

SPECIAL REPORT

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RICHARD AND HELEN DEVOS CENTER FOR RELIGION AND CIVIL SOCIETY

## About the Author

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This paper is one in a series of essays on the natural law and natural rights foundations of internationally recognized human rights. The “First Principles of International Human Rights” essays propose reforms of the human rights movement for the increased protection of the fundamental and inalienable rights of all people.

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This paper, in its entirety, can be found at <http://report.heritage.org/sr232>

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# First Principles on Human Rights: Freedom of Speech

*Michael P. Farris and Paul B. Coleman*

**T**he U.N. has a confusing approach to the meaning of the freedom of speech. Some documents and decisions provide robust free speech protections. However, due to the complex history of the U.N., there has always been a pro-censorship strand running through the U.N. system. If the pro-free speech “side” is to take precedence, U.S. action is needed. Free speech must be modelled and embraced at the national level and championed at the international level—starting with the Secretary General’s ill-advised Plan of Action on Hate Speech. The remedy for any form of speech to be wayward is the right of others to demonstrate the error of the first speaker through logic, facts, and reason. The answer is always more speech.

Two requests were recently received for legal assistance. One was from a lawyer in an Islamic-majority nation. His client was being prosecuted for allegedly defaming the prophet of Islam, Mohammed. He has subsequently been sentenced to death. The second was from a lawyer in Canada. A street preacher had been arrested for quoting perhaps the most famous verse in the Bible—John 3:16—which speaks of God’s love for the whole world. He dared to say these words at a lesbian, gay, bisexual, and transgender (LGBT) outdoor event—and now faces criminal penalties.

Although the details of the national laws vary, as do the political affiliations and worldviews of the lawmakers who enact restrictive statutes, these and countless other examples reveal a worldwide assault on freedom of speech. In many nations, draconian blasphemy laws exist with significant penalties, including the death penalty. Such laws are often used to settle scores between neighbors, attack opponents, and advance government authority. And in more recent times, loosely worded anti-terror, anti-extremism, or national security laws are being used to silence political opponents and any person or group considered an enemy of the state.

In the West, “hate speech”<sup>1</sup> laws are the biggest threat to freedom of speech.<sup>2</sup> “Hate speech” laws are extremely vaguely worded, and there is no universally agreed legal definition of “hate speech.” As discussed below, the United Nations (U.N.) has recently launched a major new initiative to combat “hate speech”—spearheaded by the Secretary-General himself. The opening report states:

There is no international legal definition of hate speech, and the characterization of what is “hateful” is controversial and disputed. *In the context of this document*, the term hate speech is understood as any kind of communication in speech, writing or behaviour, that attacks or uses pejorative or discriminatory language.<sup>3</sup>

Similar statements can be found by all major international actors. For example, the Fundamental Rights Agency of the European Union once stated in a report that the “term ‘hate speech,’ *as used in this section*, includes a broader spectrum of verbal acts...[including] disrespectful public discourse.”<sup>4</sup>

**“Hate speech” laws are vaguely worded, largely subjective, often criminal in nature, and arbitrarily enforced. Moreover, these laws need not require falsehood, need not require an actual victim, and protect some groups of people and not others.**

And a fact sheet produced by the European Court of Human Rights has explained:

The identification of expressions that could be qualified as “hate speech” is sometimes difficult because this kind of speech does not necessarily manifest itself through the expression of hatred or of emotions. It can also be concealed in statements which at a first glance may seem to be rational or normal.<sup>5</sup>

The United Nations Educational, Scientific, and Cultural Organization summarized the situation as follows: “Hate speech is a broad and contested term.... [T]he possibility of reaching a universally shared definition

seems unlikely.”<sup>6</sup> Given that there is no universally agreed definition of “hate speech,” identifying so-called hate speech laws is problematic. Nevertheless, some conclusions can be drawn based on a study of such laws across the West.<sup>7</sup>

Most of these laws criminalize speech that allegedly does one or more of the following: hates, offends, insults, belittles, vilifies, ridicules, despises, discriminates, or violates the dignity of those belonging to one or more of the following groups: sex, sexual orientation, gender identity, race, nationality, language, ethnic origin, social status, religion, belief, political affiliation, age, and disability. In some instances, the state itself can be a victim of “hate speech,” as well as religious dogma per se (not just religious people).

Hence, there is no identifiable and agreed-upon category of speech that can be labelled “hate speech”; so-called hate-speech laws are powerful tools in the hands of those who wish to censor unpopular opinions, silence political opposition, and remove irritating voices that speak out against the orthodoxies of the day. To choose one typical example among many, Chapter 11, Section 10 of the Finnish Criminal Code states the following:

A person who makes available to the public or otherwise spreads among the public or keeps available for the public information, an expression of opinion or another message where a certain group is threatened, defamed or insulted on the basis of its race, skin colour, birth status, national or ethnic origin, religion or belief, sexual orientation or disability or a comparable basis, shall be sentenced for *ethnic agitation* to a fine or to imprisonment for at most two years.<sup>8</sup>

**“Hate speech” laws are powerful tools in the hands of those who wish to censor unpopular opinions, silence political opposition, and remove irritating voices that speak out against the orthodoxies of the day.**

It is under this provision that a leading member of the Finnish Parliament, and former Minister of the Interior, is now facing four separate police investigations for alleged “hate speech.” Päivi Räsänen’s alleged crime? Tweeting an image of some Bible texts and writing a church booklet on sexual ethics *16 years ago*.<sup>9</sup>

Such cases are becoming common across Europe and the West. Catholic cardinals have been investigated for preaching homilies, journalists have been arrested and fined, and private conversations among citizens have resulted in criminal prosecutions.

*In the face of global assaults to freedom of speech, never has the need for free speech champions been greater.* And the U.N. is well-placed to be at the forefront of such efforts. It has a number of bodies and mechanisms that can promote freedom of expression, as well as foundational human rights treaties with strong protections for freedom of expression.

However, this is only half the story. The human rights treaties also contain language that encourages states to censor speech. U.N. bodies and mechanisms often encourage state-censorship. And many U.N. member states use the U.N. system to advance their censorious agenda globally.

As this essay makes clear, at the heart of the U.N. system is a contradictory—even schizophrenic—approach to freedom of expression, with both a pro-free speech and pro-censorship approach in existence at the same time. This can be traced back to the very founding of the U.N., and it reverberates through to the present day.

Before tracing the historical debates that have led to this present-day schizophrenia, it is first worth considering why a robust defense of free speech is necessary.

## I. In Defense of Freedom of Speech

Preventing the U.N. from tipping toward censorship is of pressing importance given the deep moral and political significance of free speech. Free speech is of such great significance that defenses of the right to speak freely are manifold. These defenses are, broadly speaking, either *pragmatic* or *principled*, meaning that they appeal either to the pragmatic reasons for protecting speech or to moral principles why states lack authority to restrict certain kinds of speech.

Defenses from the two categories are often used in tandem, as by John Stuart Mill, one of the most famous and influential defenders of free speech. Mill makes the pragmatic argument that protections for speech are an indispensable aid to our search for truth, since “*history teems with instances of truth put down by persecution.*”<sup>10</sup>

At the same time, Mill proposes a principled understanding of the limits of state authority: The state is only permitted to interfere with actions in order to prevent “evil” or “injury” to others, leaving an expansive “region of human liberty” that includes, first, “liberty of conscience in the most

comprehensive sense” and second, “the liberty of expressing and publishing opinions.”<sup>11</sup> This liberty to speak and publish, Mill reasons, “almost is of as much importance as the liberty of thought itself” and “is practically inseparable from it” as it rests “in great part on the same reasons.”<sup>12</sup>

In this liberal tradition, the right to free speech is, along with other natural rights, grounded in the idea that “every man has property in his own person,” to use Locke’s phraseology.

As in Mill, so also in general, free speech defenses—especially those that seek a principled reason for limiting state authority over speech—rely on a distinction between actions and speech. This speech–act distinction is quite old and finds nuanced treatment even in Montesquieu. As Montesquieu put it, laws ought only seek to punish “overt acts,” and “words do not constitute an overt act; they remain only in idea.”<sup>13</sup> Because speech is not action but only ideas expressed aloud, Montesquieu argued, laws against speech tend to be vague and therefore to give the state broad, arbitrary power.<sup>14</sup> Thus Montesquieu offers a principled reason based in distinction between speech and action to caution against policing speech.

This same interest in the distinctive characteristics of speech appears in what is perhaps the most important of the historic defenses of free speech, namely, the argument from natural law and natural rights. Certainly natural rights arguments, based in early modern theories of natural law, “powerfully shaped the way that the Founders thought about the purposes and structure of government.”<sup>15</sup> The protections for free speech enshrined in the First Amendment emerged from the influence of such theorists of natural rights as William Blackstone, Benedict Spinoza, and John Locke.<sup>16</sup> In this liberal tradition, the right to free speech is, along with other natural rights, grounded in the idea that “every man has property in his own person,” to use Locke’s phraseology.<sup>17</sup>

Locke’s argument was that natural law gives us each certain duties to God that allow us to claim certain natural rights against all worldly powers. These natural rights include, famously, life, liberty, and property. We have property in ourselves because, Locke argued, we ultimately each belong to God and have been deputized by God, “sent into the world by his order and

about his business.”<sup>18</sup> God has given us certain duties to perform, authorizing us to execute the natural law to which he will hold us accountable.

Because we are accountable to God for performance of our duties under the natural law, we cannot allow ourselves to fall under tyranny. Tyrannical rule threatens to take away life and freedom, both of which are indispensable to our efforts to serve God.<sup>19</sup> Watchfulness against tyranny includes carefully adjudging what aspects of life fall under the respective jurisdictions of “the civil governor, which is the ruler” and “the individual governor, which is conscience.”<sup>20</sup>

“Each individual alone,” Locke believed, “is responsible for their own salvation,” and therefore the ruler must allow citizens to teach publicly any doctrine that does not by its very nature “plainly undermine the very foundations of society.”<sup>21</sup> Locke’s point was put in more explicit terms by Spinoza, who wrote that individuals hold an “indefeasible natural right” to free speech, except when the opinions expressed “by their very nature nullify the [social] compact.”<sup>22</sup>

**While the state has legitimate authority to regulate our *actions* insofar as doing so is necessary to prevent us from taking away the life, liberty, or property of others, there is a strong presumption that individuals have authority to speak as they will.**

The natural rights tradition, therefore, bequeaths to us the idea that we all, simply because we are humans, have an indefeasible and inalienable right to speech that, while not entirely without limits, is nevertheless quite substantial. We have the right to speak freely because to speak is not to take action but only to express our ideas. And our ideas we cannot possibly allow any outside power to regulate, since God himself will hold us accountable for our ideas and beliefs.

Thus, while the state has legitimate authority to regulate our *actions* insofar as doing so is necessary to prevent us from taking away the life, liberty, or property of others, there is a strong presumption that individuals have authority to speak as they will. The state must therefore tread carefully when it seeks to interfere with speech—since in regulating speech the state can easily undermine the very liberty it exists to secure.

## II. Free Speech Versus Censorship at the U.N.'s Founding

Principled and pragmatic defenses of freedom of speech were deployed by Western nations at the very founding of the U.N.—and both were met with significant opposition from Communist-led nations that placed a far greater emphasis on the reaches of state power. A two-decade-long debate unfolded, the results of which can be seen today.

With the launch of the United Nations in San Francisco in 1945, work soon began on an international bill of human rights—a major priority for the U.S. and many other Western nations following the horrors of World War II. Three years later, the Universal Declaration of Human Rights (UDHR) was launched, followed by a steady succession of international and regional human rights treaties, most of which enshrine the fundamental right to freedom of expression.<sup>23</sup> However, provisions were also adopted within international human rights treaties that appear to undermine this fundamental right by *obligating* states to prohibit the impossibly vague and subjective notion of “advocacy of...hatred”—known today as “hate speech.”

This inherent conflict reflects the political and historical circumstances in which the core documents were drafted.<sup>24</sup> Moreover, this conflict continues through to the present and helps explain why parts of the U.N. machinery herald freedom of expression as a fundamental human right and lament restrictions on this right, while other bodies (or sometimes even the same U.N. body) call for greater restrictions on this right. And it explains why, in 2019, the U.N. Secretary-General can launch a strategy to combat (undefined and arguably undefinable) “pejorative or discriminatory language”—while at the same time saying this in no way undermines freedom of expression.<sup>25</sup>

As discussed below, at the heart of international law lies an insurmountable challenge that the U.N. seeks to navigate: the protection of the “right kind of speech” and prohibition of the “wrong kind of speech”—even though such categories are wholly subjective and impossible to determine.

At the start of the international human rights project, freedom of speech was considered by many nations to be an absolutely essential freedom that must be protected in any international human rights treaty. For example, in 1946, the U.N. General Assembly declared in its very first session: “Freedom of information is a fundamental human right and is the *touchstone of all the freedoms to which the United Nations is consecrated.*”<sup>26</sup> And the preamble to the UDHR states, “[T]he advent of a world in which human beings shall enjoy freedom of speech and belief...has been proclaimed as the highest aspiration of the common people.”<sup>27</sup>

At the heart of international law lies an insurmountable challenge that the U.N. seeks to navigate: the protection of the “right kind of speech” and prohibition of the “wrong kind of speech”—even though such categories are wholly subjective and impossible to determine.

On the other hand, there were consistent voices from the Soviet Union and other communist-led states that unbridled freedom of speech would simply lead to more fascism and more war. Both sides made reference to Adolf Hitler and Nazi Germany. Predominantly Western nations argued that freedom of speech must be robustly protected in order to stop totalitarian regimes such as Nazi Germany from removing the civil liberties of their citizens. Notably, for example, after coming to power in 1933, Hitler immediately passed an “emergency decree” ordering that “restrictions on personal liberty, on the right of free expression of opinion, including freedom of the press, on the right of assembly and the right of association...are permissible beyond the legal limits otherwise prescribed.”<sup>28</sup> Predominantly communist-led states argued that too much freedom of speech led to the rise of the Nazis in the first place.

Such diverging views persisted for the entire drafting period of the UDHR, as well as the other core international human rights treaties drafted in the years that followed. Hence, international law on the right to freedom of speech reflects a patchwork of influence comprised of two opposing views. We will now review the drafting of four major provisions in three different key texts, in order to better understand how the historic debates, resulting in an inherent contradiction, carry through to the present day.

#### **UDHR, 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.<sup>29</sup>

Article 19 of the Universal Declaration of Human Rights is a bold declaration of the right to freedom of speech—and does not contain any limitation clauses. However, this was not without controversy during the two-year UDHR drafting process. During the discussions in the Sub-Commission on

the Freedom of Information, two clauses were proposed that would limit this right. Only two experts objected to both versions of the limitation clauses—the Soviet and Czechoslovakian delegates. However, this was not because the amendments restricted freedom of speech, but because they did not restrict it enough. Nevertheless, the majority of the Sub-Commission voted to delete the proposed limiting clauses altogether.<sup>30</sup>

Undeterred, the Soviets continued their objections, and several more attempts to restrict freedom of speech and freedom of assembly were made. Thus, during the Third Committee of the Human Rights Commission in June 1948, the Soviet delegation proposed amendments that would put limits on both freedom of speech and freedom of association. It was submitted that the “use of freedom of speech and of the press for the purposes of propagating Fascism and aggression or of inciting war between nations shall not be tolerated.”<sup>31</sup> Moreover, “All societies, unions and other organizations of a Fascist or anti-democratic nature, as well as their activity in any form, are forbidden by law under pain of punishment.”<sup>32</sup> Again, however, all amendments intended to deny freedom of speech and assembly to those labelled as “fascists” were defeated. It was the view of the majority that despite “hating fascism as intensely as did the USSR,”<sup>33</sup> tolerance should mean tolerating even the intolerant.

Much like the concerns over the term “hate speech” today, it was not clear to the delegates of many Western nations what was meant by the term “fascist,” particularly as the Soviet delegation had defined it as “the bloody dictatorship of the most reactionary section of capitalism and monopolies.”<sup>34</sup> Thus, to the Soviets, “there was only a difference of degree and not one of kind between Nazi Germany and the Western democracies.”<sup>35</sup> With such a vague definition of “fascist,” there was real danger that it could mean anything that the state chose it to mean, and its proscription could be used to restrict people or groups that were not state-approved.

Canada, along with other Western nations, made its opposition to the loose terminology clear, and the U.N. report notes,

The Canadian delegation could not accept the theory that human rights should be limited to those sanctioned and sanctified by the communist doctrine, while all others were to be outlawed as fascist. The term “fascism” which had once had a definite meaning...was now being blurred by the abuse of applying it to any person or idea which was not communist.<sup>36</sup>

Before the final text was adopted, the Soviet delegation gave another insight into its position. A Soviet representative argued:

It was of no use to argue that ideas should only be opposed by other ideas; ideas had not stopped Hitler making war. Deeds were needed to prevent history from repeating itself. Not only must ideas be fought by other ideas but fascist manoeuvres and warmonger's machinations must also and especially be made illegal and the necessary punitive measures must be provided for.<sup>37</sup>

Therefore, in a document created to limit the reach of the state, the Soviets pushed for provisions that would extend state power, with “punitive measures” against ideas seen as “necessary.” However, the majority disagreed, and the final version of Article 19 did not explicitly exclude any particular people or group from protection. The Soviet notion that there were “dangerous ideas[,] the diffusion of which should be prevented”<sup>38</sup> was rejected. Hence, at a time when fear of fascism was perhaps at its greatest—and indeed served as a primary motivation for the UDHR itself—the framers were not prepared to single out any speech as being unworthy of protection.

**ICCPR, Article 19.** With the drafting process beginning at roughly the same time as the UDHR but finishing nearly two decades later, the International Covenant on Civil and Political Rights (ICCPR) is a binding treaty that has been ratified by most countries. ICCPR Article 19 protects the right to freedom of speech, the final version of which reads as follows:

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.<sup>39</sup>

Article 19(1) protects an absolute right to freedom of opinion. This was relatively uncontroversial and was adopted unanimously by the drafting committee in 1961.<sup>40</sup> Similarly, Article 19(2), which protects freedom of speech in very similar terms to UDHR Article 19, “was adopted by 88 votes to none with just 1 abstention.”<sup>41</sup>

However, unlike the UDHR, Article 19(3) introduces limitations on the right to freedom of speech. Hence, the right to hold opinions without interference is absolute; the right to express those opinions is qualified. And the limitation clause generated much debate over the course of more than one decade. Debate centered around various topics, including the reference to “special duties and responsibilities,” which does not appear in any other article in the treaty; the distinction between a right to “seek” and a right to “gather” information; and whether the limitation clause should be short and general in nature or list every limitation on speech imaginable (with a list of 25 possible limitations generated by the drafting committee).<sup>42</sup>

While a more general formulation was eventually voted through by 71–7 (with 12 abstentions),<sup>43</sup> this was not without considerable opposition by the Soviet bloc, which by the 1960s “had become the champion of extensive restrictive language.”<sup>44</sup> The 1961 summary of the debate is worth quoting in full, given that both sides of the argument are repeated almost verbatim today:

Those who held that additional specific restrictions should be included in article 19 laid stress on the continued existence of such evils as national, racial, and religious hatred or prejudices, war propaganda or the dissemination of slanderous rumours, and on the dangers these presented to peaceful and neighbourly relations among the nations in the era of nuclear weapons; States should therefore be able to prohibit such activities....

Those who opposed such specific restrictions as mentioned above feared that they might convert article 19 into a means of limiting freedom of information. While no one could quarrel with the objective of such restrictions, they held, it would be most difficult to determine, in general and in any specific case, what constituted e.g. war propaganda or incitement to national or racial hatred and what was legitimate information; there was also the question as to what authority would be empowered to decide such issues. There was a danger that Governments might allow only such information to appear as they favoured. Propaganda, prejudice and similar evils were best overcome by giving free play to all views, thus permitting truth to prevail.<sup>45</sup>

These paragraphs represent a near-perfect summation of today’s debate over freedom of speech. One side of the debate argues that the state must be empowered to restrict evils such as “hate speech” in order to protect individuals, groups, and society at large from the harm that negative speech causes. The other side argues:

- It is impossible to draw the line between so-called “hate speech” and otherwise legitimate speech;
- It is highly questionable what authority would be empowered to decide such issues;
- It is possible—indeed, probable—that government actors would play favorites with speech; and
- The correct response to bad speech is always more speech, not less.

Following robust debate and some compromises, ICCPR Article 19 was ultimately adopted with almost universal support and only a handful of minor reservations.<sup>46</sup> It largely matches UDHR Article 19, as well as the protections for freedom of speech in other international and regional human rights treaties.<sup>47</sup>

However, the story does not end there, as the Soviet bloc was far more successful in pushing through ICCPR Article 20—a complete anomaly in the treaty as it imposes an obligation without a corresponding right—and Article 4 of the 1965 International Convention on the Elimination of All Forms of Racial Discrimination (ICERD). Both provisions *obligate* states to *prohibit* certain forms of speech, and both were highly controversial at the time they were drafted.

**ICCPR, Article 20.** Article 20 of the International Covenant on Civil and Political Rights reads:

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.

Originally, the ICCPR included an article that stated, “Any advocacy of national, racial or religious hostility that constitutes an *incitement to violence* shall be prohibited by the law of the state.”<sup>48</sup> However, this article was dropped during the Second Session of the Drafting Committee.<sup>49</sup>

During the years that the Commission on Human Rights met, the issue continued to be discussed at length, with the Soviet bloc pushing for the prohibition of speech in addition to the limitations laid out in Article 19. The Polish representative argued that simply condemning incitement to violence did not go to “the root of the evil,” but “merely tackled its consequences, and...would only serve to hide the real nature of the problem.”<sup>50</sup>

Similarly, the representative from Yugoslavia submitted that while incitement to violence should be prohibited, “it was just as important to suppress manifestations of hatred which, even without leading to violence, constituted a degradation of human dignity and a violation of human rights.”<sup>51</sup>

The predominantly Western nations fought against such a prohibition, and Eleanor Roosevelt of the United States argued that it “would be extremely dangerous to encourage Governments to issue prohibitions in that field, since any criticism of public or religious authorities might all too easily be described as incitement to hatred and consequently prohibited. Article [20] was not merely unnecessary, it was also harmful.”<sup>52</sup>

As the debate summary text reveals, while there was “a general agreement that advocacy of national, racial, or religious hatred and war propaganda were evils, strong doubts were expressed as to whether these evils could be prohibited by the law of a state or by an international legal instrument.”<sup>53</sup> Furthermore, it was feared that such a prohibition would “prejudice the right to freedom of opinion and expression,” as “a government could invoke the article to impose prior censorship on all forms of expression and to suppress the opinions of opposition groups and parties.”<sup>54</sup> The General Assembly report of 1961 summarized the opposing views as follows:

The view was expressed that “incitement to violence” was a legally valid concept, while “incitement to discrimination” or “incitement to hostility” was not. On the other hand, it was argued that to prohibit only incitement to violence would not represent progress in international legislation. Often it was hostility or discrimination that led to violence. Any propaganda which might incite discrimination or hostility would likely incite violence and should therefore be prohibited.<sup>55</sup>

The votes on Article 20 reflect “a see-saw of influence”<sup>56</sup> which alternated between the predominantly communist support for a strong prohibition on speech, and the predominantly Western support for free speech. Over a period of seven years, “advocacy of hatred” provisions were added to the draft, deleted, added again, then deleted again—and ultimately added for good.

Hence, despite the opposition, Article 20 was incorporated into the ICCPR. As Jacob Mchangama observes, “The voting record reveals the startling fact that the internationalization of hate-speech prohibitions in human rights law owes its existence to a number of states where both criticisms of the prevalent totalitarian ideology as well as advocacy for democracy were strictly prohibited.”<sup>57</sup>

**ICERD, Article 4.** A similar story can be told with the International Convention on the Elimination of All Forms of Racial Discrimination, a treaty that was adopted in 1965. ICERD Article 4 requires states to undertake “immediate and positive measures designed to eradicate all incitement to, or acts of...discrimination.” Despite the requirement to have “due regard” for the principles embodied in the UDHR—including freedom of speech—nations that accede to the treaty must nevertheless “declare an offence punishable by law all *dissemination of ideas* based on racial superiority or hatred, incitement to racial discrimination.”<sup>58</sup>

Moreover, states must “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 [criminal<sup>59</sup>] law.”<sup>60</sup> This is considered by supporters of international “hate speech” measures to be “the most important” provision<sup>61</sup> and was undoubtedly “one of the most difficult and controversial of the Convention.”<sup>62</sup>

During the drafting of the ICERD, it was clearly recognized that racism was a great moral evil. However, there was also concern about giving the state the power to use coercive criminal law to regulate the speech and private associations of its citizens. While the communist representative of Hungary declared that his country could not sign a convention that permitted fascist organizations to exist, the U.S. maintained that “citizens must still be allowed the right to be wrong.”<sup>63</sup>

The dividing lines were as clear as ever: While the U.S. draft of Article 4 restricted its scope to speech “resulting in or likely to cause acts of violence,”<sup>64</sup> the USSR/Poland draft made no such condition.<sup>65</sup> As the debates continued, Czechoslovakia proposed an amendment to the U.S. draft that would delete the words “resulting in acts of violence”; Poland tabled an amendment that would further expand the power of the state to combat racist speech; and Ukraine sought to criminally punish citizens who paid subscriptions to fascist organizations.<sup>66</sup>

All were unacceptable to the United Kingdom representative, Lady Gaitskell, who said that the amendments “infringed the fundamental right of freedom of speech.”<sup>67</sup> Freedom of speech, she argued, is “the foundation-stone on which many of the other human rights were built; without freedom of speech, many cases of racial discrimination remained completely undiscovered.”<sup>68</sup> While she maintained that the U.K. was taking steps to tackle the problem of racial discrimination, the right of all organizations, “even fascist and communist ones,”<sup>69</sup> to exist and to make their views known must be defended, even though those organizations held views which the

majority of the people utterly repudiated. The views of such organizations were tolerated, however, on one condition—that their speech “did not involve incitement to racial violence.”<sup>70</sup> Moreover, the U.K.’s position was “based on the belief that in an advanced democracy the expression of such views was a risk which had to be taken.”<sup>71</sup>

On the other hand, the communist nations of Czechoslovakia, Hungary, Poland, and Yugoslavia argued that freedom from discrimination should take precedence over the rights to freedom of speech and assembly.<sup>72</sup> With reference to the position of the United Kingdom, the Czechoslovakian representative “felt that it was no proof of democracy that movements directed towards hatred and discrimination were allowed to exist. Her delegation was passionately dedicated to freedom of speech, but not when it was misused in the service of hatred, war and death.”<sup>73</sup>

As with the ICCPR, the predominantly Western liberal democracies, joined by nations from Latin America, were unable to garner enough votes to limit the far-reaching scope of Article 4, and freedom of speech once again made way for state censorship. During the adoption of the ICERD in the General Assembly, it was the Colombian representative who most articulately challenged the impending threats to freedom of speech. He stated:

To penalize ideas, whatever their nature, is to pave the way for tyranny, for the abuse of power; and even in the most favourable circumstance it will merely lead to a sorry situation where interpretation is left to judges and law offices. As far as we are concerned, as far as our democracy is concerned, ideas are fought with ideas and reasons; theories are refuted with arguments and not by resort to the scaffold, prison, exile, confiscation or fines.<sup>74</sup>

The warning of the Colombian representative is no less important today. ICERD Article 4, together with ICCPR Article 20(2), empower the state to use coercive means to eradicate speech that is deemed by the state to be hateful. As Mchangama notes, “The idea that deliberate state action—even at the expense of individual liberty—is the principal vehicle for social change and human progress is a hallmark of socialism, fascism, communism, and in some cases, forms of progressivism.”<sup>75</sup>

As ICERD Article 4 and ICCPR Article 20(2) were passed, states that ratified the treaties were required to take positive measures to introduce “hate speech” laws. And although some nations placed reservations against these provisions at the time of ratification, they neglected to follow their own reservations in the years that followed.

Despite the principled defense of free speech that was given on behalf of many nations during the drafting process of the international documents, “hate speech” laws gradually spread throughout the liberal democratic nations that had once opposed them.

From the 1970s onwards, the international measures passed at the U.N. were incorporated at the national level. For example, one of Italy’s “hate speech” laws explains that the provision was adopted “for the purposes of implementing Article 4 of the Convention,”<sup>76</sup> and one of Belgium’s “hate speech” laws notes that “[t]his Act fulfils the Belgian obligations under the International Convention on the Elimination of all Forms of Racial Discrimination of 21 December 1965.”<sup>77</sup> Similarly, Article 266(b) of the Danish Criminal Code—at the heart of the Danish cartoons controversy several years ago—reads, “This provision was inserted in the Criminal Code in 1971 in connection with Denmark’s ratification of the International Convention on the Elimination of All Forms of Racial Discrimination, to ensure full compliance with Article 4 of that convention.”<sup>78</sup> And Cyprus’s relatively recent “hate speech law” states in the preamble: “For the purpose of harmonization with the act of the European Union entitled ‘Framework Decision 2008/913/JHA of 28 November 2008 on combating certain forms and expressions of racism and xenophobia by means of criminal law.’”<sup>79</sup>

Despite the principled defense of free speech that was given on behalf of many nations during the drafting process of the international documents, “hate speech” laws gradually spread throughout the liberal democratic nations that had once opposed them. Having incorporated the international provisions into national legislation, most nations have since taken the opportunity to expand the reach of the “hate speech” laws—and the power of the state.

### III. Free Speech Versus Censorship in Current U.N. Interpretation

Various U.N. bodies are tasked with interpreting international human rights law. Each year, various parts of the U.N. machinery churn out countless reports, resolutions, and recommendations. These include thematic

reports by special rapporteurs on multiple issues, country reports by bodies tasked with monitoring states' compliance with treaties, reports by the Human Rights Council and General Assembly, reports by the High Commissioner for Human Rights, and many, many more.

It is therefore often inaccurate to state that “the U.N. says so” regarding any given topic, given that the U.N. comprises many different parts, which on occasion say different things. This is certainly true for freedom of speech, as the inherent free speech contradiction within foundational U.N. treaties has reverberated throughout the U.N. system, leading to contradictory statements in the decades that followed.

The following is not an exhaustive collection of everything the various U.N. bodies have said about the freedom of speech, but it provides a sample of how the fundamental right is being interpreted by various U.N. bodies.

**Support for Freedom of Speech.** Many U.N. documents convey broad support for freedom of speech. For example, the U.N. Human Rights Committee is tasked with monitoring member states' implementation of the ICCPR, as well as providing its interpretation of provisions within the treaty.<sup>80</sup> In its major interpretation of ICCPR Article 19, known as General Comment No. 34, the Committee interprets the right to freedom of speech broadly, stating:

Freedom of opinion and freedom of expression are indispensable conditions for the full development of the person. They are essential for any society. They constitute the foundation stone for every free and democratic society. The two freedoms are closely related, with freedom of expression providing the vehicle for the exchange and development of opinions.<sup>81</sup>

Moreover, restrictions on freedom of speech must pass a three-part test in order to be valid: “the restrictions must be ‘provided by law’; they may only be imposed for one of the grounds set out in subparagraphs (a) and (b) of paragraph 3 [Article 19]; and they must conform to the strict tests of necessity and proportionality.”<sup>82</sup> The Committee goes on to note that “[r]estrictions must not be overbroad”<sup>83</sup> and that

[w]hen a State party invokes a legitimate ground for restriction of freedom of expression, it must demonstrate in specific and individualized fashion the precise nature of the threat, and the necessity and proportionality of the specific action taken, in particular by establishing a direct and immediate connection between the expression and the threat.<sup>84</sup>

The U.N. also has a number of independent experts dedicated to different issues, known as special rapporteurs. Similar to the U.N. Human Rights Committee, these rapporteurs have been generally supportive of freedom of speech. For example, in 2006 several rapporteurs issued a joint report with their interpretation of the ICCPR. They stated:

Article 20 of the Covenant was drafted against the historical background of the horrors committed by the Nazi regime during the Second World War. The threshold of the acts that are referred to in article 20 is relatively high because they have to constitute advocacy of national, racial or religious hatred. Accordingly, the Special Rapporteur is of the opinion that expressions should only be prohibited under article 20 if they constitute incitement to imminent acts of violence or discrimination against a specific individual or group.<sup>85</sup>

Although the rapporteurs repeat the vague terminology of ICCPR Article 20(2), their emphasis is clearly towards freedom of speech. The threshold of acts referred to in Article 20(2) must be high because, according to the rapporteurs, the context for this provision was nothing less than the horrors of the Nazi regime.

Similarly, the Rabat Plan of Action, released by the U.N. Office of the High Commissioner for Human Rights in 2012, states:

Article 20 of the Covenant requires a high threshold because, as a matter of fundamental principle, limitation of speech must remain an exception. Such threshold must take into account the provisions of article 19 of the Covenant.... This implies, among other things, that restrictions are clearly and narrowly defined and respond to a pressing social need; are the least intrusive measure available; are not overly broad, so that they do not restrict speech in a wide or untargeted way; and are proportionate so that the benefit to the protected interest outweighs the harm to freedom of expression, including with respect to the sanctions they authorize.<sup>86</sup>

In the same year, the special rapporteur on the promotion and protection of the right to freedom of opinion and expression published an extensive report on the right to freedom of opinion and expression, in which he stated,

The threshold of the types of expression that would fall under the provisions of article 20 (2) should be high and solid.... Moreover, while States are required to prohibit by law any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence under

article 20 (2) of the Covenant, there is no requirement to criminalize such expression. The Special Rapporteur underscores that only serious and extreme instances of incitement to hatred...should be criminalized.<sup>87</sup>

Similarly, in a special report focused on tackling religious hatred, the special rapporteur on freedom of religion or belief stated, “[T]he guarantees of freedom of expression as enshrined in article 19 of the Covenant can never be circumvented by invoking article 20. Prohibitions must be precisely defined and must be enacted without any discriminatory intention or effect.”<sup>88</sup>

Moreover, all these U.N. bodies call out blasphemy laws as being incompatible with international human rights law. For example, the U.N. Human Rights Committee has stated: “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.”

The Rabat Plan of Action states: “States that have blasphemy laws should repeal them, as such laws have a stifling impact on the enjoyment of freedom of religion or belief, and healthy dialogue and debate about religion.”<sup>89</sup> The U.N. Special Rapporteur on freedom of religion or belief has concluded that “States that still have blasphemy laws should repeal them, as such laws may fuel intolerance, stigmatization, discrimination and incitement to violence and discourage intergroup communication.”<sup>90</sup> And the former special rapporteur on the promotion and protection of the right to freedom of opinion and expression “urges States to repeal [blasphemy laws] and to replace them with laws protecting individuals’ right to freedom of religion or belief in accordance with international human rights standards.”<sup>91</sup>

Similarly, the current special rapporteur on the promotion and protection of the right to freedom of opinion and expression has recommended that states “[r]eview and, where necessary, revise national laws,” because “[n]ational legislation increasingly adopts overly broad definitions of key terms, such as...hate speech, that fail to limit the discretion of executive authorities.”<sup>92</sup> In the same report, the special rapporteur notes, “In an exchange with the Government of Pakistan, I raised concerns that recent legislation aims to limit ‘extremism’ and ‘hate speech’ without specifically defining either term.... European human rights law also fails to define hate speech adequately.”<sup>93</sup>

However, despite clear problems with censoring speech under a banner that has not and cannot be adequately defined, this is the clear direction that parts of the U.N. have pursued.

**Support for Censorship.** Given the inconsistent and often contradictory nature of international law and its interpretation by various U.N. bodies, it is of little surprise that, over time, countries with abysmal free speech records have felt empowered to use the U.N. machinery to advance a censorious agenda. For example, for more than 15 years, the Organization of Islamic Cooperation (OIC) advanced through the United Nations system the idea that “defamation of religions” should be illegal. This manifested in a draft resolution introduced by Pakistan in the Commission on Human Rights in 1999. This draft was initially titled “defamation of Islam”<sup>94</sup> but was broadened to “defamation of religions.”<sup>95</sup> The Commission adopted the resolution (Resolution 1999/82) without a vote.<sup>96</sup>

Discussions surrounding the resolution nevertheless focused on the defamation of Islam, and the resolution, as approved by the Commission on Human Rights, highlights Islam in particular as being “frequently and wrongly associated with human rights violations and with terrorism.”<sup>97</sup> It also “expresses concern” at the “incite[ment of] acts of violence, xenophobia or related intolerance and discrimination towards Islam and any other religion.”<sup>98</sup> Resolution 1999/82 also:

[u]rges 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, including attacks on religious places, and to encourage understanding, tolerance and respect in matters relating to freedom of religion or belief.<sup>99</sup>

The Human Rights Council approved similar resolutions on defamation of religions through 2010. The General Assembly passed a resolution on defamation of religions from 2005 to 2010. The first defamation of religions resolution in 1999 only included “defamation” in the title; by 2009 the resolution mentioned “defamation” twelve times.<sup>100</sup>

However, with each passing year, support for the resolution dwindled in both the Human Rights Council and the General Assembly. Accordingly, in March 2011, the OIC, through Pakistan, introduced a new resolution to the Human Rights Council.<sup>101</sup> Adopted without a vote, Resolution 16/18, “Combating Intolerance, Negative Stereotyping and Stigmatization of, and Discrimination, Incitement to Violence and Violence Against, Persons Based on Religion or Belief.” The Human Rights Council and General Assembly has adopted similar resolutions ever since.

Resolution 16/18 has been called a positive improvement on the language of the resolutions on defamation of religions because it focuses on the promotion of the rights to freedom of religion and freedom of speech and emphasizes preventing harm done to people rather than to ideas or beliefs. After its passage, then–United States Secretary of State Hillary Clinton lauded the resolution for “reject[ing] the broad prohibitions on speech called for in the former ‘defamation of religions’ resolution, and support[ing] approaches that do not limit freedom of expression or infringe on the freedom of religion.”<sup>102</sup>

However, others have argued that the shift to Resolution 16/18 from the defamation of religions resolutions has a “grim [reality]: the revised approach represented in Resolution 16/18 is no more than a diplomatic veneer of global consensus on the thorny subject of freedom of expression and defamation of Islam.”<sup>103</sup> Indeed, it is important to note that the Organization of Islamic Cooperation spearheaded the passage of Resolution 16/18, as it had the defamation of religions resolutions.

In a statement before the Human Rights Council adopted Resolution 16/18, Zamir Akram, Ambassador from Pakistan, said, “I want to state categorically that this resolution does not replace the OIC’s earlier resolutions on combatting defamation of religions which were adopted by the Human Rights Council and continue to remain valid.”<sup>104</sup> Therefore, from the perspective of the OIC, Resolution 16/18 and its subsequent resolutions do not signal a move away from the defamation of religions movement. Instead, the newer language is merely a pragmatic way to increase support for its cause.

This is particularly concerning given that Resolution 16/18 challenges the fundamental freedoms guaranteed by international human rights treaties. Its ambiguous language allows for states—including those with blasphemy laws—to continue to determine what conduct or speech is permissible, rather than outlining clear criteria that apply in all states. And because Resolution 16/18 is vaguely worded, the risk is that states can use it to justify their already existing blasphemy laws, and those states without such laws may feel justified in instituting new rules.

However, it is not just a collection of member states that are pushing an increasingly censorious approach. Other parts of the U.N. apparatus do so, too. For example, in 2009 a number of special rapporteurs criticized the defamation of religion movement, but seemed pleased that it had morphed into a debate on censoring “hate speech,” stating:

Whereas the debate concerning the dissemination of expressions which may offend certain believers has throughout the last ten years evolved around the notion of “defamation of religions,” we welcome the fact that the debate seems to be shifting to the concept of “incitement to racial or religious hatred,” sometimes also referred to as “hate speech.”<sup>105</sup>

The idea that blasphemy or its international equivalent, defamation of religion, is unacceptable but the alternative framework of prohibiting “hate speech” *is compatible* with freedom of speech is shared by other U.N. bodies. For example, in its report on Greece, the Committee on the Eradication of Racial Discrimination, tasked with monitoring member state compliance with the ICERD treaty, stated:

The Committee is concerned about the continuing existence of legal provisions concerning blasphemy and the risk that they may be used in a discriminatory manner that is prohibited under the provisions of the Convention (art. 5 (d) (vii)).

The Committee recommends that the State party abolish articles 198 and 199 on blasphemy from its Criminal Code.<sup>106</sup>

However, in the preceding paragraph of the very same report, the committee urged Greece to “effectively prevent, combat and punish racist hate speech,” stating:

[T]he fundamental right of freedom of expression should not undermine the principles of dignity, tolerance, equality and non-discrimination as the exercise of the right to freedom of expression carries with it special responsibilities, among which is the obligation not to disseminate ideas on racial superiority or hatred.

Similarly, the U.N. Human Rights Committee habitually calls on member states to prohibit “hate speech,” including criminal prohibition. For example, in 2016, it noted in regard to Slovakia that “hate speech legislation does not cover sexual orientation and gender identity” and recommended the country “adopt measures to tackle hate speech on the grounds of sexual orientation and gender identity.”<sup>107</sup> In 2018, it told Norway to take “effective measures to prevent hate speech” and “systematize the regular collection of data on these crimes, including the number of reported cases, investigations launched, prosecutions and convictions.”<sup>108</sup>

Moreover, it noted Norway should “strengthen the investigation capacity of law enforcement officials on hate crimes and criminal hate speech, including on the Internet, and ensure all cases are systematically investigated, that perpetrators are prosecuted and punished and that appropriate compensation is awarded to the victims.”<sup>109</sup> And, in 2019, it called on the Netherlands to “[i]ntensify its efforts to prevent hate speech, particularly by politicians and high-level public officials.”<sup>110</sup>

Having briefly surveyed the U.N.’s various interpretations of the key treaty law, we can therefore conclude the following:

- U.N. bodies appear broadly supportive of freedom of speech and regularly voice opposition to blasphemy laws—whether these laws appear at the national level or through their international equivalent of defamation of religions;
- The *very same* U.N. bodies are broadly supportive of “hate speech” laws and increasingly call for greater censorship of “hate speech”; and
- Rather than continuing to fight for international blasphemy laws, supporters of blasphemy prohibitions such as Pakistan and the 57-member state body, the Organisation of Islamic Cooperation, have broadly accepted the alternative vague terminology promoted by Western nations, knowing that this language will suffice for their purposes.

This all reached a head in 2019, with the U.N.’s new Strategy and Plan of Action on Hate Speech—supported by almost all member states.

**A Decisive Move Toward Censorship?** In May 2019, U.N. Secretary-General António Guterres released a synopsis of the U.N.’s new Strategy and Plan of Action on Hate Speech that has the potential to influence every part of the United Nations, from the Secretariat to the General Assembly to the agencies.<sup>111</sup>

In a speech at U.N. Headquarters in New York, Guterres called “hate speech” “an attack on tolerance, inclusion, diversity and the very essence of our human rights norms and principles,” and said “it undermines social cohesion, erodes shared values, and can lay the foundation for violence, setting back the cause of peace, stability, sustainable development and the fulfillment of human rights for all.”<sup>112</sup> While he recognized that international law does not prohibit “hate speech” but instead prohibits incitement to discrimination, hostility, and violence, he tied “hate speech” to genocide in

Rwanda, Bosnia, and Cambodia, and to recent violence in Sri Lanka, New Zealand, and the United States. His message is clear: “Hate speech” must be stopped at all costs.

The two stated goals of the U.N. Strategy and Plan of Action on Hate Speech are to “[e]nhance U.N. efforts to address root causes and drivers of hate speech” and to “[e]nable effective U.N. responses to the impact of hate speech on societies.” Guterres and the synopsis document claim that addressing hate speech does not mean suppressing freedom of speech, and that the strategy will not infringe on that right. Yet given the broad terms laid out in the synopsis, this is almost certainly a misguided promise at best—and a deliberately misleading promise at worst.

The launch campaign for the Strategy and Plan of Action on Hate Speech was enthusiastically supported by Western nations keen to criminalize “hate speech,” Islamic nations keen to criminalize blasphemy, and authoritarian nations keen to criminalize anyone who poses a threat to state power. The U.N.’s new definition of “hate speech” applies to “any kind of communication,” including “behaviour,” which could include any number of actions, even involuntary ones. Under this definition there is a very low threshold for speech to be considered “hate speech.”

The synopsis acknowledges that the definition of “hate speech” goes beyond ICCPR article 20(2), but states that “hate speech” as defined in the document “may to [sic] be harmful.” While the synopsis currently focuses on what the U.N. can do to address and combat “hate speech” and does not in its current form explicitly call for the criminalization of “hate speech,” calls for prohibition will likely follow, not least because other parts of the U.N. machinery use the term “hate speech” in a different way and *do* call for the prohibition of criminal “hate speech.”

Only time will tell how the U.N. will proceed with this campaign, but its introduction marks what could be a decisive step towards censorship.

#### IV. Freedom of Speech and Our Future Direction

What, then, does the future hold in the battle for freedom of speech? There are four immediate actions that can be taken to defend and uphold freedom of speech.

**Reform International Law.** First, international law should be reformed to better protect freedom of speech. As detailed above, the vague wording of ICCPR Article 20 and ICERD Article 4 has resulted in the global spread of “hate speech” laws—as well as providing cover for blasphemy laws and other severe speech restrictions. As Amal Clooney and Philippa Webb have

persuasively argued, “CERD Article 4 should be deleted by the agreement of States Parties or excluded through reservations.”<sup>113</sup> Similarly, Clooney and Webb argue, “States should enter reservations to ICCPR Article 20 to prohibit speech only where it intentionally incites violence or a criminal offence that is likely to follow imminently (or is otherwise concretely identified) as a result of the speech.”<sup>114</sup>

If international law cannot currently be reformed—and there is certainly a lack of political will at this moment in time—states should add reservations to these articles *and* follow their reservations at the national level. The reservations of the U.S. could be emulated by other nations. They state:

[ICCPR] article 20 does not authorise or require legislature 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.

[T]he Constitution and laws of the United States contain extensive protections of individual freedom of speech, expression and association. Accordingly, the United States does not accept any obligation under this Convention, in particular under [ICERD] articles 4 and 7, to restrict those rights, through the adoption of legislation or any other measures, to the extent that they are protected by the Constitution and laws of the United States.

**Repeal National “Hate Speech” Laws and Blasphemy Laws.** Second, even if the governing treaty law remains exactly the same, the speech restrictions of many nations go well beyond the permissible limits of these provisions. Hence, national laws should be repealed in line with the fundamental right to freedom of speech. As the special rapporteur on the promotion and protection of the right to freedom of opinion and expression recommended in 2016, U.N. member states should “[r]eview and, where necessary, revise national laws. National legislation increasingly adopts overly broad definitions of key terms, such as terrorism, national security, extremism and hate speech, that fail to limit the discretion of executive authorities.”<sup>115</sup> Similarly, as the Rabat Plan of Action states: “States that have blasphemy laws should repeal them, as such laws have a stifling impact on the enjoyment of freedom of religion or belief, and healthy dialogue and debate about religion.”<sup>116</sup>

Repealing excessive speech restrictions is not unthinkable or even unlikely. For example, in the United Kingdom a diverse array of campaign groups, civil liberty organizations, and politicians successfully called for the word “insulting” to be removed from section 5 of the Public Order Act

1986. Section 5 made it a criminal offence to use “threatening, abusive or insulting words...within the hearing or sight of a person likely to be caused harassment, alarm or distress.” The campaign was overwhelmingly successful, and the law was changed in 2013.<sup>117</sup> In the same year, section 13 of the Canadian Human Rights Act was repealed. The section had prohibited “the communication of hate messages by telephone or on the Internet” and made it unlawful to “expose a person or persons to hatred or contempt.” Referred to as “a good, albeit belated, first step at reform,”<sup>118</sup> the law was seen to cause a greater threat to liberty than the harm it was meant to address.<sup>119</sup>

As Clooney and Webb state, “In order to recognize a higher measure of protection for speech than what is necessarily provided for under international human rights law, national parliaments may need to enact and amend domestic legislation, or even domestic constitutions or bills of rights.”<sup>120</sup> This can and should be done immediately.

**Rescind the U.N.’s Current Plan on “Hate Speech.”** Third, the U.S. and other nations that protect and promote freedom of speech should urge Secretary-General Guterres to rescind the U.N. Strategy and Plan of Action on Hate Speech in the interest of protecting freedom of speech. If the Secretary-General fails to rescind the Plan of Action, member states should urge the Secretary-General to significantly amend the Plan of Action to make it compatible with the fundamental right to freedom of speech. If the Secretary-General fails to either rescind the Plan of Action or make significant amendments to it, the U.S. and other nations that protect and promote freedom of speech should officially disassociate from Plan of Action.

**Promote a Robust Free Speech Standard.** Fourth, restrictions on “hate speech” should only be valid when the speech constitutes incitement to imminent violence or other criminal offences. A higher free speech threshold will allow citizens to effectively regulate their conduct, as well as allowing the law to be applied without its current arbitrariness.

This is the standard adopted by the U.S. Supreme Court,<sup>121</sup> which has taken a markedly different position than every other nation in the world—upholding freedom of speech through the First Amendment to a far greater degree than all 192 other U.N. Member States. Under this standard, speech can be punished—if likely to incite imminent lawless action—but not for simply causing offence.

As we have seen, this was the free speech standard that would have been adopted under international law had the Soviet Union and other Communist nations not prevented it. If such a free speech standard is to be adopted in other nations today, U.S. leadership is greatly needed.

## Conclusion

The U.N. has a confusing approach to the meaning of the freedom of speech. The UDHR Article 19, ICCPR Article 19, and various interpretations by the U.N. Human Rights Committee and Special Rapporteur on Freedom of Expression provide robust free speech protections. However, due to the complex history of the U.N., particularly the East/West positions throughout the drafting process of foundational human rights treaties, there has always been a pro-censorship strand running through the U.N. system.

If the pro-free speech “side” is to take precedence, positive U.S. action is needed. Free speech must be modelled and embraced at the national level and championed at the international level—starting with the Secretary General’s ill-advised Plan of Action on Hate Speech. To persuade a skeptical world, the idea of free speech must be convincingly argued in principle and demonstrated in practice.

Almost a century ago, Justice Oliver Wendell Holmes stated:

Those who won our independence...knew that order cannot be secured merely through fear of punishment for its infraction; that it is hazardous to discourage thought, hope and imagination; that fear breeds repression; that repression breeds hate; that hate menaces stable government; that the path of safety lies in the opportunity to discuss freely supposed grievances and proposed remedies, and that the fitting remedy for evil counsels is good ones.<sup>122</sup>

In other words, the remedy for any form of speech to be wayward is the right of others to demonstrate the error of the first speaker through logic, facts, and reason. The answer is always more speech. And as a Colombian delegate reminded the U.N. General Assembly over 50 years ago, “[I]deas are fought with ideas and reasons; theories are refuted with arguments.”<sup>123</sup> Today, the idea of freedom of speech itself must be fought for.

## Endnotes

1. The term “hate speech” is used in quotation marks throughout this article—a reminder that its definition or understanding cannot be taken for granted. As a leading academic, Peter Molnar has written, “When used in legal parlance, the colloquial expression ‘hate speech’ seems to presuppose that the state can define with legal precision the particular forms of content that should be regulated as ‘hate speech.’ Because I regard this implicit assumption as questionable, I shall use ‘hate speech’ only in quotation marks.” Peter Molnar, “Towards Better Law and Policy Against ‘Hate Speech’: The ‘Clear and Present Danger’ Test in Hungary,” in Ivan Hare and James Weinstein, eds., *Extreme Speech and Democracy* (Oxford University Press, 2009), p. 237. We follow this practice in all of our writings on the subject.
2. See Paul Coleman, *Censored: How European Hate Speech Laws Are Limiting Freedom of Speech* (Vienna: Kairos Publications, 2016). This essay is largely based on Coleman’s book, in particular, section 3, and parts of the book have been reproduced with permission.
3. United Nations, “United Nations Strategy and Plan of Action on Hate Speech,” p. 2, <https://www.un.org/en/genocideprevention/documents/UN%20Strategy%20and%20Plan%20of%20Action%20on%20Hate%20Speech%2018%20June%20SYNOPSIS.pdf> (accessed May 11, 2020) (emphasis added).
4. EU Agency for Fundamental Rights, *Homophobia and Discrimination on Grounds of Sexual Orientation and Gender Identity in the EU Member States, Part II: The Social Situation*, 2009, p. 46, [https://fra.europa.eu/sites/default/files/fra\\_uploads/397-FRA\\_hdgso\\_report\\_part2\\_en.pdf](https://fra.europa.eu/sites/default/files/fra_uploads/397-FRA_hdgso_report_part2_en.pdf) (accessed May 11, 2020) (emphasis added).
5. Council of Europe, “Factsheet: Hate Speech,” November 2008, p. 2 (emphasis added).
6. Iginio Gagliardone et al., “Countering Online Hate Speech,” *UNESCO Series on Internet Freedom*, 2015, pp. 7–8, [https://www.researchgate.net/publication/284157227\\_Countering\\_Online\\_Hate\\_Speech\\_-\\_UNESCO](https://www.researchgate.net/publication/284157227_Countering_Online_Hate_Speech_-_UNESCO) (accessed May 11, 2020).
7. See Coleman, *Censored: How European Hate Speech Laws Are Limiting Freedom of Speech*.
8. Finland, Criminal Code, Ch. 11, § 10, p. 58, <https://www.finlex.fi/en/laki/kaannokset/1889/en18890039.pdf> (accessed June 4, 2020) (emphasis in original).
9. See Alliance Defending Freedom, “Major Finnish Free Speech Case: Two Additional Investigations Against Räsänen, MP,” March 10, 2020, <https://adfinternational.org/news/major-free-speech-case-in-finland-2newinvestigations/> (accessed May 11, 2020).
10. John Stuart Mill, *On Liberty* (Indianapolis: Hackett, 1978), p. 27 (emphasis added). For a recent discussion of this argument of Mill’s and its profound influence on First Amendment law, see Irene M. Ten Cate, “Examination of John Stuart Mill’s and Oliver Wendell Holmes’s Free Speech Defenses,” *Yale Journal of Law and the Humanities*, Vol. 22 (2010), pp. 50–56, [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1831766](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1831766) (accessed May 11, 2020).
11. Mill, *On Liberty*, p. 11. For a recent discussion of Mill’s harm principle and its relation to free speech, see Kent Greenwalt, *From the Bottom Up: Selected Essays* (Oxford: Oxford University Press, 2016), pp. 357–362. On the distinction between the harm principle and the offense principle, which is less protective of free speech, see David van Mill, “Freedom of Speech,” in Edward N. Zalta, ed., *The Stanford Encyclopedia of Philosophy*, Summer 2018, <https://plato.stanford.edu/entries/freedom-speech/> (accessed May 11, 2020).
12. Mill, *On Liberty*, p. 12.
13. Montesquieu, *The Spirit of the Laws*, Thomas Nugent, trans. (New York: Harper, 1949), p. 193.
14. *Ibid.*, pp. 193–194. See the discussion of Montesquieu on this point in William T. Mayton, “Seditious Libel and the Lost Guarantee of a Freedom of Expression,” *Columbia Law Review*, Vol. 91 (1984), p. 9, <https://www.jstor.org/stable/1122370?seq=1> (accessed May 11, 2020).
15. Jud Campbell, “Natural Rights and the First Amendment,” *Yale Law Journal*, Vol. 127, No. 2 (2017–2018), p. 253, <https://www.yalelawjournal.org/article/natural-rights-and-the-first-amendment> (accessed May 11, 2020).
16. See the discussion of influences on the founding generation in Michael Kahn, “The Origination and Early Development of Free Speech in the United States,” *Florida Bar Journal*, Vol. 71 (2002), pp. 1–5. On Locke’s influence in particular, Peter Myers is correct in his judgment that “[i]n virtually all the elements of their account of natural rights, the Founders restate the political philosophy of John Locke, whose ‘little book on government,’ the *Second Treatise of Government* (1689), Jefferson held to be ‘perfect as far as it goes.’” Peter C. Myers, “From Natural Rights to Human Rights—and Beyond,” Heritage Foundation *Special Report* No. 197, December 20, 2017, p. 7, [https://www.heritage.org/sites/default/files/2017-12/SR-197\\_0.pdf](https://www.heritage.org/sites/default/files/2017-12/SR-197_0.pdf).
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56. Fariior, "Molding the Matrix: The Historical and Theoretical Foundations of International Law Concerning Hate Speech," § 25.
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58. United Nations, *International Convention on the Elimination of All Forms of Racial Discrimination*, Art. 4 (emphasis added).
59. While the article calls for prohibition by law, the monitoring body of the treaty has held this to mean criminal law. See Fariior, "Molding the Matrix: The Historical and Theoretical Foundations of Law Concerning Hate Speech," § 51.
60. The final version of Article 4 reads: "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 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; (c) Shall not permit public authorities or public institutions, national or local, to promote or incite racial discrimination."
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