejakartapost.com/news/2013/09/20/constitutional-court-rejects-blasphemy-review-request.html. UN Human Rights Council Press Release (March 27, 2008). Available at: http://www.unhchr.ch/huricane/huricane.nsf/0/FBACCEB04BC0A595C125741A002E96F9?opendocument. ("BILAL HAYEE (Pakistan), speaking on behalf of the Organization of the Islamic Conference (OIC) members of the Council and introducing the draft resolution, said that this was an annual initiative by the OIC, and it was built on previous resolutions. The resolution highlighted the impact of religious stereotyping on the enjoyment on human rights. It noted that the defamation of religion caused social disruption.").

[48] Evelyn M. Assad, Rashad Hussain, and M. Arsenal Suleiman, "Why the United States Cannot Agree to Disagree on Blasphemy Laws," Boston University International Law Journal (Vol. 32:119 2014) at 142. This Report will examine the concept of "heckler's veto" in the context of U.S. First Amendment jurisprudence, *infra*.

[49] UN Human Rights Comm., General Comment No. 34, supra ("the concept of morals derives from many social, philosophical and religious traditions; consequently limitations . . . for the purpose of protecting morals must be based on principles not deriving exclusively from a single tradition. Any such limitation must be understood in the light of universality of human rights and the principle of non-discrimination.").

B. Customary Law

The traditional definition of "customary law" set forth in the Restatement reflects two critical characteristics: (1) a general and consistent practice followed by all, or nearly all, states, (2) which they do out of a sense of legal obligation (opinio juris), which means that the states believe themselves legally bound to follow the practice.[50] A state which persistently objects to a particular requirement of customary international law is generally exempt from it,[51] unless the requirement reaches the level of status of a jus cogens norm, defined by the Vienna Convention as "a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character."[52]

Determining the intention of states as to whether they view a practice as something they follow out of a sense of legal obligation is a factual exercise that may rely on evidence such as official documents and other indications of government action on matters relating to the practice at issue. Being a party to a relevant treaty or supporting resolutions of international organizations that pronounce what those voting for the resolution believe the law to be are examples of such actions.[53]

The Restatement notes that the "United Nations General Assembly in particular has adopted resolutions, declarations, and other statements of principles that in some circumstances contribute to the process of making customary law, insofar as statements and votes of governments are kinds of state practice…and may be expressions of *opinio juris*."[54]

After stating that the significance of such contributions to "the lawmaking process will differ widely," the Restatement proceeds to list a number of factors that are relevant to this determination. Such factors include "the subject of the resolution, whether it purports to reflect legal principles, how large a majority it commands and how numerous and important are the dissenting states, whether it is widely supported (including in particular the states principally affected), and whether it is later confirmed by other practice."[55]

Certain General Assembly resolutions in the form of declarations of fundamental principles, such as the Universal Declaration of Human Rights quoted from in the previous subsection,[56] may

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[50] Restatement *supra*, Section 102(2) and comments b and c. See also, *The Piquet Habana*, 175 U.S. 677, 700 (1900) ("International law is part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction as often as questions of right depending upon it are duly presented for their determination. For this purpose, where there is no treaty and no controlling executive or legislative act or judicial decision, resort must be had to the customs and usages of civilized nations and, as evidence of these, to the works of jurists and commentators who by years of labor, research, and experience have made themselves peculiarly well acquainted with the subjects of which they treat. Such works are resorted to by judicial tribunals not for the speculations of their authors concerning what the law ought to be, but for trustworthy evidence of what the law really is.").

[51] *Id.*at Section 102 comment d.

[52] Vienna Convention, *supra* Article 53.

[53] Restatement *supra*, Section 102 reporters' note 2, Section 103 comments a and c.

[54] *Id.* at Section 102 reporter's note 2.

[55] *Id.*

[56] Universal Declaration of Human Rights, *supra.*

carry additional weight as the basis for the development of customary international law.[57] Furthermore, the Universal Declaration is cited in the legally binding International Covenant on Civil and Political Rights.[58] This citation arguably adds further weight to the Universal Declaration's elevation to customary law status by in effect codifying the Universal Declaration's fundamental principles in the widely accepted ICCPR.[59]

The Defamation of Religions Resolutions and Incitement Resolutions, however, were not passed as declarations of fundamental principles on par with the Universal Declaration and, therefore, would not on that basis alone carry any additional weight in developing a new norm of customary international law with respect to their subject matter.

Another way in which some UN General Assembly resolutions that do not rise to the level of the Universal Declaration may nevertheless evolve into constituting new norms of customary international law is by their repeated passage over a significant period of time by consensus or overwhelming majorities and their consistent application in the practices of many member states.[60] Even then, however, the Restatement explains that such a norm may not be binding on dissenting states that indicated their dissent while the norm was being developed. Moreover, according to the Restatement: "Failure of a significant number of important states to adopt a practice can prevent a principle from becoming general customary law though it might become 'particular customary law' for the participating states."[61]

The Defamation of Religions Resolutions, although passed cumulatively over a period of decade, were not consistently passed with overwhelming majorities. In fact, support for these resolutions declined over time. For example, General Assembly Resolution 64/156 (dated March 8, 2010, but actually passed on December 18, 2009) received 80 votes in favor to 61 against and 42 abstentions. Among the major countries voting against this resolution were the United States, United Kingdom, France, Germany, Italy, Norway, Sweden, Spain, Australia, New Zealand, Mexico, and Chile. The abstentions included Argentina, Brazil, India and Japan.[62] Under these circumstances, annual passage of the Defamation of Religions Resolutions, though cumulative, did not meet the test over time of being consistently voted for by overwhelming majorities. Coupled with the fact that there is no universal consistency among the member states in applying defamation laws in practice to protection of religions from offensive speech in their own legal systems,[63] such division of opinion regarding the Defamation of Religions Resolutions would tend to undermine the status of these resolutions as expressions of customary international law.

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[57] Restatement, *supra* Section 103 comment c and reporter's note 2. See also *Filartiga v. Pena-Irala*, 630 F.2d 876, 883 (2d Cir. 1980).

[58] International Covenant on Civil and Political Rights, *supra*.

[59] Restatement, *supra* Section 102 comment I and reporters' note 5. *Cf,* Filartiga v. Pena-Irala, *supra* at 883-84.

[60] Advisory Opinion on Western Sahara, ICJ Reports 12 (1975) ("Advisory Opinion") at 121 (separate opinion of Dillard, L.).

[61] Restatement, *supra* Section 102 comments b. See also comments c and d and reporters' note 2.

[62] See: http://www.un.org/News/Press/docs/2009/ga10905.doc.htm.

[63] UN High Commissioner for Human Rights, Report on the Implementation of Human Rights Council Resolution 7/19 Entitled: "Combating Defamation of Religions," UN Doc. A/HRC/9/7 (Sept. 12, 2008) at para. 67 ("Some countries have specific laws against the defamation of religion. Of the countries that reported on such laws, there does not appear to be a common understanding of what is considered defamation of

In any event, the Defamation Resolutions have been superseded, at least for now, by the passage of HRC Resolution 16/18, which eliminated any references to "defamation of religions." Unlike the divisive Defamation of Religions Resolutions, HRC Resolution 16/18 was adopted by consensus.[64] However, as noted earlier, attempts to reach consensus among the UN member states over determining the appropriate boundary between permissible expression of ideas and "advocacy" of "religious hatred" that constitutes "incitement" to violence have so far proved to be unavailing.

C. Secondary Evidence of International Law

(1) UN Human Rights Committee Recommendations and Decisions

The role of the UN Human Rights Committee in providing its general comments interpreting provisions of the ICCPR has been discussed previously, with reference to the interrelationship of Articles 19(3) and 20(2) of the ICCPR.

In addition, the Human Rights Committee has written opinions on specific cases. There are few specific decisions reached by the Human Rights Committee that deal with the interrelationship of Articles 19(3) and 20(2) of the ICCPR in a particular factual setting. Nevertheless, a couple of cases in which the Human Rights Committee gave its views, which it can do for State parties that have agreed to the Optional Protocol to the International Covenant on Civil and Political Rights, are instructive.[65]

Ross v. Canada dealt with a teacher who lost his teaching position because of public expressions of anti-Semitism, including in books and media interviews.[66] No criminal penalties were involved. The Human Rights Committee stated that "[R]estrictions on expression which may fall within the scope of Article 20 must also be permissible under Article 19, paragraph 3, which lays down requirements for determining whether restrictions on expression are permissible."[67] The Committee found that there was no violation of Article 19's protection of the right of free

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religion. The reported laws address somewhat different phenomena and apply various terms such as contempt, ridicule, outrage and disrespect to connote defamation.") Available at: http://webcache.googleusercontent.com/search?q=cache:2-pv6qterdwJ:www2.ohchr.org/english/bodies/hrcouncil/docs/9session/A.HRC.9.7.doc+&cd=2&hl=en&ct=clnk&gl=us.

[64] A chart prepared by Freedom House contrasts the consensus vote on HRC Resolution 16/18 versus the divisive votes on previous Defamation of Religions Resolutions at the UN Human Rights Council. http://www.freedomhouse.org/sites/default/files/DOR%20Vote%20Tracker.pdf.

[65] Optional Protocol to the International Covenant on Civil and Political Rights (Adopted and opened for signature, ratification and accession by General Assembly resolution 2200A (XXI) of 16 December 1966 entry into force 23 March 1976. Under Article 5 of the Optional Protocol, the Committee can receive complaints from individuals claiming to be victims of violations of any of the rights set forth in the ICCPR under the conditions specified in Article 5, and provide its views as to the appropriate outcome of the dispute. It should be noted that the decisions of the Human Rights Committee are not legally binding on the State Parties but do serve as an authoritative source for guidance in interpreting the contemporary meaning of the ICCPR. Available at: http://www.ohchr.org/EN/ProfessionalInterest/Pages/OPCCPR1.aspx.

[66] *Ross v. Canada*, CCPR/C/70/D/736/1997, 26 October 2000

[67] *Id.* at para. 10.6.

expression: "In the circumstances, the Committee recalls that the exercise of the right to freedom of expression carries with it special duties and responsibilities. These special duties and responsibilities are of particular relevance within the school system, especially with regard to the teaching of young students…In that context, the removal of the author from a teaching position can be considered a restriction necessary to protect the right and freedom of Jewish children to have a school system free from bias, prejudice and intolerance."[68]

In the case of *Shin v. Republic of Korea*, the Human Rights Committee did find a violation of ICCPR Article 19 where the state party, the Republic of Korea, brought criminal charges against a painter and confiscated his painting on the grounds that the painting constituted an "enemy-benefiting expression" that threatened national security.[69] The Committee concluded that the State party failed to adequately "demonstrate in specific fashion the precise nature of the threat to any of the enumerated purposes caused by the author's conduct, as well as why seizure of the painting and the author's conviction were necessary."[70]

(2) Special Rapporteurs

Special Rapporteurs are independent experts appointed by the UN Human Rights Council who study and prepare reports on thematic topics such as the right to freedom expression and freedom of religion. They also may be appointed to study and report on human rights in a particular country. Two Special Rapporteurs relevant to this Report are the Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression and the Special Rapporteur on Freedom of Religion or Belief.

In 1993, the United Nations Commission on Human Rights (replaced by the Human Rights Council) established the mandate of the Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression to, *inter alia*, "gather all relevant information, wherever it may occur, relating to violations of the right to freedom of opinion and expression, discrimination against, threats or use of violence, harassment, persecution or intimidation directed at persons seeking to exercise or to promote the exercise of the right to freedom of opinion and expression, including, as a matter of high priority, against journalists or other professionals in the field of information…and (c) To make recommendations and provide suggestions on ways and means to better promote and protect the right to freedom of opinion and expression in all its manifestations…."[71]

By way of example, in his 2012 report, the Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression, Frank La Rue, made the following recommendations:

"77. The Special Rapporteur urges States to conduct constitutional and legal

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[68] *Id.* at para. 11.6.
[69] *Shin v. Republic of Korea*, CCPR/C/80/D/926/2000 (2004).
[70] *Id.* at para. 7.3.
[71] http://www.ohchr.org/EN/ISSUES/FREEDOMOPINION/Pages/OpinionIndex.aspx. Special Rapporteurs are independent experts appointed by the UN Human Rights Council to study and provide their informed analyses and recommendations on various themes within the jurisdiction of the Human Rights Council.

reviews to ensure that domestic law on hate speech complies with the three-part test stipulated in article 19 (3) of the International Covenant on Civil and Political Rights, namely that: the restriction must be provided by law, which is clear and accessible to everyone; it must be proven as necessary and legitimate to protect the rights or reputation of others; national security or public order, public health or morals; and it must be proven as the least restrictive and proportionate means to achieve the purported aim. Any breach of those principles should be subject to review by an independent court or tribunal.

78. Given that blasphemy laws do not comply with the above-mentioned criteria, the Special Rapporteur urges States to repeal them and to replace them with laws protecting individuals' right to freedom of religion or belief in accordance with international human rights standards…

79. To prevent any abusive use of hate speech laws, the Special Rapporteur recommends that only serious and extreme instances of incitement to hatred be prohibited as criminal offences. The Special Rapporteur thus calls upon States to establish high and robust thresholds, including the following elements: severity, intent, content, extent, likelihood or probability of harm occurring, imminence and context. Such examination must be performed on an ad hoc basis, taking context into consideration."[72]

The Special Rapporteur on freedom of religion and belief is tasked by the Human Rights Council to "identify existing and emerging obstacles to the enjoyment of the right to freedom of religion or belief and present recommendations on ways and means to overcome such obstacles."[73]

In his 2013 report, the Special Rapporteur on freedom of religion and belief, Heiner Bielefeldt, stated as follows:

"54. Sentiments expressing hatred can escalate into real acts of discrimination, hostility or violence. This often happens as a result of deliberate incitement to such acts. The question of how States and other stakeholders should prevent, or react to, incidents motivated by hatred has attracted the increased attention of the international community. It seems obvious that States have to tackle this problem by developing effective preventive and coping strategies. In extreme situations this may also include restrictive measures, such as prohibiting certain speech acts. However, when resorting to prohibitions and other restrictive measures, States should always make sure that this does not have a chilling effect on people's willingness to communicate freely and frankly, including on controversial religious issues. Any limitations to freedom of expression or

[72] Report of the Special Rapporteur on Promotion and Protection of the Right to Freedom of Opinion and Expression, A/67/357 (2012). Available at: http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N12/501/25/PDF/N1250125.pdf?OpenElement.

[73] http://www.ohchr.org/EN/Issues/FreedomReligion/Pages/FreedomReligionIndex.aspx.

other human rights deemed necessary in this respect must comply with all the criteria laid down in respective international human rights standards."[74]

Mr. Bielefeldt's report referred to an initiative known as the Rabat Plan of Action[75] on the prohibition of advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence, which the UN Office of the United Nations High Commissioner for Human Rights ("OHCHR") organized. Its purpose was to deal, among other things, with issues arising from the interdependence between freedom of religion or belief and freedom of expression.

The lead up to the Rabat Plan of Action document consisted of a series of high-level expert workshops, which met during 2011 and 2012 in Vienna, Nairobi, Bangkok, Santiago and Rabat. The workshops included the participation of three UN Special Rapporteurs — on Freedom of Opinion and Expression, Freedom of Religion or Belief, and Racism, Racial Discrimination, Xenophobia and Related Intolerance — as well as 45 experts from different cultural backgrounds and legal traditions. They examined legislation, jurisprudence, existing international law and national policies in the course of their work.

As Mr. Bielefeldt, who participated in the Rabat Plan of Action initiative, explained in his own report:

> "The Rabat Plan of Action places great emphasis on the need to uphold a climate of free communication and public discourse based on freedom of expression, freedom of religion or belief and various other freedoms. It establishes a high threshold for imposing limitations on freedom of expression, for identifying incitement to hatred and for the application of article 20 of the International Covenant on Civil and Political Rights… the Rabat Plan of Action presents a six-part test for assessing whether concrete acts of speech that are aggressive or antagonistic to certain religious or ethnic groups actually amount to 'incitement to discrimination, hostility or violence' and are serious enough to warrant prohibitive measures. The six test questions concern: (a) the social and political context; (b) the speaker, for example his or her status and influence; (c) the intent of a speech act, as opposed to mere negligence; (d) its content or form, for example style or degree of provocation; (e) the extent of the speech, for example its public nature and the size of its audience; and (f) the likelihood and imminence of actually causing harm."[76]

This Report will return to the Rabat Plan of Action in the course of analyzing HRC Resolution 16/18, *infra*. For present purposes, the Rabat Plan of Action affirms the UN Human Rights Committee's conclusion that anti-blasphemy laws – an antecedent of the Defamation of Religions Resolutions – are generally incompatible with the ICCPR and that banning criticism of religious doctrine and tenets of faith impermissibly restricts freedom of expression.

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[74] Report of the Special Rapporteur on Freedom of Religion or Belief, A/HRC/25/58 (2013). Available at: http://www.refworld.org/docid/52fa0dce4.html.

[75] Rabat Plan of Action on the prohibition of advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence (2012). Available at: http://www.ohchr.org/Documents/Issues/Opinion/SeminarRabat/Rabat_draft_outcome.pdf.

[76] Report of the Special Rapporteur on Freedom of Religion or Belief, *supra* at para. 58.

A joint statement by the Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance, Special Rapporteur on Freedom of Religion or Belief, and Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression stated their concern about the vagueness of the "defamation of religions" concept, which the Special Rapporteurs said could be subject to abuse.[77] And in another joint statement by the UN Special Rapporteur on Freedom of Opinion and Expression and three regional representatives or rapporteurs on freedom of expression (European, Organization of American States, and African Commission on Human and Peoples' Rights), these international human rights experts concluded that "(T)he concept of 'defamation of religions' does not accord with international standards regarding defamation, which refer to the protection of reputation of individuals, while religions, like all beliefs, cannot be said to have a reputation of their own."[78]

In sum, the call in the Defamation of Religions Resolutions for legislation to prevent the defamation of religions and the negative stereotyping of religious groups not only lacks any binding force under the UN Charter or customary international law. It is also inconsistent with the standards of the ICCPR or other relevant international law applicable to protection of the right of free expression, according to the body of independent experts charged with the responsibility to monitor the implementation of the ICCPR and other international human rights experts.

Whether HRC 16/18 is ultimately successful in changing the focus of restricting freedom of expression from preventing defamation of religions to perhaps the more solid legal ground of preventing incitement to violence on account of religious belief, will depend on overcoming differences of opinion among UN member states on how to define and implement the language they agreed to in the resolution. These differences arise from the differences in treatment of freedom of expression versus other rights and values in regional and national laws, to which this Report now turns.

III. Examples of Treatment of Freedom of Expression in Regional and National Laws

This section provides illustrative examples of regional and national laws across a spectrum ranging from strict enforcement of anti-blasphemy and defamation of religion laws at one end to the primacy of free expression in the United States at the other end, with Europe, Australia and Canada in between as they weigh free expression with competing values on a case by case basis.

A. Anti-Blasphemy and Defamation of Religion Laws in India and OIC Countries

This brief survey begins with the countries that still enforce anti-blasphemy and defamation of religion laws vigorously. These countries are primarily, but not exclusively, members of the Organization of Islamic Cooperation.

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[77] "Freedom of expression and incitement to racial or religious hatred" Joint statement, *supra*.

[78] "Joint Declaration on Defamation of Religions and Anti-Terrorism and Anti-Extremism Legislation," *supra* (see fn. 11).

Anti-blasphemy laws may best be characterized as attempts to criminalize statements that call into doubt the "truth" or societal value of a religion. These laws generally criminalize challenges to the orthodoxy behind the official state religion. A recent Pew Foundation study found that anti-blasphemy laws are particularly common in the Middle East and North Africa; 13 of the 20 countries in that region (65%) make blasphemy a crime. In the Asia-Pacific region, nine of the 50 countries (18%) had anti-blasphemy laws in 2011, while in Europe such laws were found in eight out of 45 countries (18%).[79]

The root distinction in many of these statutes is that they seek to establish an official religion, thus, conversion or apostasy are similarly criminalized: In 2011, a total of 20 countries across the globe prohibited apostasy (abandoning one's faith, including by converting to another religion). Such measures were in effect in more than half the countries in the Middle East-North Africa region (11 of 20, or 55%) as well as in five of the 50 countries in the Asia-Pacific region (10%) and four of the 48 countries in sub-Saharan Africa (8%). According to this study, laws against apostasy were not present in any country in Europe or the Americas.[80]

Similar to anti-blasphemy laws, defamation of religion laws criminalize the "insulting" of a religion, its practices or of its personages. The Pew study related that laws against defamation of religion were "far more common worldwide than laws against blasphemy and apostasy" and that as of 2011, 87 countries (44%) had a law, rule or policy at some level of government forbidding defamation of religion or hate speech against members of religious groups.[81]

A recent highly publicized episode of the conflict between such laws and free expression occurred in India. It involved the matter of author Wendy Doniger, a professor at the University of Chicago's divinity school, and her 2009 book, "The Hindus: An Alternative History."

When Penguin Press attempted to import the book into India in 2011, it was met with a firestorm of publicity[82] and a complaint filed by a group called Shiksha Bachao Andolan (The "Save Education Movement") claiming that the book "hurts people's religious sentiments."[83] The complaint (India allows a private right of action in criminal matters) was based on Section 295-a of the Indian Penal Code, which states in relevant part that:

> "Whoever, with deliberate and malicious intention of outraging the religious feelings of any class of citizens of India, by words, either spoken or written, or by signs or by visible representations or otherwise insults or attempts to insult the religion or the religious

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[79] Laws Penalizing Blasphemy, Apostasy and Defamation of Religion are Widespread." Available at: http://www.pewforum.org/2012/11/21/laws-penalizing-blasphemy-apostasy-and-defamation-of-religion-are-widespread/.

[80] *Id.*

[81] *Id.*

[82] Hamish McDonald, "Pulp friction threatens India's free speech." The Canberra Times (March 10, 2014). Available at: http://www.canberratimes.com.au/comment/pulp-friction-threatens-indias-free-speech-20140309-34fkm.html.

[83] Swati Sharma , "Right or wrong, Wendy Doniger's 'The Hindus' should be published." The Washington Post (February 20, 2014). Available at: http://www.washingtonpost.com/blogs/post-partisan/wp/2014/02/20/right-or-wrong-wendy-donigers-the-hindus-should-be-published/.

beliefs of that class, shall be punished with imprisonment of either description for a term which may extend to three years, or with fine, or with both."[84]

On February 10, 2014, Penguin agreed in district court in Delhi to settle the case and recall the book, according to Penguin's solicitor, Monika Arora.[85]

OIC countries commonly have laws prohibiting blasphemy and/or religious defamation. The following is a summary of the pertinent laws in a number of these countries.

(1) Bahrain

Bahrain's religious defamation law prescribes punishment for a period not exceeding one year or a fine not exceeding BD (Bahraini Dinar) 100 to be inflicted upon any person who commits an offence by any method of expression against one of the recognized religious communities or ridicules the rituals thereof.[86]

(2) Indonesia

Article 156 a of Indonesia's penal code punishes an individuals who "deliberately in public gives expression to feelings or commits an act" which principally has "the character of being at enimity (sic) with, abusing or staining a religion, adhered to in Indonesia" with up to five years in prison.[87]

(3) Jordan

The Constitution, in Article 14, provides for the freedom to practice religion in accordance with the customs that are observed in the Kingdom, unless they violate public order or morality. According to the constitution, the state religion is Islam, and conversion from Islam and efforts to proselytize to Muslims are prohibited. The penal code makes insulting Islam, the Prophet Muhammad, or a Muslim's feelings, a crime punishable by up to three years in prison.[88]

(4) Kuwait

Kuwait's constitution makes Islam the state religion, and Sharia a primary source of legislation.[89] The 1961 Press and Publications Law prohibits the publication of any material that "attacks

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[84] http://indiankanoon.org/doc/1803184/.

[85] "Penguin Books India pulps academic book on Hinduism in legal settlement." Reuters (February 12, 2014). Available at: http://www.theguardian.com/world/2014/feb/11/penguin-books-india-pulps-academic-book-hinduism-doniger.

[86] Bahrain Penal Code (Article 309). Available at: http://www.vertic.org/media/National%20Legislation/Bahrain/BH_Criminal_Code.pdf.

[87] Penal Code of Indonesia, Article 156 a. See www.humanrights.asia/.../indonesia/law.

[88] http://www.representatives.jo/pdf/constitution_en.pdf.

[89] Constitution of Kuwait (Article 2). Available at: http://www.servat.unibe.ch/icl/ku00000_.html.

religion or incites people to commit crimes, or spread hatred and dissension."[90] The laws also provide that any Muslim citizen may file criminal charges against an author if the citizen believes that the author has defamed Islam, the ruling family, or public morals.[91]

(5) Pakistan

Chapter XV of the Penal Code contains several sections regarding blasphemy. Article 295 outlaws "deliberate and malicious acts intended to outrage religious feelings of any class by insulting its religion or religious beliefs"; the use of "derogatory remarks" in respect of Muhammad; and punishes "deliberately intending to wound another person's religious feelings."[92]

(6) Saudi Arabia

Islam is the official religion of the Kingdom of Saudi Arabia and "[C]itizens are to pay allegiance to the King in accordance with the holy Koran and the tradition of the Prophet, in submission and obedience, in times of ease and difficulty, fortune and adversity."[93] "The state protects human rights in accordance with the Islamic Shari'ah."[94] "Information, publication, and all other media shall employ courteous language" and "acts that foster sedition or division or harm the state's security and its public relations or detract from man's dignity and rights shall be prohibited."[95]

(7) Malaysia

The Malaysian Constitution provides that "Islam is the religion of the Federation; but other religions may be practiced in peace and harmony in any part of the Federation."[96] Article 10(1) provides that "every citizen has the right to freedom of speech and expression" but subject to restrictions imposed by Parliament to prevent "defamation, or incitement to any offense."[97]

Malaysia's Criminal Code states in (amended) Section 298 (re "uttering words, etc., with deliberate intent to wound the religious feelings"):

> "Whoever, with deliberate intention of wounding the religious or racial feelings of any person utters any word or makes any sound in the hearing of that person, or makes any gesture in the sight of that person, or places any object in the sight of that person, shall be

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[90] "*International Religious Freedom Report,*" United States Department of State (2004). Available at: http://www.state.gov/j/drl/rls/irf/2004/35501.htm.
[91] *Id.*
[92] "Policing Belief: The Impact of Blasphemy Laws On Human Rights," Freedom House (2011). Available at: http://expression.freedomhouse.org/reports/blasphemy_report/.
[93] Constitution of Saudi Arabia (Articles 1 and 6). Available at: http://www.servat.unibe.ch/icl/sa00000_.html .
[94] Id. (Article 26).
[95] Id. (Article 39).
[96] Federal Constitution of Malaysia, Article 3(1). Available at: http://www.jac.gov.my/images/stories/akta/federalconstitution.pdf .
[97] *Id.* at Article 10(1) (a) and (2).

punished with [...] for a term which may extend to three years, or with fine, or with both."[98]

Section 298A in regard to promotion of enmity between different groups on ground of religion or race, that a person who:

> "a) by words, either spoken or written, or by signs or by visible representations or otherwise, promotes or attempts to promote, on grounds of religión or race, disharmony, disunity, or feelings of enmity, hatred or ill will between different religious or racial groups or communities; or
>
> b) commits any act which is prejudicial to the maintenance of harmony between different religious or racial groups or communities, and which disturbs or is likely to disturb the public tranquility, and which disturbs or is likely to disturb the public tranquility,
> shall be punished with imprisonment which may extend to three years, or with fine, or with both"[99]

B. Europe

Member States of the European Union each maintain their own civil and criminal libel laws, but by Treaty of Rome (1950), those laws must be applied in accordance with The Convention for the Protection of Human Rights and Fundamental Freedoms ("ECHR").[100]

The ECHR gives significant weight to reputational interests by dint of assigning a near-constitutional interest in personal honor and dignity. Article 10, Section 2 of the European Convention on Human Rights and Fundamental Freedoms states that:

> "The exercise of [freedom of speech], since it carries with it duties and responsibilities, 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 the rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary."[101]

In the same breath that establishes a right to freedom of expression, Article 8 of the European Convention on Human Rights provides a right to respect for one's "private and family life, his

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[98] Malaysia: Penal Code, Act No. 574 of 1997 (Section 298). Available at: http://www.refworld.org/docid/3ae6b5cf0.html .

[99] *Id.* at Section 298A.

[100] European Convention for the Protection of Human Rights and Fundamental Freedoms, ETS 5 (November 4, 1950). Available at: http://www.echr.coe.int/Documents/Convention_ENG.pdf .

[101] I*d.* at Article 10 (2). See also Stijn Smet, "The Right to Reputation under the European Convention on Human Rights," Strasbourg Observers, (November 1, 2010). Available at: http://strasbourgobservers.com/2010/11/01/the-right-to-reputation-under-the-european-convention-on-human-rights/ .

home and his correspondence." Although this sounds like a privacy interest, the ECHR has been increasingly conflating harm to reputation and privacy.[102]

Interest in protecting free expression is often met with the countervailing interest protecting individual dignitary rights. In the case of *Print Zeitungsverlag GmbH v Austria*,[103] for example, the European Court of Human Rights discussed the need to strike "a fair balance when protecting two values guaranteed by the Convention which may come into conflict with each other in certain cases, namely freedom of expression protected by Article 10, and the right to respect for private life enshrined in Article 8."[104] It upheld a claim against a newspaper that had published the full text of a letter that raised questions on the reputation of two local politicians on the basis that the public interest in the dissemination of information about politicians well-known in the circulation area of the newspaper did not outweigh the claimants' rights to reputation under Article 8.

There are some variations among European nations themselves in applying defamation, libel and privacy law in limiting free expression where injury to persons' reputations or privacy interests are concerned.

Under Spanish law, for example, defamatory meaning is broad, and libel is most often defined as "an illegitimate intrusion in someone's right of honor."[105]

The Italian Supreme Court of Cassation found that referring to the president of the Italian chamber of deputies as "a young ignorant" or describing an individual "as having the glance of a hired killer" or suggesting that a television journalist "advanced or career because of political connections" were all insulting, and damaged the honor and integrity of the claimants.[106]

Section 140 of the Danish Criminal Code prohibits disturbing public order by publicly ridiculing or insulting the dogmas of worship of any lawfully existing religious community in Denmark.[107] Under Section 266 b(1) of the Danish Criminal Code "any person who, publicly or with the intention of wider dissemination, makes a statement or imparts other information by which a

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[102] See, *e.g.,* two cases dealing with the balancing of Articles 8 and 10: *Axel Springer v Germany* (2012) ECHR 227 (2012) (violation of Article 10 of the ECHR) and *Von Hannover v. Germany* (No. 2) ECHR 228 (2012) (no violation of Article 8 of the ECHR). See also Hugh Tomlinson, "Privacy and Defamation, Strasbourg blurs the boundaries," QC. Available at: http://inforrm.wordpress.com/2014/01/23/privacy-and-defamation-strasbourg-blurs-the-boundaries-hugh-tomlinson-qc/.

[103] *Print Zeitungsverlag GmbH v Austria*, ECHR 943 (October 10, 2013). But see *Ungváry and Irodalom Kft v. Hungary*, ECHR 1229 (October 29, 2013). The case involved a challenge to a newspaper article alleging that a judge had during the Communist era worked as an official contact of the state security services, had written reports for them, and also advocated hardline policies. In this case, the Court came down on the side of the newspaper, concluding that "journalistic freedom covers possible recourse to a degree of exaggeration or even provocation." (para. 43) However, the Court also cautioned against crossing the tabloid line with overly sensationalist stories that did not advance the public interest.

[104] *Print Zeitungsverlag*, *supra* at para. 31.

[105] Organic law 1/1982, of May 5, right of honor and privacy.

[106] See, Charles Glasser, ed.,International Libel and Privacy Handbook, (Third Ed.), Charles Glasser, ed., John Wiley & Sons (2013) at p. 386, "Italy" collecting cases.

[107] Geoff Holland, "Drawing the Line - Balancing Religious Vilification Laws and Freedom of Speech," UTS Law Review 8 (2006): 9-20. Available at: http://epress.lib.uts.edu.au/research/bitstream/handle/10453/6537/2006006061.pdf?sequence=1 .

group of people are threatened, scorned or degraded on account of their race, colour, national or ethnic origin, religion, or sexual inclination shall be liable to a fine or to imprisonment for any term not exceeding two years."[108]

Despite these two criminal provisions dealing with offensive religious speech, the Danish Director of Public Prosecutions decided in 2006 not to prosecute the newspaper Jyllands Posten for publishing the article "The Face of Muhammad," which included 12 drawings of the Prophet Muhammad that caused an uproar in the Muslim world. He concluded that protection of the right of free expression was too important to subject the expression at issue to criminal prosecution.[109]

Section 130 of Germany's Penal Code (Agitation of the People) imposes criminal penalties on a person who, in a manner that is capable of disturbing the public peace, incites hatred against segments of the population or calls for violent or arbitrary measures against them, or assaults the human dignity of others by insulting, maliciously maligning, or defaming segments of the population.[110]

Section 188 of Austria's Penal Code criminalizes speech that "is likely to arouse justified indignation, disparages or insults a person who, or object which, is an object of veneration of a church or religious community established within the country, or a dogma, a lawful custom or a lawful institution of such a church or religious community."[111]

At the other end of the spectrum, in January 2014 the British Parliament passed the 2013 Defamation Act which radically rewrote United Kingdom law regarding free expression to provide more protection for this right.[112]

No cases have been adjudicated under the Defamation Act as of yet, but the provisions in this legislation promise to bring British law much more in line with American media law than any other European nation. The changes under the Defamation Act are wide ranging. Section 1 of the Act redefines "harm" regarding corporate claimants, who will now have to plead and prove that the statement "has caused or is likely to cause the body serious financial loss."

The Defamation Act also allows "substantial truth" as a defense,[113] and creates a statutory defense for "Honest Opinion."[114] In what may be the most meaningful change, Section 4 of the

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[108] *Id.*

[109] http://merlin.obs.coe.int/iris/2006/8/article105.en.html .

[110] German Criminal Code (Strafgesetzbuch, StGB), Section 130. Available at: http://www.iuscomp.org/gla/statutes/StGB.htm#130 .

[111] "CASE OF OTTO-PREMINGER-INSTITUT V. AUSTRIA, App. No(s). 13470/87, September 20, 1994, para. 28 (quoting Austrian Penal Code, Section 188). Available at: http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-57897. In this case, which was brought to the European Court of Human Rights by a non-for-profit organization interested in creative arts that wanted to show films deemed disparaging of the Catholic religion, the European Court found no incompatibility between the application of Austria's Penal Code and Article 10 of the ECHR. The opinion stated: "The Court cannot disregard the fact that the Roman Catholic religion is the religion of the overwhelming majority of Tyroleans. 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... No violation of Article 10 (art. 10) can therefore be found as far as the seizure is concerned." (para. 56)

[112] Available at: http://www.legislation.gov.uk/ukpga/2013/26/pdfs/ukpga_20130026_en.pdf .

Defamation Act also creates a "public interest" privilege wherein the court will decide whether it was "reasonable for the defendant to believe that publishing the statement was in the public interest" and even to "disregard any omission of the defendant to take steps to verify the truth of the imputation conveyed."[115]

In sum, European countries, with the possible exception of the United Kingdom since its passage of the Defamation Act, take pains to balance the right of freedom of expression with equally important rights of reputation or privacy. This is because, broadly speaking, the rights of reputation and privacy are part of the dignitary rights established at both the national level and as a right enforceable under the ECHR.

When hate speech is involved, the scales tip more heavily towards protecting those victimized by the hate speech than helping protect the right of free expression rights, except here too the United Kingdom appears to balance the two protections more equally as described *infra*.

As the European Court of Human Rights explained in its factsheet,[116] while there is "no universally accepted definition of the expression 'hate speech,'" the European Court has endeavored to establish in its case law "certain parameters making it possible to characterise 'hate speech' in order to exclude it from the protection afforded to freedom of expression" in Article 10 of the ECHR. It does so by either applying Article 17 of the ECHR (prohibition of abuse of rights)[117] or by applying the limitations provided for in the second paragraph of Article 10 and Article 11 of the ECHR.[118]

The European Court of Human Rights has protected the right of individuals to express their views freely, which includes the right to "offend, shock or disturb" others. [119] It has also applied the same necessary test in its application of restrictions on free expression permitted in Article 10(2) of the ECHR as the UN Human Rights Committee did in its analysis of Articles 19 and 20 of the ICCPR. For example, in *Lingens v. Austria*, the European Court construed the term "necessary" as meaning that there must be a "pressing social need" for the restriction, which

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[113] *Id.* at Section 2(1).
[114] *Id.* at Section 3.
[115] *Id.* at Section 4(1), 4(3) and 4(4).
[116] Factsheet - Hate speech, European Court of Human Rights ("Factsheet"). Available at: http://www.echr.coe.int/Documents/FS_Hate_speech_ENG.pdf .
[117] As explained in footnote 3 of the Factsheet: "This provision is aimed at preventing persons from inferring from the Convention [i.e., the ECHR] any right to engage in activities or perform acts aimed at the destruction of any of the rights and freedoms set forth in the Convention."
[118] As explained in footnote 4 of the Factsheet: "Restrictions deemed necessary in the interests of national security, public safety, the prevention of disorder or crime, the protection of health or morals and the protection of the rights and freedoms of others." This carve out from the right of free expression is very similar to the one found in Article 19(3) of the ICCPR.
[119] *Handyside v. the United Kingdom*, ECHR 5 (December 7, 1976) at para. 49. See also Günduz v. Turkey, Application Number 35071/97 (December 14, 2003) at para. 48, 52-53. (Although the European Court stated that "there can be no doubt that concrete expressions constituting hate speech, which may be insulting to particular individuals or groups, are not protected by Article 10 of the Convention," the Court found in this case that strong condemnations of democratic secular institutions and praising Islamic sharia law as the only valid basis for governance "cannot be construed as a call to violence or as hate speech based on religious intolerance," and, therefore, is protected by Article 10.)

must be "proportionate to the legitimate aim pursued" and supported by a justification that the Court finds to be "relevant and sufficient."[120]

In the case of *Lehideux and Isorni v. France*, the European Court applied this test, concluding that it was not necessary for the preservation social order to apply criminal penalties against certain individuals associated with an ad, published in the daily newspaper *Le Monde*, praising the Nazi collaborator Marshal Pétain.[121]

Nevertheless, the European Court has placed restrictions on free expression in cases involving religious hate speech. For example, in the case of *Pavel Ivanov v. Russia*,[122] the European Court did not extend the protection of Article 10 of the ECHR to a series of articles portraying Jews as the source of evil in Russia.[123] In *Norwood v. the United Kingdom*,[124] involving the display of a poster representing the Twin Towers in flame, accompanied by the words "Islam out of Britain – Protect the British People," the European Court concluded that this expression of hostility towards Muslims was not protected expression under Article 10 of the ECHR.[125] The result is consistent with the European Court's decision in the *Otto-Preminger-Institut* case discussed previously.[126]

The European Court of Human Rights even lumped together the notion of group defamation and hate speech in a decision agreeing with a French court ruling that denial of the Holocaust did not deserve protection as a legitimate exercise of the right of free expression. In the case of *Garaudy v. France*,[127] the European Court concluded:

> "There can be no doubt that denying the reality of clearly established historical facts, such as the Holocaust, as the applicant does in his book, does not constitute historical research akin to a quest for the truth. The aim and the result of that approach are

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[120] *Lingens v. Austria*, Application Number 9815/82 (July 8, 1986) at paras. 39-40.

[121] *Lehideux and Isorni v. France*, Application Number 24662/94(September 23, 1998). ("The adjective 'necessary', within the meaning of Article 10 § 2, implies the existence of a 'pressing social need'. The Contracting States have a certain margin of appreciation in assessing whether such a need exists, but it goes hand in hand with European supervision, embracing both the legislation and the decisions applying it, even those given by an independent court. The Court is therefore empowered to give the final ruling on whether a 'restriction' is reconcilable with freedom of expression as protected by Article 10… the Court considers the applicants' criminal conviction disproportionate and, as such, unnecessary in a democratic society. There has therefore been a breach of Article 10.").

[122] *Pavel Ivanov v. Russia*, Application No. 35222/04 (February 20, 2007).

[123] Id. at para. 1 ("The Court has no doubt as to the markedly anti-Semitic tenor of the applicant's views and it agrees with the assessment made by the domestic courts that he sought through his publications to incite hatred towards the Jewish people. Such a general and vehement attack on one ethnic group is in contradiction with the Convention's underlying values, notably tolerance, social peace and non-discrimination. Consequently, the Court finds that, by reason of Article 17 of the Convention, the applicant may not benefit from the protection afforded by Article 10 of the Convention.")

[124] *Norwood v. the United Kingdom*, Application No. 23131/03 (November 16, 2004).

[125] *Id.* ("Such a general, vehement attack against a religious group, linking the group as a whole with a grave act of terrorism, is incompatible with the values proclaimed and guaranteed by the Convention, notably tolerance, social peace and non-discrimination.").

[126] *Otto-Preminger-Institut v. Austria, supra.*

[127] *Garaudy v. France*, Application Number 65831/01 (June 24, 2003). See also *Marais v. France*, Application Number 31159/96 (June 24, 1996) (article in a periodical aimed at demonstrating the scientific implausibility of the "alleged gassings" held not entitled to ECHR Article 10 protection).

> completely different, the real purpose being to rehabilitate the National-Socialist regime and, as a consequence, accuse the victims themselves of falsifying history. Denying crimes against humanity is therefore one of the most serious forms of racial defamation of Jews and of incitement to hatred of them. The denial or rewriting of this type of historical fact undermines the values on which the fight against racism and anti-Semitism are based and constitutes a serious threat to public order. Such acts are incompatible with democracy and human rights because they infringe the rights of others. Their proponents indisputably have designs that fall into the category of aims prohibited by Article 17 of the Convention."[128]

The Parliamentary Assembly of the Council of Europe[129] adopted a resolution in 2006 summarizing the attempt to balance the right of free expression and protection of individuals against religious hatred at the European law level:

> "Attacks on individuals on grounds of their religion or race cannot be permitted but blasphemy laws should not be used to curtail freedom of expression and thought…The Assembly is of the opinion that freedom of expression as protected under Article 10 of the European Convention on Human Rights should not be further restricted to meet increasing sensitivities of certain religious groups. At the same time, the Assembly emphasises that hate speech against any religious group is not compatible with the fundamental rights and freedoms guaranteed by the European Convention on Human Rights and the case law of the European Court of Human Rights."[130]

The Parliamentary Assembly noted that in reaching the correct balance, there are some differences in approach at the national level "when regulating freedom of expression in relation to matters liable to offend intimate personal moral convictions or religion. What is likely to cause substantial offence to persons of a particular religious persuasion will vary significantly from time to time and from place to place."[131]

With respect to national legislation on religious insults and inciting religious hatred, approximately half of the European member states of the Council of Europe have laws imposing criminal penalties for religious insults.[132] According to the Venice Council Report,

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[128] *Id.* at para. 1.

[129] According to its website, "The Council of Europe is the continent's leading human rights organisation. It includes 47 member states, 28 of which are members of the European Union. All Council of Europe member states have signed up to the European Convention on Human Rights, a treaty designed to protect human rights, democracy and the rule of law." Available at: http://www.coe.int/aboutCOe/index.asp .

[130] Parliamentary Assembly, Resolution 1510 (2006) at paras. 3 and 12. Available at: http://assembly.coe.int/Mainf.asp?link=/Documents/AdoptedText/ta06/ERES1510.htm#1 .

[131] *Id.* at para. 11.

[132] Report On The Relationship Between Freedom Of Expression And Freedom Of Religion: The Issue Of Regulation And Prosecution Of Blasphemy, Religious Insult And Incitement To Religious Hatred, European Commission For Democracy Through Law ("Venice Commission") (2008) at para. 27. The countries listed in the Venice Commission report are Andorra, Cyprus, Croatia, the Czech Republic, Denmark, Spain, Finland, Germany,13 Greece, Iceland,
Italy, Lithuania, Norway, the Netherlands, Poland, Portugal, Rùssian Federation, Slovak Republic, Switzerland, Turkey and Ukraine. Available at: http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2008)026-e .

"(N)egationism, in the sense of public denial of historical facts or genocide with a racial aim, is an offence in a few countries (Austria, Belgium, France, Switzerland). In other countries such as Germany, certain activity amounting to negationism may come within the definition of the offence of incitement to hatred."[133]

Public incitement to hatred itself is an offense in virtually all Council of Europe member states, although in a number of states such as Austria, Cyprus, Greece, Italy and Portugal "the law punishes incitement to acts likely to create discrimination or violence, not to mere hatred."[134] Proof of intent to incite hatred is not required in most states, although some do require a showing of at least recklessness or awareness of the likelihood that the words used could be viewed as threatening or insulting, or likely to arouse hatred.[135]

As was the case with the United Kingdom's Defamation Law, its legislation regarding religious hate speech is fairly nuanced. Its law addressing hate speech, entitled "The Racial and Religious Hatred Act 2006,"[136] defined "religious hatred" as "hatred against a group of persons defined by reference to religious belief or lack of religious belief" and stated that a person is guilty of an offense if he or she uses "threatening words or behaviour, or displays any written material which is threatening" and "intends thereby to stir up religious hatred."[137] In addition, "[A] person who publishes or distributes written material which is threatening is guilty of an offence if he intends thereby to stir up religious hatred."[138] However, this is all qualified in a clause entitled "Protection of freedom of expression":

> "Nothing in this 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 proselytising or urging adherents of a different religion or belief system to cease practising their religion or belief system."[139]

C. Australia

While the Australian Constitution does not itself expressly address the protection of freedom of expression, the High Court of Australia held there was an implied right at least with regard to discussion of political and public affairs.[140]

At the federal level, Australian law focuses on prohibiting racial or ethnic hate speech, with no explicit reference to hate speech based on religion or belief.[141] Nevertheless, in the federal court

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[133] *Id.* at para. 30. Blasphemy is an offense in only a few states and is rarely prosecuted (see paras. 24 and 26.
[134] *Id.* at para. 33. See also para. 36.
[135] *Id.* at para. 39.
[136] http://www.legislation.gov.uk/ukpga/2006/1/pdfs/ukpga_20060001_en.pdf .
[137] *Id.* at Part 3A, 29 B (1).
[138] *Id.* at 29 C (1).
[139] *Id.* at 29 J.
[140] *Nationwide News Pty Ltd v. Wills* (1992) 66 ALJR 658 (political insults case) and *Australia Capital Television Pty Ltd v. The Commonwealth* (1992) 66 ALJR 695 (political broadcast and advertising case).

case of *Jones v. Toven*,[142] the court treated postings on the Internet attacking Jewish people as equivalent to ethnic hate speech. The complaint alleged, among other things, that the home page contained a denial of the Nazi genocide of the Jews and blamed Jews for the crimes of Stalin.

The Australian court concluded: "In my view, it is abundantly clear that race was a factor in the respondent's decision to publish the material set out in [81] above. The material includes many references to Jews and events and people characterised as Jewish. It is particularly concerned with the Holocaust and with the conduct of German forces during World War II, matters of particular importance to Jewish people. It is, in my view, plainly calculated to convey a message about Jewish people." As remedies, the court required the removal of the offensive material from the websites controlled by the offending party.[143]

Some individual states within Australia have vilification laws that extend expressly to religious hate speech as well as racial hate speech.[144] Section 8(1) of Victoria's Racial and Religious Tolerance Act, for example, provides: "A person must not, on the ground of the religious belief or activity of another person or class of persons, engage in conduct that incites hatred against, serious contempt for, or revulsion or severe ridicule of, that other person or class of persons."[145] There are carve-outs from this prohibition for conduct involving "an artistic performance or work" or serving a "genuine academic, artistic, religious or scientific purpose."[146] While cases invoking this law have been readily dismissed, the Islamic Council of Victoria succeeded in persuading the Victorian Civil and Administrative Tribunal that alleged criticism of Islam launched by an evangelical Christian church amounted to unlawful religious vilification.[147] However, after the Victorian Court of Appeal set aside this tribunal's finding and remanded the case to another tribunal venue,[148] the parties settled the case.

The Victorian Court of Appeals opinion provides some instructive insights into the interpretation of a law purporting to protect people against incitement of religious hatred. The court defined "incite" as including "inchoate or preliminary conduct, whether or not it causes the kind of third party response it is calculated to encourage." However, with respect to what should constitute actionable religious vilification, the court concluded that it should not include simply "statements which are critical or destructive of religious beliefs" or statements that "may offend or insult" members of a religious group. There has to be an audience receptive to the emotional reaction that the writer or speaker is trying to incite, based on a reasonable person test. Statements published generally in the media or on a website reach "all manner of persons who are likely to see them and absorb them" - too general and dispersed in nature to establish a significant enough

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[141] Racial Discrimination Act 1975 (Section 18C). Available at: http://www.austlii.edu.au/au/legis/cth/consol_act/rda1975202/s18c.html.

[142] *Jones v Toben*, [2002] FCA 1150, Federal Court of Australia at para. 99. Available at: http://www.austlii.edu.au/au/cases/cth/federal_ct/2002/1150.html .

[143] *Id.* at para. 99.

[144] https://www.humanrights.gov.au/publications/racial-vilification-law-australia .

[145] Racial and Religious Tolerance Act 2001 (VIC), Section 8.

[146] *Id.* at Section 11.

[147] *Islamic Council of Victoria v. Catch The Fire Ministries Inc.*, Victorian Civil and Administrative Tribunal Human Rights Division, Member Higgins V-P, VCAT REFERENCE NO. A392/2002.

[148] *Catch the Fire Ministries Inc & Ors v Islamic Council of Victoria Inc.*, Supreme Court of Victoria Court of Appeal (2006). Available at: http://netk.net.au/FreedomOfSpeech/Fire1.asp .

connection by the speaker or writer with a select audience to incite. The emotional effect on the Muslims in the audience who felt they were being insulted by allegedly inaccurate pastor statements concerning Muslim religious beliefs is not the determinative factor in deciding whether actionable incitement has occurred in this case. "The concentration needed to be upon the members of the audience who were not Muslims," the court opinion stated. "What demanded to be assessed was whether the effect of the injunctions to love and to witness to Muslims was sufficient to prevent hatred or other relevant emotion by the non-Muslims towards Muslims."[149]

D. Canada

The Canadian Charter of Rights and Freedoms ("Charter") sets forth the guarantee of certain fundamental rights and freedoms, including, "freedom of conscience and religion" (Section 2(a)) and "freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication" (Section 2 (b)).[150] Section 1 of the Charter allows the guarantee of such fundamental rights and freedoms to be "subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society."

Section 15(1) of the Charter states the principle of equality: "Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability." Section 15(2) explicitly permits affirmative action laws or programs to help "disadvantaged individuals or groups" including those that are disadvantaged because of religion. Section 27 refers to the importance of Canada's multicultural tradition: "This Charter shall be interpreted in a manner consistent with the preservation and enhancement of the multicultural heritage of Canadians."

Section 26 of the Charter states the principle of equality of all rights and freedoms as exist in Canada: "The guarantee in this Charter of certain rights and freedoms shall not be construed as denying the existence of any other rights or freedoms that exist in Canada."

When read together, Sections 15 and 26 and 27 of the Charter can be interpreted as implying that individual dignity and equality, support for the disadvantaged including on the basis of religion, and harmony within the context of Canada's multicultural society are considered core rights that are not subordinate to rights and freedoms explicitly guaranteed in the Charter such as freedom of expression. Moreover, pursuant to Section 1, reasonable limits can be imposed on certain guaranteed rights set forth in the Charter to protect the overall "free and democratic society" of Canada.

Section 319(1) of the Canadian Criminal Code prescribes a punishment of possible imprisonment for a term not exceeding two years for anyone who publicly "incites hatred against any identifiable group where such incitement is likely to lead to a breach of the peace."[151] Section

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[149] *Id.*

[150] Canadian Charter of Rights and Freedoms. Available at: http://laws-lois.justice.gc.ca/eng/const/page-15.html#docCont .

[151] Canada Criminal Code (R.S.C., 1985, c. C-46) (Section 319). Available at: http://laws-lois.justice.gc.ca/eng/acts/C-46/ .

319(2) sets forth a separate criminal offense of wilful promotion of hatred, which also carries a potential jail sentence not exceeding two years.

Section 319(3) includes statutory defenses to the charge of wilful promotion of hatred. Section 319(3) provides that an accused person is not guilty of a violation of Section 319(2) (the wilful promotion of hatred subsection): (a) if the person establishes that the statements communicated were true; (b) if, in good faith, the person expressed or attempted to establish by an argument an opinion on a religious subject or an opinion based on a belief in a religious text; (c) if the statements were relevant to any subject of public interest, the discussion of which was for the public benefit, and if on reasonable grounds he believed them to be true; or (d) if, in good faith, the person intended to point out, for the purpose of removal, matters producing or tending to produce feelings of hatred toward an identifiable group in Canada.[152]

Canada's Supreme Court has upheld the constitutionality of Section 319(2).[153] Notably, the court examined U.S. First Amendment precedents involving hate speech but determined that "Canada and the United States are not alike in every way, nor have the documents entrenching human rights in our two countries arisen in the same context. It is only common sense to recognize that, just as similarities will justify borrowing from the American experience, differences may require that Canada's constitutional vision depart from that endorsed in the United States…the aspect of First Amendment doctrine most incompatible with s. 319(2), at least as that doctrine is described by those who would strike down the legislation, is its strong aversion to content-based regulation of expression"[154]

The court also recognized a difference between Canada and the United States in the weight each country gives to free expression versus other values: "…the international commitment to eradicate hate propaganda and, most importantly, the special role given equality and multiculturalism in the Canadian Constitution necessitate a departure from the view, reasonably prevalent in America at present, that the suppression of hate propaganda is incompatible with the guarantee of free expression…If values fundamental to the Canadian conception of a free and democratic society suggest an approach that denies hate propaganda the highest degree of constitutional protection, it is this approach which must be employed."[155]

The Canadian Human Rights Act also included a provision (Section 13) treating hate speech on the Internet as a form of discrimination carrying a financial penalty up to $10,000.[156] A Federal Court of Appeal ruling issued on January 31, 2014 upheld the constitutionality of this provision,

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[152] *Id.* at Section 319(3). It should be noted that these defenses apply to the wilful promotion of hatred offense (319(2)) but not explicitly to incitement of hatred (319(1)).
[153] *R. v. Keegstra*, [1990] 3 SCR 697, Supreme Court of Canada. Available at: http://scc-csc.lexum.com/scc-csc/scc-csc/en/item/695/index.do .
[154] *Id.* at VIIB. The rather unique importance of content-based regulation of expression in U.S. Supreme Court jurisprudence is discussed *infra*.
[155] *Id.*
[156] Canadian Human Rights Act (R.S.C., 1985, c. H-6) (Section 13). Available at: http://laws-lois.justice.gc.ca/eng/acts/h-6/ .

concluding that it did not violate the right of free expression.[157] However, the court decision appears to be moot in light of the Canadian legislature's decision to repeal Section 13, effective in June 2014.[158]

Canadian provinces have their own human rights laws. Most notable of the cases brought under such legislation was a complaint against *Maclean's* magazine, filed in December 2007 by Mohamed Elmasry of the Canadian Islamic Congress with the support of the Canadian Human Rights Commission, the British Columbia Human Rights Tribunal and the Ontario Human Rights Commission. The complaint arose from a 2006 article titled "*The Future Belongs to Islam*" written by conservative editorialist Mark Steyn.[159] The thrust of the column was about the "Islamification" of western culture, cast in a way that portrayed that future as anathema to Western values.

The complainants alleged that the article and the refusal of *Maclean's* to provide space for a rebuttal violated their human rights. Steyn was ultimately vindicated after the Ontario Human Rights Commission ruled that it did not have jurisdiction to hear the complaint. The British Columbia Human Rights Tribunal later did assert jurisdiction and heard the complaint in June 2008, but issued a ruling on October 10, 2008 dismissing the complaint. The Canadian Human Rights Commission dismissed the federal complaint on June 26, 2008 without referring the matter to a tribunal.[160]

In *Saskatchewan (Human Rights Commission) v Whatcott*, on the other hand, Canada's Supreme Court upheld the central "hate speech" provisions in the Saskatchewan Human Rights Code.[161] The court applied a balancing test between the protection of freedom of expression set forth in the Canadian Charter of Rights and Freedoms and other values such as protection of individuals and groups from hate speech.[162] At the same time, the court distinguished permissible prohibition

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[157] Joseph Brean, "Court finds Internet hate speech law Section 13 to be constitutionally valid, doesn't violate freedom of expression," National Post (February 2, 2014). Available at: http://news.nationalpost.com/2014/02/02/court-finds-internet-hate-speech-law-section-13-to-be-constitutionally-valid-doesnt-violate-freedom-of-expression/ .

[158] *Lemire v. Canadian Human Rights Commission*, 2014 FCA 18, Federal Court of Appeals (January 31, 2014). Available at: http://decisions.fca-caf.gc.ca/fca-caf/decisions/en/item/66631/index.do . See also Michael Woods, "Hate speech no longer part of Canada's Human Rights Act," National Post (June 27, 2013). Available at: http://news.nationalpost.com/2013/06/27/hate-speech-no-longer-part-of-canadas-human-rights-act/ .

[159] Interestingly, *Maclean's* no longer makes this column available on-line, but an archived copy is available at: http://webcache.googleusercontent.com/search?q=cache:uOjl7y2R5ZEJ:www.macleans.ca/article.jsp%3Fcontent%3D20061023_134898_134898+&cd=1&hl=en&ct=clnk&gl=us .

[160] "Human rights complaint against Maclean's dismissed," CTV (June 28, 2008). Available at: http://www.ctvnews.ca/human-rights-complaint-against-maclean-s-dismissed-1.305350.

[161] *Saskatchewan (Human Rights Commission) v. Whatcott*, 2013 SCC 11 (CanLII), [2013] 1 SCR 467. Available at: http://www.canlii.org/en/ca/scc/doc/2013/2013scc11/2013scc11.html

[162] *Id.* at para. 1 and 66 ("All rights guaranteed under the Canadian Charter of Rights and Freedoms are subject to reasonable limitations. This balancing of rights and limitations gives rise to a tension between freedom of expression constitutionally guaranteed under s. 2(b) of the Charter and legislative provisions prohibiting the promotion of hatred or the publication of hate speech…We are therefore required to balance the fundamental values underlying freedom of expression (and, later, freedom of religion) in the context in which they are invoked, with

of hate speech from impermissible prohibition of speech that ridicules, belittles or otherwise affronts the dignity of an individual or group.[163] It rejected the notion that intent need be proved, as opposed to harmful effects that hate speech produces.[164]

Like Europe and Australia, Canada displays ambivalence in weighing the value of free expression against other fundamental values such as equality and human dignity. It examines each case on its own facts to try and strike the right balance that is reflective of Canada's conception of a free and pluralistic democratic society. The United States, by contrast, presumes the paramount importance of free expression to a viable democratic society, with only a limited number of exceptions that are narrowly defined.

E. U. S. Constitutional Law on Free Expression

Compared to other national, regional and international human rights standards governing freedom of expression examined previously, U.S. jurisprudence prioritizes freedom of expression over other interests, incorporating strong protections while carving out limited exceptions. Applying a "limited categorical approach" the U.S. Supreme Court has noted that "[f]rom 1791 to the present . . ., our society, like other free but civilized societies, has permitted restrictions upon the content of speech in a few limited areas, which are 'of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality.'"[165]

The narrow categories of speech that typically fall outside the purview of First Amendment protection include incitement to imminent violence,[166] "fighting words,"[167] obscenity and child pornography,[168] and defamatory speech directed at private individuals.[169] The Supreme Court recently added another category of speech that could be limited by statute in narrowly defined

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competing Charter rights and other values essential to a free and democratic society, in this case, a commitment to equality and respect for group identity and the inherent dignity owed to all human beings...").

[163] *Id.* at 41 ("Representations that expose a target group to detestation tend to inspire enmity and extreme ill-will against them, which goes beyond mere disdain or dislike. Representations vilifying a person or group will seek to abuse, denigrate or delegitimize them, to render them lawless, dangerous, unworthy or unacceptable in the eyes of the audience. Expression exposing vulnerable groups to detestation and vilification goes far beyond merely discrediting, humiliating or offending the victims... It can have a societal impact. If a group of people are considered inferior, subhuman, or lawless, it is easier to justify denying the group and its members equal rights or status.").

[164] *Id.* at para. 127. See also paras. 71 and 74 ("Hate speech is, at its core, an effort to marginalize individuals based on their membership in a group. Using expression that exposes the group to hatred, hate speech seeks to delegitimize group members in the eyes of the majority, reducing their social standing and acceptance within society. When people are vilified as blameworthy or undeserving, it is easier to justify discriminatory treatment.").

[165] *R.A.V. v. City of St. Paul*, 505 U.S 377, 382-83 (1992) (quoting *Chaplinskly v. New Hampshire*, *infra*).

[166] *Brandenburg v. Ohio*, 895 U.S. 444, 447 (1969)

[167] *Chaplinsky v. New Hampshire*, 315 U.S. 568, 571-572 (1942) (Johovah's witness was distributing literature on the street and was escorted away by a police officer after a disturbance broke out. He then got into a fight with the City Marshal, calling him a "God damned racketeer" and a "damned Fascist." The court concluded that Chaplinsky's words were "epithets likely to provoke the average person to retaliation" and thus not protected.).

[168] *Miller v. California*, 413 U.S. 15, 23-25 (1973); Osborne v. Ohio, 495 U.S. 103, 108-11 (1990); New York v. Ferber, 458 U.S. 747, 756-62.

[169] *Gertz v. Welch*, 418 U.S. 323 (1974).

circumstances involving national security in the fight against terrorism. In the case of *Holder v. Humanitarian Law Project*, the Supreme Court upheld the constitutionality of a federal statute that criminalizes the act of knowingly providing material support or resources to an entity designated by the Secretary of State as a "foreign terrorist organization."[170] Under the statute, the term "material support" is defined to include expert advice and assistance.[171]

Since the ratification of the First Amendment in 1791, U.S. courts have devoted significant attention to defining the parameters of First Amendment protection, expanding its contours over time to develop a relatively strong speech protective tradition. Unlike some other countries, the U.S. does not have legislation that prohibits defamation of religion. Such legislation would likely be found unconstitutional under current First Amendment doctrine, which prohibits content-based and viewpoint based distinctions.[172]

(1) Theoretical Underpinnings

In the U.S., the primacy of freedom of expression arguably derives from three foundational and interrelated priorities: (1) the pursuit and advancement of truth; (2) the promotion of representative democracy, and (3) the advancement of individual autonomy.[173] In recognizing the importance of this first objective, Justice Oliver Wendell Holmes argued in his dissent in *Abrams v. United States,* "the ultimate good desired is better reached by free trade in ideas –that the best test of truth is the power of the thought to get itself accepted in the competition of the market."[174]

Although Supreme Court Justices have applied different free speech theories and have varied in their approaches, a recurrent theme in many seminal First Amendment cases is the importance of preserving debate. Justice Louis Brandeis wrote, "that without free speech and assembly discussion would be futile; that with them, discussion affords ordinarily adequate protection against the dissemination of noxious doctrine; that the greatest menace to freedom is an inert people; that public discussion is a political duty, and that this should be a fundamental principle of the American government."[175] In other words, the First Amendment has been viewed by U.S. federal courts, led by the Supreme Court, as integral to preserving freedom. Accordingly, the

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[170] *Holder v. Humanitarian Law Project*, 130 S.Ct. 2705 (2010). Several U.S. based groups seeking to provide non-violent assistance to groups designated as foreign terrorist organizations challenged the statute on First Amendment grounds, asserting that the law prohibited them from providing lawful training on how to utilize international law and UN mechanisms to resolve conflicts and to engage in peaceful political advocacy. Specifically, the groups challenged the law's criminalization of support without requiring a showing of intent to advance the organization's unlawful ends. The Supreme Court analyzed the case as dealing with speech and not conduct. Nevertheless, the Supreme Court found in this case that the restriction was justified as serving the "[g]overnment's interest in combating terrorism" which constitutes "an urgent objective of the highest order." *Id.* at 2724.

[171] *Id.* at 2713.

[172] See *R.A.V. v. City of St. Paul, supra* 391-92.

[173] See Thomas Irwin Emerson, The system of Freedom of Expression, Random House (1970).

[174] *Abrams v. United States*, 250 U.S. 616 (1919) Justice Holmes, dissenting opinion at 630.

[175] *Whitney v. California*, 274 U.S. 357 (1927) Justice Brandeis, concurring opinion at 375.

federal judiciary has often established legal standards geared towards advancing debate and creating the requisite "breathing space" for debate and discourse.[176]

(2) Defining the Contours of First Amendment Jurisprudence

Incitement and Subversive Speech

Shortly after the adoption of the Bill of Rights including the First Amendment, Congress enacted The Sedition Act of 1798, which prohibited publication of "false, scandalous, and malicious writings [against] the Government of the United States, or either House of [Congress], or the President, [with] intent to defame [them]; or to bring them [into] contempt or disrepute; or to excite against them [the] hatred of the good people of the United States, or to stir up sedition within the United States. . . ."[177] Unlike British law, the statute provided that malicious intent was an element of the crime, truth was a defense, and the jury was responsible for determining the seditious nature of a publication. The statute, which was enacted by the Federalists to censor and quell opposition on behalf of Jeffersonian Republicans, expired in 1801 and was not revived. However, similar attempts reemerged in the Civil War era to suppress abolitionist publications and literature.

Substantive developments in First Amendment doctrine materialized during the World War I era, when courts were forced to address the issue of subversive speech during wartime. In assessing various forms of propaganda, protests, and challenges to government conduct, the Supreme Court weighed the right to freedom of expression against the government's interest in self-preservation and maintaining order.

In 1917, Congress enacted the Espionage Act, which has been amended numerous times since. It created three new offenses, outlawing (1) intentional interference with the operation of military or naval forces; (2) the wilful attempt to cause insubordination, disloyalty, mutiny, or refusal of duty in the military or naval forces; or (3) the wilful obstruction of recruiting or enlistment service.[178]

In *Schenck v. United States*,[179] defendants were charged with conspiracy to violate the Espionage Act for circulating a pamphlet challenging conscription to men who had been drafted for World War I. The document encouraged conscripts to assert their rights. The Supreme Court affirmed the convictions, concluding that the question was "whether the words used are used in such circumstances and are such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent."[180] The "clear and present" danger test signified an important first step for the Supreme Court in delineating the line between opinion that should be protected and instigation, which could be restricted. However, Justice

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[176] See *New York Times Co. v. Sullivan*, 376 U.S. 254, 264-65 (1964) ("[Erroneous] statement is inevitable in free debate, and [it] must be protected if the freedoms of expression are to have the 'breathing space' that they 'need [to] survive."

[177] Sedition Act of 1798, 5th Congress, 2nd Session, Library of Congress. Available at: http://memory.loc.gov/cgi-bin/ampage?collId=llsl&fileName=001/llsl001.db&recNum=719 .

[178] 18 U.S.C. Ch. 37 (18 U.S.C. Sec. 792 *et seq.*). Originally under Title 50 of the U.S. Code (War).

[179] *Schenck v. United States*, 294 U.S. 47 (1919).

[180] *Id.* at 52.

Holmes qualified the test, noting "It is a question of proximity and degree. When a nation is at war many things that might be said in time of peace are such a hindrance to its effort that their utterance will not be endured so long as men fight, and that no Court could regard them as protected by any constitutional right."[181]

The Espionage Act was amended in 1918 to add an additional prohibition against advocating acts to curtail the production of war supplies with intent to hinder the war effort. In *Abrams v. United States*,[182] the Supreme Court upheld convictions under the amendment of Russian immigrants who were supporters of the revolutionary forces in the 1917 Russian Revolution and who distributed leaflets challenging the U.S. military expedition in northern Soviet Union in support of the Czarist government. Justice Holmes dissented, finding lack of the requisite intent. His dissent, building on his reasoning in *Schenck*, stated that, "the United States constitutionally may punish speech that produces or is intended to produce a clear and imminent danger that it will bring about forthwith certain substantive evils that the United States constitutionally may seek to prevent. . . . It is only the present danger of immediate evil or an intent to bring it about that warrants Congress in setting a limit to the expression of opinion where private rights are concerned."[183]

The Supreme Court's later decisions incorporated concepts of imminence and intent, yet marked a shift towards a more speech protective regime focused on whether speech constituted a direct incitement to violence. In *Brandenburg v. Ohio*,[184] the head of a Ku Klux Klan group was convicted under Ohio's Criminal Syndicalism Statute for speaking at and participating in a rally in which he made derogatory statements about various ethnic and religious groups. Ohio's law prohibited criminal syndicalism and "advocat[ing] the duty, necessity, or propriety of crime, sabotage, violence, or unlawful methods of terrorism as a means of accomplishing industrial or political reform . . . ." The appellant was filmed stating, "Personally, I believe the nigger should be returned to Africa, the Jew returned to Israel." In a per curiam decision, the Supreme Court held that "the constitutional guarantees of free speech and free press do not permit a State to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action."[185] The Court struck down Ohio's law, finding that it inappropriately punished advocacy of political reforms.[186]

In a subsequent case, the Supreme Court applied the "imminent" test strictly in reversing the conviction of a student who was arrested during an antiwar protest because of provocative words

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[181] *Id.*
[182] *Abrams v. United States*, 250 U.S. 616, *supra*.
[183] *Id.* at 627-628.
[184] *Brandenburg v. Ohio*, 895 U.S. 444 *supra*.
[185] *Id.*at 447.
[186] But see *Holder v. Humanitarian Law Project*, *supra*. Despite the Supreme Court's enduring protection of certain controversial categories of speech, such as offensive and hateful speech, the Supreme Court's recent decision in *Holder* suggests that the Court is willing to loosen its speech protections in cases where national security is implicated. The Court concluded that the statute did not ban "pure political speech" since the U.S organizations could still freely engage in independent advocacy in favor of the designated "terrorist" organizations. However, at the same time the majority reasoned that providing material support towards a terrorist group's lawful ends served various harmful ends such as legitimizing the organizations actions and freeing up resources for its unlawful aims.

he used in rallying fellow protestors, whom had been pushed back from blocking a street, to "take the [expletive deleted] street later."[187] The Supreme Court determined that the speech at issue "amounted to nothing more than advocacy of illegal action at some indefinite future time."[188] Speech directed at causing immediate violence or other immediate unlawful conduct is the touchstone for a permissible proscription of such incitement under the "fighting words" doctrine. Whether HRC Resolution 16/18, the key UN Incitement Resolution, meets this test with its call "to criminalize incitement to imminent violence based on religion or belief" will be discussed in Section IV of this Report.

Sacrilegious or Offensive Speech

As the fabric of First Amendment doctrine has unfolded, U.S. courts have increasingly refused to protect religious or other sensibilities and to curb offensive speech or expressive conduct if to do so interfere with the right of free expression.

Although anti-blasphemy laws were not unusual in the early history of the United States, they can no longer withstand constitutional scrutiny under the First Amendment to the extent they would prohibit speech deemed to be sacrilege, religious insult or vilification. The U.S. Supreme Court resolved this issue in the case of *Joseph Burstyn, Inc. v. Wilson*,[189] when it struck down a New York statute that permitted the state to ban movies deemed to be sacrilegious. "It is not the business of government in our nation to suppress real or imagined attacks upon a particular religious doctrine, whether they appear in publications, speeches, or motion pictures," the Supreme Court held.[190]

Under the Supreme Court's holding in *Joseph Burstyn, Inc. v. Wilson*, no law purporting to ban speech deemed to be "defamation of religions" would survive a constitutional challenge. The holding is directly at odds with the anti-blasphemy and defamation of religions laws found in other countries and used as the model for the UN Defamation of Religions Resolutions.

In the case of *Cohen v. California*, in which the Supreme Court struck down a California law under which the defendant had been sentenced to 30 days in prison for wearing a jacket inscribed with profanity while in a Municipal Court, the Court emphasized the importance of not allowing state authorities to "shut off discourse solely to protect others from hearing it."[191] In his opinion for the majority, Justice John Marshall Harlan rejected the justification that a ban on offensive language under a statute which prohibited "maliciously and willfully disturb[ing] the peace or

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[187] *Hess v. Indiana*, 414 U.S. 105 (1973) (per curiam).
[188] *Id.* at 108.
[189] *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495 (1952).
[190] *Id.* at 505. See also *Cantwell v. State of Connecticut*, 310 U.S. 296, 310 (1940), in which the Supreme Court overturned the conviction of a Jehovah Witness for religiously provocative speech demeaning the Catholic faith which allegedly incited a breach of the peace. ("In the realm of religious faith, and in that of political belief, sharp differences arise. In both fields the tenets of one man may seem the rankest error to his neighbor. To persuade others to his own point of view, the pleader, as we know, at times, resorts to exaggeration, to vilification of men who have been, or are, prominent in church or state, and even to false statement. But the people of this nation have ordained in the light of history, that, in spite of the probability of excesses and abuses, these liberties are, in the long view, essential to enlightened opinion and right conduct on the part of the citizens of a democracy.").
[191] *Cohen v. California*, 403 U.S. 15, 21 (1971).

quiet of any neighborhood or person . . . by . . . offensive conduct" was necessary to prevent a violent reaction.[192] Banning offensive speech to protect the sensibilities of those who are offended because of the possibility that some may "strike out physically at whoever may assault their sensibilities with execrations like that uttered by Cohen" leads to the untenable position that "to avoid physical censorship of one who has not sought to provoke such a response by a hypothetical coterie of the violent and lawless, the States may more appropriately effectuate that censorship themselves."[193] In other words, the First Amendment protection of free speech does not recognize the potential threat of violence by persons likely to be offended by speech as legitimate grounds for effectively allowing them to veto such speech through the instrumentality of the state.

In a 1969 case involving an individual convicted for violating a New York law that inflicted criminal punishment upon one who casts "contempt" upon the American flag "either by words or act," the Supreme Court overturned the conviction, focusing only on the "words" part of the statute. It stated "we are unable to sustain a conviction that may have rested on a form of expression, however distasteful, which the Constitution tolerates and protects."[194] Twenty years later, the Supreme Court extended First Amendment protection to flag burning as expressive conduct.[195]

In *Snyder v. Phelps*,[196] the Supreme Court took the opportunity to explain why the First Amendment required the protection of speech of an extremely offensive nature, which caused intense emotional distress to the aggrieved family of a dead soldier whom they were mourning at his funeral. Members of the Westboro Baptist Church picketed on public property approximately 1,000 feet from the military funeral in accordance with police instructions, holding signs expressing the view that military deaths were God's punishment for homosexuality. The father of the deceased marine initiated a tort action against the church, alleging intentional infliction of emotional distress, intrusion upon seclusion, and civil conspiracy.

Looking at the content, form, and context of the speech, the Supreme Court concluded that the First Amendment safeguarded the protestors from tort liability because the congregation was picketing in a public space in accordance with police instructions on "matters of public concern[,]"[197] thus, affording their speech "special protection" under the First Amendment. The Court noted that "[s]peech deals with matters of public concern when it can "'be fairly considered as relating to any matter of political, social, or other concern to the community.'"[198]

Similar to its analysis in *Cohen*, the Court concluded that although the congregation chose the funeral as its platform to voice its criticism, the criticism was more broadly directed at society and was not a personal attack on the Snyder family.

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[192] *Id.* at 16, 20 ("No individual actually or likely to be present could reasonably have regarded the words on appellant's jacket as a direct personal insult. Nor do we have here an instance of the exercise of the State's police power to prevent a speaker from intentionally provoking a given group to hostile reaction.").
[193] *Id.* at 23.
[194] *Street v. New York*, 394 U.S. 576, 578 (1969).
[195] *Texas v. Johnson*, 491 U.S. 397 (1989).
[196] *Snyder V. Phelps*, 131 S. Ct. 1207 (2011).
[197] *Id.* at 126-17.
[198] *Id.* at 1216 (quoting *Connick v. Myers*, 461 U.S. 138, 146).

Of significance was the Court's reiteration of several key components of its First Amendment jurisprudence, including (1) the special protection afforded to speech on public property that is of public concern; (2) the government's ability to impose content-neutral and reasonable time, place, and manner restrictions; and (3) an enduring commitment to protect offensive speech in order to preserve public discourse and debate. Chief Justice John Roberts noted, "[s]peech is powerful. It can stir people to action, move them to tears of both joy and sorrow, and—as it did here—inflict great pain. On the facts before us, we cannot react to that pain by punishing the speaker. As a Nation we have chosen a different course—to protect even hurtful speech on public issues to ensure that we do not stifle public debate."[199]

Hate Speech

Diverging from human rights principles expressed in Article 20 of the International Covenant on Civil and Political Rights,[200] U.S. courts have tolerated speech advocating national, racial or religious hatred in order to create an atmosphere in which provocative speech has a place within public discourse.[201]

Thus, attempts to guard against speech that is derogatory, hateful, or offensive to racial, religious, ethnic or other types of groups have been largely unsuccessful. Hate speech, no matter how outrageous, crude or offensive it may be to some people, is generally protected speech, particularly if the subject matter of the speech is related to matters of public interest. The *Westboro* case discussed above illustrated this point,[202] as well as another Supreme Court case decided in 1977 involving a hate-filled pro-Nazi march in Skokie, Illinois, a predominantly Jewish community which included Holocaust survivors. A state trial court had issued an injunction prohibiting the march, the display of swastikas, and the distribution of materials that incite or promote hatred against persons of the Jewish faith. The Illinois Supreme Court denied a petition to stay the injunction. In *National Socialist Party v. Skokie*, the Supreme Court reversed the denial of the stay, authorizing the march.[203]

Skokie subsequently enacted ordinances establishing a permit system, prohibiting dissemination of material that intentionally promotes or incites hatred against a person based on their race, national origin or religion, and prohibiting demonstrations in "military style" uniforms. The District Court found the ordinances unconstitutional, stating "it is better to allow those who preach racial hate to expend their venom in rhetoric rather than to be panicked into embarking on the dangerous course of permitting the government to decide what its citizens may say and hear… The ability of American society to tolerate the advocacy even of the hateful doctrines espoused by the plaintiffs without abandoning its commitment to freedom of speech and assembly is perhaps the best protection we have against the establishment of any Nazi-type

[199] *Id.* at 1220.
[200] International Covenant on Civil and Political Rights, Article 20, *supra*.
[201] See *Terminiello v. Chicago*, 337 U.S. 1 (1949). (The speaker was convicted under a breach of the peace statute for standing outside an auditorium and voicing opinions against various political and racial groups. The Court overturned the conviction, finding that the speech fell short of producing "a clear and present danger of a serious substantive evil that rises far above public inconvenience, annoyance, or unrest."
[202] *Snyder V. Phelps*, 131 S. Ct. 1207, *supra*.
[203] *National Socialist Party v. Skokie*, 432 U.S. 43 (1977).

regime in this country."[204] This decision articulated a driving element behind First Amendment doctrine: the view that repression of ideas can itself cause violence and unrest. The Seventh Circuit affirmed this decision.[205] The city sought a Supreme Court stay of this ruling; however, the Supreme Court denied the stay and later declined to review the Seventh Circuit's decision invalidating the ordinances.[206]

In *Beauharnais v. Illinois*,[207] the Supreme Court deviated from its more speech protective approach, upholding an Illinois law that prohibited the portrayal of the "depravity, criminality, unchastity, or lack of virtue of a class of citizens of any race, color, creed or religion." The defendant, who was convicted under the law for distributing a leaflet opposing the "encroachment" and "harassment" of white people by African Americans, challenged his conviction on First Amendment grounds. Justice Felix Frankfurter upheld the conviction, finding that the defendant's speech constituted libel and thus fell outside the realm of First Amendment protection. Justice Frankfurter asserted that "if an utterance directed at an individual may be the object of criminal sanctions, we cannot deny to a state power to punish the same utterance directed at a defined group, unless we can say that this is a willful and purposeless restriction unrelated to the peace and well-being of a state."[208] His rationale, that such racially charged speech could cause a breach of the peace due to the reactions of others, comes close to the European, Canadian and Australian focus on maintenance of public order and human dignity as counterweights to protecting free speech. However, while the *Beauharnais* case has never been expressly overturned,[209] later decisions have upheld the protection of hateful or offensive speech directed at larger groups, subject to the limitation on speech "directed to inciting or producing imminent lawless action and is likely to incite or produce such action."[210]

The Supreme Court reinforced its perspective on hate speech in *R.A.V. v. City of St. Paul*.[211] Petitioner was charged under a local Bias-Motivated Crime Ordinance, which prohibited certain conduct, including cross-burning, which one "knows or has reasonable ground to know arouses anger, alarm or resentment in others on the basis of race, color, creed, religion or gender...."[212] The Court ruled that the statute was facially unconstitutional. In doing so, the Court articulated a defining element of U.S. First Amendment law, emphasizing that apart from a narrow class of

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[204] *Collin v. Smith*, 447 F. Supp. 676, 702 (United States District Court, N.D. Illinois, Eastern Division 1978).
[205] *Collin v. Smith*, 578 F.2d 1197 (7th Circuit.1978).
[206] *Smith v. Collin*, 439 U.S. 916 (1978).
[207] *Beauharnais v. Illinois*, 343 U.S. 250 (1952).
[208] *Id.* at 258.
[209] The *Beauharnais* case has been treated as an aberration. For example, the federal district court judge in the *Collin v. Smith* case, *supra*, stated that "it is widely believed by First Amendment scholars that the case is no longer good law... the court concludes that insofar as Beauharnais held that speech which defames racial and religious groups may be restricted in order to protect the reputation of individual members of such groups, it has been overruled, or at the very least has been so severely undermined that it should not be extended to new kinds of speech-inflicted damage to individuals, where such an extension would pose a substantial danger of inhibiting free speech and debate." (pp. 694, 697).
[210] *Brandenburg v. Ohio,* 895 U.S. 444, *supra* p. 447.
[211] *R.A.V. v. City of St. Paul,* 505 U.S 377, *supra*.
[212] *Id.* at 380.

categories, the First Amendment precluded adoption of content-based regulations or viewpoint-based restrictions, both of which were "presumptively invalid."[213]

According to the Supreme Court, the ordinance was invalid because it prohibited fighting words based on race, color, creed, religion, or gender while leaving the door open for similar speech based on political affiliation, sexual preference, or other associations. The Court acknowledged that the city had a compelling interest in protecting members of minority groups who had suffered protracted discrimination; however, it concluded that content-based discrimination was not reasonably necessary to achieve the city's purpose.

In a subsequent case also involving cross-burning, the U.S. Supreme Court reached a different result because a violation of the content neutrality principle was not at issue. In an opinion written by Justice Sandra O'Connor, the Supreme Court upheld the constitutionality of a cross-burning statute that bans cross- burning carried out with the intent to intimidate, which did not confine its ban to certain specified classes of targets or speech. The statute made it a felony "for any person … with the intent of intimidating any person or group … to burn … a cross on the property of another, a highway or other public place."[214]

Justice O'Connor wrote that "(I)ntimidation in the constitutionally proscribable sense of the word is a type of true threat, where a speaker directs a threat to a person or group of persons with the intent of placing the victim in fear of bodily harm or death." She added that "(A)s the history of cross burning in this country shows, that act is often intimidating, intended to create a pervasive fear in victims that they are a target of violence."[215]

Acknowledging the fact that cross-burning has been used to intimidate African Americans in particular, Justice O'Connor added that "Virginia may choose to regulate this subset of intimidating messages in light of cross burning's long and pernicious history as a signal of impending violence."[216] While this does involve a legislative judgment in selecting a particular form of intimidation for prohibition because of what cross-burning has historically represented and the fear of bodily harm it has instilled in a potential class of victims, Justice O'Connor distinguished the prior *R. A. V. v. City of St. Paul* cross-burning case because, unlike the statute declared unconstitutional in that case, "the Virginia statute does not single out for opprobrium only that speech directed toward 'one of the specified disfavored topics' (quoting from *R. A. V. v. City of St. Paul* at p. 391)… Thus, just as a State may regulate only that obscenity which is the most obscene due to its prurient content, so too may a State choose to prohibit only those forms of intimidation that are most likely to inspire fear of bodily harm."[217]

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[213] *Id.* at 386. ("[t]he government may not regulate use based on hostility—or favoritism—towards the underlying message expressed.").

[214] *Virginia V. Black*, 538 U.S. 343 (2003).

[215] *Id.* at 360. Intent to intimidate is a key element of proof to support a conviction that would meet the test that Justice O'Connor has laid out. In the case of Mr. Black, his conviction was overturned because there was not sufficient evidence of his intent to intimidate. In other words, as frightening a symbol as cross-burning may be, there is not an automatic presumption of intent to intimidate arising from the act of cross-burning itself. Context is a critical factor in adducing such intent.

[216] Id. at 363.

[217] *Id.* at 363.

The United States presents an interesting case study with respect to balancing freedom of speech with protecting minority populations. While the horrors of ethnic cleansing and genocide have inspired many speech restrictive laws against hate speech in other countries, U.S. law has developed, in the context of a large and diverse population, in the direction of preserving protections for the expression of diverse views. Despite the history of Jim Crow laws and racial discrimination in the United States, permissible restraints on hate speech itself for the purpose of protecting the dignity and sensibilities of members of minority groups, which have been singled out for discrimination, are very narrowly circumscribed by U.S. courts. They have deliberately chosen to protect diversity of viewpoints by vastly broadening the scope of protected free speech. This approach, which prohibits content-based distinctions, brings U.S. law in conflict with international, regional and other national human rights standards, which seek to carve out specific protections against advocacy of national, racial, or religious hatred.

Defamation

Another important evolution in freedom of expression doctrine has been developing standards governing defamation of government officials. Since the Sedition Act of 1798, which expired without legal challenge, states have tried to enact similar laws which prohibit criticism of public officials and public conduct.

The Supreme Court's decision in *New York Times Co. v. Sullivan*[218] reiterated a central principle at the core of U.S. freedom of expression doctrine: the importance of protecting the right to question and criticize government conduct. The case raised the question of whether a state could empower public officials to recover damages by bringing libel actions against critics of official conduct. Alabama's libel law imposed crippling fines for violating the statute. An Alabama police commissioner brought a libel suit against the New York Times for publishing an advertisement that made claims regarding police conduct involving Martin Luther King Jr. and protestors on the Alabama State College Campus. The law found a publication "libelous per se" if the language "tend[s] to injure a person [in] his reputation" or to "bring him into public contempt."[219] Once "libel per se" was established, damages were presumed and the defendant's only defense was to establish the truth of the challenged statements. The Supreme Court struck down the law, finding that a "rule compelling the critic of official conduct to guarantee the truth of all his factual assertions—and to do so on pain of libel judgments virtually unlimited in amount—leads to a comparable 'self-censorship'. Under such a rule, would-be critics of official conduct may be deterred from voicing their criticism, even though it is believed to be true and even though it is in fact true, because of doubt whether it can be proved in court or fear of the expense of having to do so."[220] The Supreme Court required a showing that the statements at issue in a libel suit were made with actual malice, i.e., with knowledge that the statement was false or with reckless disregard as to whether or not it was true.

In the case of *Hustler Magazine, Inc. v. Falwell*,[221] the Supreme Court held that the First Amendment's protection of free speech prohibits awarding damages to public figures (a category

[218] *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964).
[219] *Id.* at 267.
[220] *Id.* at 279.
[221] *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46 (1988).

which is not confined just to government officials), which would compensate for emotional distress intentionally inflicted upon them. The motivation of the speaker – even if driven by hate - would not change this result: "Debate on public issues will not be uninhibited if the speaker must run the risk that it will be proved in court that he spoke out of hatred; even if he did speak out of hatred, utterances honestly believed contribute to the free interchange of ideas and the ascertainment of truth."[222]

Other than in the aberrational case of *Beauharnais v. Illinois*, which has not been explicitly overturned but essentially treated as a sui generis case of little precedential value,[223] the concept of group libel or group defamation has had little traction when used as the basis for attempting to suppress free expression.

A fortiori, combining the Supreme Court's limitation on the scope of permissible defamation claims against public figures with its aversion to claims based on religious insult discussed above in this subsection, the Supreme Court would almost certainly show no tolerance for legislation "to prevent the defamation of religions and the negative stereotyping of religious groups," as recommended by the UN Defamation of Religions Resolutions.[224]

IV. Analysis of UN Human Rights Council Resolution 16/18: Separating Permissible Free Expression From Unlawful Incitement to Imminent Violence Based on Religion or Belief

A. Textual Review of HRC Resolution 16/18

(1) Interrelationship of Relevant Provisions

HRC Resolution 16/18, the progenitor of the UN Incitement Resolutions, focuses on protection of individuals. It sets forth positive, non-proscriptive steps to combat religious hatred such as education, awareness-building, the creation of collaborative networks, training of government officials in effective outreach strategies, countering religious profiling and discrimination against individuals based on their religion or beliefs, enforcing anti-discrimination laws, speaking out against intolerance, and inter-faith and inter-cultural dialogue.

Paragraph 2 of HRC 16/18 expresses "its concern that incidents of religious intolerance, discrimination and related violence, as well as of negative stereotyping of individuals on the basis of religion or belief, continue to rise around the world." It then "condemns, in this context, any advocacy of religious hatred against individuals that constitutes incitement to discrimination, hostility or violence, and urges States to *take effective measures*, as set forth in the present resolution, *consistent with their obligations under international human rights law, to address*

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[222] *Id.* at 53.
[223] See *Garrison v. Louisiana*, 379 U.S. 64, 82 (1964) (Douglas, J., concurring); *Dworkin v. Hustler Magazine, Inc.*, 867 F.2d 1188, 1200 (9th Cir. 1989).
[224] Resolution 64/156 para. 16, *supra*.

and combat such incidents." (emphasis added) Paragraph 8 calls "upon States to *adopt measures and policies* to promote the full respect for and protection of places of worship and religious sites, cemeteries and shrines, and *to take measures* in cases where they are vulnerable to vandalism or destruction." (emphasis added)

Specific "measures" are not spelled out in these paragraphs, but there is an oblique mention in paragraph 2 to measures "set forth in the present resolution," without any cross-references. As noted earlier, the resolution does contain a number of non-proscriptive steps to address religious intolerance or hatred, which paragraph 2 may have been referring to. Moreover, in the context of dealing with harmful conduct resulting from intolerance or hatred, such as vandalism and destruction of religious symbols and sites or discrimination against individuals based on their religion or beliefs, "measures" could be read to implicitly encompass the use of civil and criminal laws and their enforcement.

However, HRC 16/18 does make one explicit call in paragraph 5(f) for states to adopt punitive measures "to criminalize incitement to imminent violence based on religion or belief." It does so in the course of reaffirming the call of the Secretary-General of the OIC for states to take a number of "actions to foster a domestic environment of religious tolerance, peace and respect" listed in paragraph 5.

While paragraph 5(f) itself refers only to criminalizing incitement to imminent violence, and not to any type of speech that may cause such incitement, it is reasonable to read paragraph 5(f) in conjunction with other clauses in the resolution that link hate speech to incitement. These include the three paragraphs in the resolution which refer in disparaging terms to the "*advocacy of religious hatred*" that "*constitutes incitement* to discrimination, hostility or violence."[225] (emphasis added) Resolution 16/18 also refers to the International Covenant on Civil and Political Rights, which provides in Article 20(2) that "(A)ny advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law."

In other words, HRC Resolution 16/18 continues to posit, as a number of Defamation of Religions Resolutions had done previously, that "advocacy of religious hatred" (a type of speech) itself can constitute "incitement" to violence because it is the means through which the threat of imminent harm is communicated with the intent to precipitate such harm. Therefore, it is reasonable to interpret the call to criminalize "incitement to imminent violence" in paragraph 5(f) of HRC 16/18 to encompass "advocacy of religious hatred" within the scope of such criminalization. Whether the violence against an individual or group based on their religious

[225] HRC Resolution 16/18, *supra*, paras. 2, 3, 5(e). Paragraph 2 specifies that the target of advocacy of religious hatred it is addressing is "advocacy of religious hatred against individuals." This paragraph, as quoted earlier, refers to "incidents of religious intolerance, discrimination and related violence, as well as of negative stereotyping of individuals on the basis of religion or belief." Its condemnation of "religious hatred against individuals" follows "in this context," immediately after the foregoing examples of "incidents," which in turn is followed by paragraph 2's call for states to take "effective measures… to address and combat such incidents." Paragraphs 3 and 5(e), however, leave out the reference to individuals when calling out advocacy of religious hatred for condemnation. The only other time in HRC Resolution 16/18 that the term "advocacy" is used is in an introductory paragraph: "Deploring any advocacy of discrimination or violence on the basis of religion or belief." There is no reference to incitement.

belief actually occurs as a result of the incitement is not determinative as to whether the incitement itself is actionable. The reason is that incitement to violence communicated, for example, by means of advocacy of religious hatred is regarded as an inchoate offense, meaning it is "deemed to have been committed despite the fact that the substantive offence, that is, the offence whose commission they were aiming at, is not completed and the intended harm is not realized."[226] It is enough to simply put an ordinary person who is identified with the target of the hate speech in imminent fear of violence.

(2) Meaning of Key Terms

As previously noted in Section I, differences remain among the member states of the United Nations as to the meaning of terms such as advocacy of religious hatred and incitement.

In an effort to provide some coherent, informed input to aid the member states in reaching a consensus, Navi Pillay, United Nations High Commissioner for Human Rights, organized the Rabat Plan of Action discussed in Section II C (2) *supra*.

It concluded that existing "legislation that prohibits incitement to hatred uses variable terminology and is often inconsistent with article 20 of the ICCPR… The terminology relating to offences on incitement to national, racial or religious hatred varies in the different countries and is increasingly rather vague while new categories of restrictions or limitations to freedom of expression are being incorporated in national legislation. This contributes to the risk of a misinterpretation of article 20 of the ICCPR and an addition of limitations to freedom of expression not contained in article 19 of the ICCPR."[227]

The Rabat Plan of Action states that criminal sanctions related to unlawful forms of expression "should be seen as last resort measures to be only applied in strictly justifiable situations."[228] To this end, the Rabat Plan of Action sets out a number of suggested thresholds it recommends should be met for hate speech to be criminally prohibited. They include intent to advocate or incite, content, and imminence:

> **"Intent:** Article 20 of the ICCPR requires intent. Negligence and recklessness are not sufficient for an article 20 situation which requires 'advocacy' and 'incitement' rather than mere distribution or circulation. In this regard, it requires the activation of a triangular relationship between the object and subject of the speech as well as the audience.[229]
>
> **Content or form:** The content of the speech constitutes one of the key foci of the court's deliberations and is a critical element of incitement. Content analysis may include the degree to which the speech was provocative and direct, as well as a focus on the form, style, nature of the arguments deployed in the speech at issue or in the balance

[226] Wibke Kristin Timmermann , "Incitement in international criminal law," International Review of the Red Cross, Volume 88 Number 864 (December 2006), pp. 825 and 846.
[227] Rabat Plan of Action, *supra*, p. 3.
[228] *Id.* at 7.
[229] *Id.* at 6. *Cf, Prosecutor v. Naletilic and Martinovic*, Case No. IT-98-34-T, Judgment (Trial Chamber), (March 31, 2003, para. 60.

struck between arguments deployed, etc.[230]

Likelihood, including imminence: Incitement, by definition, is an inchoate crime. The action advocated through incitement speech does not have to be committed for that speech to amount to a crime. Nevertheless some degree of risk of resulting harm must be identified. It means the courts will have to determine that there was a reasonable probability that the speech would succeed in inciting actual action against the target group, recognising that such causation should be rather direct."[231]

Another group of experts in international human rights law on freedom of expression and equality issues, known as ARTICLE 19, devised a set of principles in an effort "to promote greater consensus globally about the proper relationship between respect for freedom of expression and the promotion of equality."[232] Principle 12 (Incitement to hatred) provides suggested working definitions of "hatred,"[233] "advocacy,"[234] and "incitement."[235]

A law review article setting forth what the author describes as a "reasonably possible consequences" test for analyzing when actionable incitement to genocide occurs may also be instructive for this Report's discussion.[236] The author proposes a six-pronged inquiry. At least four of these prongs also have some relevance in helping to determine whether there is incitement to violence communicated via hate speech:[237]

1. "Was the Speech Understood by Its Audience as a Call
To Commit Genocide? Did it use language, explicit or coded, to justify and promote violence?"[238] This is a contextual analysis in which "(C)ourts must rely on detailed factual investigation to determine how a speech was actually understood."[239]

2. "Was the Speaker Able To Influence the Audience, and

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[230] *Id.*
[231] *Id.* See also Wibke Kristin Timmermann , "Incitement in international criminal law," *supra.*
[232] The Camden Principles on Freedom of Expression and Equality, Article 19 (2009) at p. 2. Available at: http://www.article19.org/data/files/pdfs/standards/the-camden-principles-on-freedom-of-expression-and-equality.pdf.
[233] *Id.* at 10 ("intense and irrational emotions of opprobrium, enmity and detestation towards the target group").
[234] Id. ("requiring an intention to promote hatred publicly towards the target group").
[235] Id. ("statements about national, racial or religious groups which create an imminent risk of discrimination, hostility or violence against persons belonging to those groups").
[236] Susan Benesch, "Vile Crime or Inalienable Right: Defining Incitement to Genocide." Virginia Journal of International Law, Vol. 48, No. 3 (2008).
[237] For the record, the author of this article distinguishes between the crime of incitement to genocide and hate speech. She states that the six-pronged test she sets forth is intended to help in making that distinction and that "all six prongs must be satisfied for a court to find that incitement to genocide has been committed by a defendant." (p.520) However, she also acknowledges that "(S)everal of the prongs characterize other crimes, including forms of hate speech." (p. 520) This Report has selected the four prongs that appear to be most relevant to advocacy of religious hatred that incites violence.
[238] *Id.* at 498.
[239] Id. at 521.

Was the Audience Able To Commit Genocide? To apply this prong of the test, courts must examine the form and degree of influence that the speaker had over the audience, and the audience's capacity to commit genocide against the intended victims."[240]

3. "Did the Speaker Dehumanize the Target Group, and Justify Killing?"[241]

4. "Had the Audience Already Received Similar Messages? Inciters know that the message must be repeated over and over, and when they repeat language that they know has previously sparked violence, they betray their own intent to cause such violence."[242]

The probative factors identified by the foregoing international human rights law expert sources[243] can be distilled into the following requisite elements around which a consensus might be developed for an implementable measure to criminalize incitement to imminent violence based on religion or belief:

(1) the intent and capacity of the speaker or writer to incite violence with an incendiary message promoting intense feelings of hatred against individuals or a group targeted for reasons related to religious belief,

(2) a receptive audience that the speaker or writer knows or should know has the capacity to immediately act on the message, and

(3) a high risk that the message conveyed will have the foreseeable consequence of inducing persons who resonate with the content and intensity of the message to immediately act on it by committing violence against members of the target group. This requires a fact-intensive examination of the nature of the speech and the context in which the speech was delivered and received to determine the probability that it will lead imminently to the proscribed consequence of violence.[244]

Note that the focus of proof is to establish that the advocacy of religious hatred, in the context within which it is expressed to and received by a receptive audience, is in effect the proximate cause of incitement of members of the audience to imminent commission of violence against individuals or groups who are the targets of the hatred. However, what may prevent a consensus is that the focus of the suggested elements would not take into account, for purposes of proving

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[240] *Id.*
[241] *Id.* at 523.
[242] *Id.* at 524.
[243] See also Joint submission by Heiner Bielefeldt, Special Rapporteur on Freedom of Religion or Belief; Frank La Rue, Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression; and Githu Muigai, Special Rapporteur on Contemporary Forms of Racism, Racial Discrimination, Xenophobia and Related Intolerance, OHCHR expert workshops on the prohibition of incitement to national, racial or religious hatred: Expert workshop on Europe (February 9-10, 2011, Vienna). Available at: http://www.ohchr.org/Documents/Issues/Religion/CRP3Joint_SRSubmission_for_Vienna.pdf .
[244] See Toby Mendel, "Hate Speech Rules Under International Law," Centre for Law and Democracy (February 2010), p. 8. ("Context is clearly of the greatest importance…many of the hate speech cases refer to contextual factors.").

the crime of incitement to imminent violence, the impact that advocacy of religious hatred may have in inciting members of the victimized group targeted by the hate speech to commit violence themselves in reaction to the hate speech.[245] This Report shall return to this issue in the discussion, *infra*, of the compatibility of HRC Resolution 16/18 with the First Amendment as currently interpreted by the U.S. Supreme Court.

B. Compatibility with First Amendment Jurisprudence

The Organization of Islamic Cooperation Permanent Observer to the United Nations Ufuk Gokcen noted that, in using "much of the United States First Amendment language," HRC Resolution 16/18 "promotes respect for and protection of the individual rights of all people."[246] If, by referring to "United States First Amendment language," he meant that HRC Resolution 16/18 used language paralleling what the U.S. Supreme Court has used in describing the threshold required to be met in order to constitutionally criminalize hate speech under the First Amendment, he would be making a valid observation.

The phrase "incitement to imminent violence" used in HRC Resolution 16/18 is substantially the same as the rule the U.S. Supreme Court set forth in describing when the government can and cannot punish speech, except that the Supreme Court referred to lawless action rather than violence and did not limit the application of the rule to circumstances involving an individual's religion or belief:

> "the constitutional guarantees of free speech and free press do not permit a State to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action."[247]

However, despite this congruence of language between HRC Resolution 16/18 and a leading U.S. Supreme Court case on freedom of speech, the OIC Permanent Observer Ufuk Gokcen also correctly noted that "many parts of the world are at different points in their development of human rights and have various interpretations of these rights." As an example, he pointed to

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[245] Sarah Chayes, a former special adviser to the chairman of the Joint Chiefs of Staff and currently a senior associate in the Democracy and Rule of Law Program and the South Asia Program at the Carnegie Endowment, has argued that the anti-Islam film "Innocence of Muslims," which sparked acts of violence in the Muslim world in response to the film's hate-filled mockery of Islam, arguably does not deserve protection as legitimate free speech. The rationale is that the video was intentionally provocative and likely to lead to the violent response that did in fact occur. "The egregiousness of its smears, the apparent deception of cast and crew as to its contents and the deliberate effort to raise its profile in the Arab world a week before 9/11 all suggest intentionality." Sarah Chayes, *Los Angeles Times* (September 18, 2012). A counter-argument to this position was presented by the editor in chief of a libertarian magazine entitled *Reason*: "What was once an appropriately difficult standard of incitement becomes a much broader unprotected category of provocation, one that depends most of all on the potentially violent proclivities of the group being provoked." Matt Welch, Reason (Sep. 18, 2012). Available at: http://reason.com/blog/2012/09/18/former-joint-chiefs-of-staff-employee-in .

[246] Ufuk Gokcen, The Reality of Freedom of Expression in the Muslim World, *supra.*

[247] *Brandenburg v. Ohio*, *supra*, p. 447.

differences between the United States and Europe "in how they combat hate crimes, religious insult, incitement, and defamation."[248]

This Report's earlier examination of European laws and court decisions alongside the evolution of U.S. case law on the First Amendment bears out Ambassador Gokcen's observation.[249] There are also significant differences between OIC members and the United States in terms of the relative weights they place on protection of the right of free expression versus protection of other rights and values, particularly the protection of religious belief from derogatory speech.[250] Europe, Canada and Australia fall in between, as discussed in Section III B through D.

Outside of the United States, legal systems, including as developed in Western-style democracies and international human rights bodies, tend to balance the right of free expression with other rights so as to ensure that they do not come into conflict with each other.[251] There is no established hierarchy of values in these systems that places free expression above all others. This approach is consistent with Article 5 of the Vienna Declaration which considers all universal human rights to be of equal value:[252]

> "All human rights are universal, indivisible and interdependent and interrelated. The international community must treat human rights globally in a fair and equal manner, on the same footing, and with the same emphasis."

The United States takes a different approach. U.S. Supreme Court Justice Benjamin Cardozo described the paramount importance the U.S. Constitution attaches to freedom of thought and speech in a majority opinion he wrote in 1937: "Of that freedom one may say that it is the matrix, the indispensable condition, of nearly every other form of freedom."[253]

In balancing the right of an individual to express his or her criticism of a religion, no matter how offensive to the religion's believers, versus the right of the believers to be protected against denigration of their religion that hurts their human dignity and sensibilities in the practice of their religion, the right of free expression generally wins out in the United States.[254]

However, the First Amendment right of free speech is not absolute. As discussed *supra* in Section III E, narrow exceptions to the right have been upheld by the courts, including "fighting

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[248] Ufuk Gokcen, *supra*.
[249] *Supra*, Section III B and E.
[250] *Supra*, Section III A.
[251] *Malcolm Ross v. Canada, supra* at para. 11.5. ("The Committee notes that both the Board of Inquiry and the Supreme Court found that the author's statements were discriminatory against persons of the Jewish faith and ancestry and that they denigrated the faith and beliefs of Jews and called upon true Christians to not merely question the validity of Jewish beliefs and teachings but to hold those of the Jewish faith and ancestry in contempt as undermining freedom, democracy and Christian beliefs and values. In view of the findings as to the nature and effect of the author's public statements, the Committee concludes that the restrictions imposed on him were for the purpose of protecting the "rights or reputations" of persons of Jewish faith, including the right to have an education in the public school system free from bias, prejudice and intolerance.").
[252] Vienna Declaration and Programme of Action (adopted by the World Conference on Human Rights in Vienna June 25, 1993). Available at: http://www.ohchr.org/en/professionalinterest/pages/vienna.aspx .
[253] *Palko v. Connecticut*, 302 U.S. 319, 327 (1937).
[254] *Joseph Burstyn, Inc. v. Wilson*, *supra*.

words" – defined in 1942 by the U.S. Supreme Court as words "which, by their very utterance, inflict injury or tend to incite an immediate breach of the peace."[255] Subsequent Supreme Court case law, articulated in the *Brandenburg* case, has narrowed this definition of "fighting words" to speech "directed to inciting or producing imminent lawless action and is likely to incite or produce such action." [256]

As noted earlier, HRC Resolution 16/18 incorporates the *Brandenburg* "fighting words" standard. However, legislation codifying the wording of HRC Resolution 16/18 into U.S. law still may face significant constitutional challenges, both on its face and in its potential application.

(1) Content Discrimination

HRC Resolution 16/18's call for criminalizing "incitement to imminent violence based on religion or belief" makes a content-based distinction in that it singles out one's religious beliefs for special protection from fighting words to the exclusion of any other beliefs or subjects. The U.S. Supreme Court has declined to apply the "fighting words" exception to the protection of free speech under the First Amendment when confronted with a statute that prohibits some fighting words involving a particular topic of keen sensitivity to those verbally targeted, such as race or religion, but does not prohibit other fighting words dealing with different topic areas. If a statute banning fighting words is not content neutral, it would run afoul of the First Amendment.

In *R. A. V. v. City of St. Paul*, the case involving a statute prohibiting the burning of crosses, the Supreme Court determined that the statute was unconstitutional. The Court reached this conclusion because the statute was not content neutral in that it confined its ban to fighting words aimed at certain specified classes of targets and not others.[257]

To avoid the content discrimination problem while taking some concrete action to implement HRC Resolution 16/18's criminalization provision, the United States could utilize legislation criminalizing incitement to imminent violence generally, rather than limiting the object of the proscribed incitement to "religion or belief." It would then be possible, consistent with the First Amendment, to add penalties for actual violence committed as a hate crime, with evidence of the advocacy of racial hatred used to prove the animus motivating the commission of violence against members of the target group. In *Wisconsin v. Mitchell,* the Supreme Court upheld the constitutionality of a Wisconsin statute which punished criminal conduct more heavily if the victim is selected because of his race or other protected status than if no such motive existed.[258]

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[255] *Chaplinsky v. New Hampshire, supra*. Regulations governing speech that focus on time, manner and place are also permissible if reasonable, and assuming that they are "justified without reference to the content of regulated speech, that they are narrowly tailored to serve a significant governmental interest, and that they leave open ample alternative channels for communication of the information." See *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989).

[256] *Brandenburg v. Ohio, supra*, p. 447.

[257] *R. A. V. v. City of St. Paul, supra*, p. 391. See also *United States v. Alvarez*, 183 L. Ed. 2d 574, 586 (2012) (Kennedy, J.). ("[A]s a general matter, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content") (quoting *Ashcroft v. American Civil Liberties Union*, 535 U.S. 564, 573 (2002)).

[258] *Wisconsin v. Mitchell*, 508 U.S. 47 (1993).

(2) Likelihood of imminent violence

The Supreme Court interprets 'imminent' in strict time-bound terms.

In *Hess v. Indiana*, for example, the Supreme Court found that Hess's expletive-laced exhortation to take back the streets later, after protestors had been pushed back from blocking the streets, "amounted to nothing more than advocacy of illegal action at some indefinite future time."[259]

In *NAACP v. Claiborne Hardware Co.,*[260] a threat of physical harm to blacks who shopped in boycotted white-owned stores in the South, delivered in speeches by a key black leader of the NAACP, was not deemed to have incited violence "within a reasonable time" following the speeches.

Moreover, there would need to be a direct addressee whom the speaker or writer is trying to incite to engage in illegal conduct. In the *Hess* case, the Supreme Court found it "undisputed that Hess' statement was not directed to any person or group in particular." [261] As the Supreme Court put it in another case, fighting words must "'have a direct tendency to cause acts of violence by the person to whom, individually, the remark is addressed.'"[262] Internet communications generally reach too diffuse an audience to tie such communications directly to any specific addressees whom the author of the communications intended to incite to commit immediate violence.

Analyzed against these standards, the anti-Muslim video entitled "Innocence of Muslims" denigrating the Prophet Muhammad, which appeared on the Internet in 2012, would not meet the 'likelihood of imminent violence' threshold despite its highly offensive content.[263] First of all, the video did not itself call for violence against Muslims. Moreover, there was no "true threat" against any Muslims that would itself be regarded as unprotected speech.[264] It understandably

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[259] *Hess v. Indiana, supra*, p. 108.

[260] *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886 (1982).

[261] *Hess v. Indiana, supra*, p. 107.

[262] *Gooding v. Wilson*, 405 U.S. 518, 524 (1972) (citation omitted).

[263] It should be noted, however, that a three judge panel of the Ninth Circuit Court of Appeals ordered Google to remove the 14 minute video trailer of a longer version of the film from YouTube. The panel concluded that an actress who claimed to have been deceived as to the role she was actually playing in the video "may have a copyright" in her performance and, therefore, merited the granting of an injunction to have the entire video removed until her performance could be taken out of the video. Google has appealed the decision, noting that the Copyright Office rejected the actress's application for registration of a claimed copyright in her performance. See *Garcia v. Google Inc.*, Case: 12-57302 (9th Cir. 02/26/2014). Available at: https://www.eff.org/files/2014/02/26/garcia_opinion_.pdf

[264] *Watts v. United States*, 394 U.S. 705 (1969). (upholding the constitutionality of a statute prohibiting threats made against the president of the United States). In the Second Circuit Court of Appeals case, *United States v. Kelner*, 534 F.2d 1020, 1027 (2d Cir. 1976), the court stated its test for determining whether a "true threat" existed that would not be treated as protected free speech: "the threat on its face and in the circumstances in which it is made is so unequivocal, unconditional, immediate and specific as to the person threatened, as to convey a gravity of purpose and imminent prospect of execution." The Second Circuit loosened this standard somewhat in *United States v. Malik*, 16 F.3d 45 (2d Cir. 1994), in which the court held that an explicit threat was not required so long as a reasonable listener could construe the words in context as a threat. The Ninth Circuit Court of Appeals adopted a test for the "true threat" exception to protected free speech that focused on the speaker rather than the listener, defining

was deemed very offensive to Muslims' sensibilities, but the video did not target them for any immediate violent attack.

In sum, the "Innocence of Muslims" video came nowhere close to constituting unprotected "fighting words" under the test laid down in *Brandenburg v. Ohio* ("inciting or producing imminent lawless action and is likely to incite or produce such action").[265] To the contrary, its ridicule of a religion is protected free expression under the holding more than fifty years ago of *Joseph Burstyn, Inc. v. Wilson*, which can now be extended to postings on the Internet: "It is not the business of government in our nation to suppress real or imagined attacks upon a particular religious doctrine, whether they appear in publications, speeches, or motion pictures."[266]

If HRC 16/18's criminalization of "incitement to imminent violence" edict were to be applied under a federal or state statute, it must be applied in accordance with both the *Brandenburg v. Ohio* and *Joseph Burstyn, Inc. v. Wilson* standards.

(3) Heckler's Veto

The Supreme Court has placed another limitation on circumventing free expression protection, barring the so-called "heckler's veto" which would allow those offended by the speech to effectively censor it by claiming such speech would have the capacity to incite them to commit retaliatory violence.

The concept of "heckler's veto" was discussed in a Supreme Court case dealing not with violence, but rather with an overly broad statute meant to prevent access by children to pornographic materials. In the case of *Reno v. ACLU*,[267] dealing with two provisions of the Communications Decency Act of 1996, the Supreme Court held that these provisions abridged the freedom of speech protected by the First Amendment. Although the provisions were supposed to be read as intended to prevent children specifically from gaining access to pornographic materials via the Internet, the Supreme Court held that "even the strongest reading of the 'specific person' requirement would confer broad powers of censorship, in the form of a 'heckler's veto,' upon any opponent of indecent speech."[268] The Court explained that such an opponent of indecent speech "might simply log on and inform the would-be discoursers that his 17-year-old child—a 'specific person . . . under 18 years of age,' 47 U. S. C. § 223(d)(1)(A) (1994 ed., Supp. II)—would be present."[269]

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such a threat as "'an expression of an intention to inflict evil, injury, or damage on another'" taking into account its "entire factual context, including the surrounding events and reaction of the listeners." *United States v. Orozco-Santillan*, 903 F.2d 1262, 1265 (9th Cir. 1990) (citations omitted). In *Planned Parenthood of the Columbia/Willamette, Inc. v. American Coalition of Life Activists*, 290 F.3d 1058 (9th Cir. 2002) (en banc), the Ninth Circuit held that wanted posters targeting certain doctors performing abortions carried a message that in context could be construed as a threat against their lives. An associated website displayed names of doctors still working, doctors injured and doctors who had lost their lives.

[265] *Brandenburg v. Ohio, supra*, p. 447.

[266] *Burstyn, Inc. v. Wilson, supra*, p. 505.

[267] *Reno v. ACLU*, 521 U.S. 844 (1997).

[268] *Id.* at 847.

[269] *Id.* at 880.

The Supreme Court's aversion to allowing a "heckler's veto" to enable suppression of free speech should apply to defeat the argument that vilification of religious beliefs, which is so hateful that it stirs up the emotions of those offended to commit violent acts in reprisal, should be banned to forestall such potential violence. Aside from the issues around imminence discussed previously, allowing the offended believers to be the arbiters of what can be said or published about their faith on the basis of whether they would be likely to react violently provides them with an effective veto power over free speech.[270]

A communication of hate is triangular in that it involves the speaker, the target of the hate message and the audience that the speech is intended to stir up to a highly charged emotional response against the target. The speaker may be trying to provoke a response from the target of the hate message as well. However, the more direct control that the speaker can exercise is over how his or her words will affect his or her sympathetic audience whom the speaker is trying to exhort to action. Thus, as a law professor and Associate Director of the International Center for Law and Religion Studies of the J. Reuben Clark Law School, Brigham Young University, explained in an article: "Violence by those who are the targets of offensive speech is not what defines something as actionable 'hate speech;' rather it is violence, hatred, or discrimination that is manifested by the intended 'third party' audience of the hate speech."[271]

Consider the example of Florida pastor Terry Jones who burned Korans in 2012. One can stipulate that this was a despicable act, but it is expressive conduct that is deemed protected free speech absent circumstances that would bring it within one of the narrow categories of exceptions such as "fighting words."[272] The Koran burning event took place in front of Pastor Jones' Florida church, the Dove World Outreach Center, according to a newspaper account, following some speeches.[273] Reportedly there were no protestors, but about 20 people gathered on church property. Jones was issued a citation for burning books without proper authorization, in violation of fire ordinances.

Suppose, in changing the facts for hypothetical discussion purposes only, a number of people strongly disagreeing with Pastor Jones' actions had come by to protest after they had heard of Pastor Jones' plans and were so enraged at seeing the Korans burnt in front of their eyes that they attacked Jones' supporters who were also watching. The potential for such violence as soon as the protestors arrived does not in any way affect Pastor Jones' First Amendment right to proceed with the burning. First of all, in this hypothetical, the protestors voluntarily placed themselves in a situation where they saw the burning. They could have easily avoided the burning altogether.

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[270] Cohen v. California, 403 U.S. 15, 23 *supra*.

[271] Brett G. Scharffs, "International Law and the Defamation of Religion Conundrum," The Review of Faith & International Affairs, 11:1, 66-75 (2013).

[272] *Texas v. Johnson*, *supra* (flag burning permitted as expressive conduct).

[273] Cindy Swirko, "Pastor burns holy books in protest of imprisoned clergyman," Gainesville.com (April 28, 2012). Available at: http://www.gainesville.com/article/20120428/ARTICLES/120429572 . ("Jones spoke at a podium that was far enough away that he could not be heard by people along 37th Street. The event was streamed live over the Internet. After the speeches, copies of the Islamic holy book and an image depicting Muhammad were burned at about 5:50 p.m. in a portable fire pit…Several onlookers watched the event from across 37th Street. Some said they wished Jones and Dove World would stop its activities or relocate, while others noted that Jones has a constitutional right to protest.").

Second, the fact that, upon seeing the Korans being burned, some of the protestors could be expected to have a violent reaction does not subject Jones' right of free expression to their veto.

However, assume the protestors were acting peacefully, but a supporter of Pastor Jones stood in front of the church, after Pastor Jones finished burning the Korans, and delivered a hate-filled speech against Islam while holding up a vial of lighter fluid and pointing to the protestors. His intention for the purposes of this hypothetical was to incite members and supporters of the church, who were glowering at the protestors, to set upon the protestors immediately. Such inciting words, if uttered in the context assumed by this hypothetical, would not be considered protected free speech under the *Brandenburg* test.

In sum, while prohibition of "defamation of religions" is inconsistent with U.S. free speech jurisprudence, a statute based on HRC Resolution 16/18's call "to criminalize incitement to imminent violence based on religion or belief" has more potential to survive a constitutional challenge if certain conditions are met:

1. It must be rendered content neutral, which would mean dropping its limitation to incitement "based on religion or belief." Penalties, however, could be imposed for actual violence committed as a hate crime, with evidence of the advocacy of religious hatred used to prove the animus motivating the commission of violence against members of the target group.

2. There needs to be a direct addressee whom the speaker or writer is trying to incite to engage in illegal conduct within an immediate time frame, not at some indefinite time in the future.

3. The possibility or even virtual certainty of violence by those offended by the hate speech cannot be taken into account in applying the "incitement to imminent violence standard" because to do so would subject free speech to the "heckler's veto."

CONCLUSION

In this Report the Committee has examined sources of international law and examples of regional and national laws in terms of how they weigh the importance of protecting freedom of expression as against other core values with which broad-ranging freedom of expression may at times come into conflict, such as human dignity, equality and protection of the free exercise of religious belief. The United Nations has served as a forum in which competing views of the appropriate weighting have played out in the context of resolutions dealing with defamation of religions, religious hate speech, and incitement to violence based on religion or belief.

After more than a decade of diminishing support in the General Assembly and Human Rights Council for resolutions calling for the prohibition of "defamation of religions," a consensus emerged behind language in resolutions that focused on protecting individuals from incitement to violence, hostility or discrimination based on their religion, rather than protecting any religion per se from the expression of criticism that its adherents may deem offensive. The vague phrase "defamation of religions" was de-coupled completely from the narrower category of speech that

the Incitement Resolutions address - advocacy of religious hatred against individuals that constitutes incitement to discrimination, hostility or violence.

Nevertheless, as this Report has described, there are differing views on how to best implement the Incitement Resolutions within individual UN member states and as a norm of international law. Fundamental differences, particularly between the OIC countries at one end of the free expression spectrum and the United States at the other end, over the meaning of certain terms used in the Incitement Resolutions have become evident in discussions following the passage of the initial Incitement Resolution in 2011. No consensus has been reached over defining the appropriate boundary between permissible expression of ideas on the one hand, and "advocacy" of "religious "hatred" constituting "incitement" to violence on the other, which is critical to having any chance of developing a consensus among UN member states over when and under what circumstances to criminalize incitement to imminent violence based on religion or belief.

We have suggested consideration of a three-factor test for proving the crime of incitement to imminent violence based on religion or belief:

> (1) the intent and capacity of the speaker or writer to incite violence with an incendiary message promoting intense feelings of hatred against individuals or a group targeted for reasons related to religious belief,
>
> (2) a receptive audience that the speaker or writer knows or should know has the capacity to act immediately on the message, and
>
> (3) a high risk that the message conveyed will have the foreseeable consequence of inducing persons who resonate with the content and intensity of the message to act immediately on it by committing violence against members of the target group.

However, a statute criminalizing incitement to imminent violence based solely on religion or belief, rather than being content neutral, would most likely not pass constitutional muster in the United States, which is an outlier in terms of the highest importance it attaches to protecting free expression, even in the face of outrageous hate speech. Any attempt to water down this protection to accommodate pressures from other countries, including by adopting the model under which each case of alleged hate speech is analyzed on its own facts to try and strike the right balance among multiple values considered to be of equal importance, would require the reversal of decades of U.S. Supreme Court jurisprudence.

APPENDIX A

Commission on Human Rights resolution 1999/23	– E/CN.4/1999/167	(22 March-30 April 1999)
Commission on Human Rights resolution 2000/84	– E/CN.4/RES/2000/84	(26 April 2000)
Commission on Human Rights resolution 2001/4	– E/CN.4/RES/2001/4	(18 April 2001)
Commission on Human Rights resolution 2002/9	– E/CN.4/RES/2002/9	(15 April 2002)
Commission on Human Rights resolution 2003/4	– E/CN.4/RES/2003/4	(14 April 2003)
Commission on Human Rights resolution 2004/6	– E/CN.4/RES/2004/6	(13 April 2004)
Commission on Human Rights resolution 2005/3	– E/CN.4/RES/2005/3	(12 April 2005)
General Assembly resolution 60/150	– A/RES/60/150	(20 January 2006)
Human Rights Council decision 1/107	– A/HRC/DEC/1/107	(30 June 2006)
General Assembly resolution 61/164	– A/RES/61/164	(21 February 2007)
Human Rights Council resolution 4/9	– A/HRC/RES/4/9	(30 March 2007)
General Assembly resolution 62/154	– A/RES/62/154	(6 March 2008)
Human Rights Council resolution 7/19	– A/HRC/RES/7/19	(27 March 2008)
General Assembly resolution 63/171	– A/RES/63/171	(24 March 2009)
Human Rights Council resolution 10/22	– A/HRC/RES/10/22	(26 March 2009)
General Assembly resolution 64/156	– A/RES/64/156	(8 March 2010)
General Assembly resolution 65/224	– A/RES/65/224	(11 April 2011)
General Assembly resolution 16/18	– A/HRC/RES/16/18	(12 April 2011)
General Assembly resolution 19/...	–A/HRC/RES/19/L.7	(16 March 2012)
General Assembly Resolution 22/...	– A/HRC/22/L/40	(18 March 2013)