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„Same Horse, Different Color: The Incorporation of Defamation of Religion into the Broader Concept of Hate Speech at the International Level and the Danger it Poses to Religious and Political Minorities“

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DEDICATION

To all the women who have influenced my life, especially my mother, Dorothea Poeschl von Kessler, whose kindness, selflessness, and egalitarianism knew no bounds, whose intellectual curiosity, academic and professional excellence were stellar, and whose example I have taken to heart and soul in furtherance of my own dreams.

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SAME HORSE, DIFFERENT COLOR: THE INCORPORATION OF DEFAMATION OF RELIGION INTO THE BROADER CONCEPT OF HATE SPEECH AT THE INTERNATIONAL LEVEL AND THE DANGER IT POSES TO RELIGIOUS AND POLITICAL MINORITIES

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I. Abstract/Abstrakt

Starting in the late 1990s, there was a concerted effort by the Organization of the Islamic Conference/Organization for Islamic Cooperation Member States and other aligned UN Member States to establish defamation of religion as an internationally recognized right. Due to opposition by some western democracies, as well as human rights organizations, a compromise was reached with adoption of Resolution 16/18 by the Human Rights Council and ensuing Rabat Plan of Action on the prohibition of advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence, as well as the Human Rights Committee's General comment no. 34, both of which found that defamation of religion/blasphemy laws are incompatible with freedom of expression. Both note however, in the limited circumstances envisaged by Article 20(2) – the “hate speech” provision of the International Covenant on Civil and Political Rights – that states have an obligation to prohibit “any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence.”

With the launch in 2019 of the United Nations Strategy and Plan of Action on Hate Speech, which broadly defines hate speech as “any kind of communication in speech, writing or behaviour, that attacks or uses pejorative or discriminatory language with reference to a person or a group on the basis of who they are, in other words, based on their religion, ethnicity, nationality, race, colour, descent, gender or other identity factor,” these Member States and outside groups have now renewed their efforts to incorporate defamation of religion into this new, broader definition of hate speech.

These efforts to address hate speech at the United Nations are antithetical to the natural right of freedom of expression – especially critical religious and political expression - incorporated in the Universal Declaration of Human Rights and Article 19 of the ICCPR. In reflection of the right to freedom of expression, its fundamental nature in the hierarchy of the modern human rights scheme, and the critical part that it plays in protecting the rights of minority voices against government interference, the actions of the United Nations

threaten to marginalize just the individuals whom it should be most concerned about protecting – religious and political minorities.

Ab Ende der 1990er Jahre gab es eine konzertierte Anstrengung der Mitgliedstaaten der Organisation der Islamischen Konferenz/Organisation für Islamische Zusammenarbeit und anderer gleichgeschalteter UN-Mitgliedstaaten, um die Verleumdung der Religion als international anerkanntes Recht zu etablieren. Aufgrund des Widerstands einiger westlicher Demokratien sowie von Menschenrechtsorganisationen wurde mit der Verabschiedung der Resolution 16/18 durch den Menschenrechtsrat und dem darauffolgenden Aktionsplan von Rabat ein Kompromiss zum Verbot der Befürwortung von nationalem, rassistischem oder religiösem Hass erzielt eine Aufstachelung zu Diskriminierung, Feindseligkeit oder Gewalt darstellt, sowie die allgemeine Bemerkung Nr. 34, die beide feststellten, dass Gesetze zur Verleumdung von Religion/Blasphemie mit der Meinungsfreiheit unvereinbar sind. Beide weisen jedoch darauf hin, dass die Staaten unter den in Artikel 20(2) vorgesehenen begrenzten Umständen – der „Hassreden“-Bestimmung des Internationalen Pakts über bürgerliche und politische Rechte – verpflichtet sind, „jede Befürwortung von nationalem, rassistischem oder religiösem Hass zu verbieten, die stellt eine Anstiftung zu Diskriminierung, Feindseligkeit oder Gewalt dar.“

Mit der Einführung der Strategie und des Aktionsplans der Vereinten Nationen zu Hate Speech im Jahr 2019, die Hassrede weit definiert als „jede Art der Kommunikation in Wort, Schrift oder Verhalten, die eine Person angreift oder eine abwertende oder diskriminierende Sprache verwendet oder verwendet einer Gruppe auf der Grundlage dessen, wer sie sind, mit anderen Worten, auf der Grundlage ihrer Religion, ethnischen Zugehörigkeit, Nationalität, Rasse, Hautfarbe, Abstammung, ihres Geschlechts oder eines anderen Identitätsfaktors“, haben diese Mitgliedstaaten und externe Gruppen nun ihre Bemühungen erneuert, Verleumdung einzubeziehen der Religion in diese neue, breitere Definition von Hassrede.

Diese Bemühungen, Hassreden bei den Vereinten Nationen zu bekämpfen, stehen im Gegensatz zum natürlichen Recht auf freie Meinungsäußerung – insbesondere kritischer religiöser und politischer Meinungsäußerung – das in der Allgemeinen Erklärung der Menschenrechte und in Artikel 19 des ICCPR verankert ist. In Anbetracht des Rechts auf freie Meinungsäußerung, seiner grundlegenden Natur in der Hierarchie des modernen Menschenrechtssystems und der entscheidenden Rolle, die es beim Schutz der Rechte von Minderheitenstimmen gegen staatliche Eingriffe spielt, drohen die Maßnahmen der

Vereinten Nationen zu marginalisieren nur die Personen, um deren Schutz es am meisten besorgt sein sollte – religiöse und politische Minderheiten.

II. Introduction

“Nobody has the right to not be offended. That right doesn't exist in any declaration I have ever read. If you are offended it is your problem, and frankly lots of things offend lots of people.”¹

“Sticks and stones may break my bones, but words will never hurt me.”²

On June 18, 2022, the United Nations celebrated the inaugural International Day for Countering Hate Speech.³ As laudable as that may sound, the informal session of the General Assembly in New York commemorating that day, held on June 20, 2022, reflected just how problematic the issues of restraints on the right of freedom of expression and punishment for the exercise of the right under the guise of hate speech are, with criticism of the illiberal nature of those restraints coming from some parties, praise from others, and ultimately the session descending into accusations between member states of engaging in the very acts the commemoration sought to counter.⁴

But the rhetoric of the session, following on the introduction of the United Nations Strategy and Plan of Action on Hate Speech,⁵ and two resolutions regarding alleged promotion of interreligious and intercultural dialogue and tolerance in countering hate speech, also revealed that the Organization for Islamic Cooperation⁶ member states and other United Nations member states, having failed in their efforts in the late 1990s and early 2000s to establish defamation of religion as a right, are now seeking to incorporate that

¹ Robin Banerji, ‘Sir Salman Rushdie: Pakistan on the road to tyranny’ (BBC, 18 September 2012) <<https://www.bbc.com/news/world-asia-india-19624100>> accessed 2 August 2022.

² Traditional English language nursery rhyme.

³ ‘International Day for Countering Hate Speech, 18 June 2022’ (United Nations, 2022) <<https://www.un.org/en/observances/countering-hate-speech>> accessed 2 August 2022.

⁴ See Part VI, *infra*.

⁵ United Nations Secretary General ‘United Nations Strategy and Plan of Action on Hate Speech’ (May 2019) <https://www.un.org/en/genocideprevention/documents/advising-and-mobilizing/Action_plan_on_hate_speech_EN.pdf> accessed 2 August 2022, hereinafter “UN Hate Speech Strategy”.

⁶ Hereinafter “OIC”.

right into the broader language of the UN Hate Speech Strategy, with the very real threat, and current reality, of silencing the voices of religious and political minorities.

This commentary will address this threat, with the ultimate conclusion that the UN Hate Speech Strategy is ill-advised, illiberal and antithetical to the human rights that the United Nations is charged with protecting, and that any efforts to expand hate speech beyond the strictures of Article 20(2) of the International Covenant on Cultural and Political Rights⁷ – an already illiberal restraint on freedom of expression – are flawed, non-democratic, and will inure to the benefit of those in power, at the cost of those who are not.

This commentary will first address the current normative basis for freedom of expression under the Universal Declaration of Human Rights⁸ and the ICCPR. It will then provide brief histories regarding the adoption of Article 20(2) of the ICCPR, and the defamation of religion campaign at the United Nations waged by the OIC and others ultimately resulting in the adoption of Resolution 16/18⁹ by the Human Rights Council, and the Human Rights Committee’s General comment no. 34.¹⁰ This will be followed by a history of recent anti-hate speech efforts at the United Nations, followed by the opinions of the special rapporteurs who most significantly have a bearing on the issues of freedom of expression and freedom of religion. An analysis of issues raised by the broadened definition of hate speech utilized by the UN Hate Speech Strategy will follow, and finally, a comprehensive analysis of the risks of the strategy, and the dangers it poses to religious and political minorities will be presented.

III. The Normative Basis of Freedom of Expression under the Language the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights

In order to understand the issues raised by the UN Hate Speech Strategy, it is important to understand the normative basis of freedom of expression, and the limitations placed thereon by Article 20(2) of the ICCPR.

Article 19 of the UHDR reaffirms the natural right of freedom of expression, elegantly providing that “[e]veryone has the right to freedom of opinion and expression;

⁷ International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR), hereinafter “ICCPR”.

⁸ Universal Declaration of Human Rights (adopted 10 December 1948) UNGA Res 217 A(III) (UDHR), hereinafter “UDHR”.

⁹ UNGA Res 16/18 (12 April 2011) UN Doc A/HRC/RES/16/18.

¹⁰ UN Human Rights Committee, ‘General comment no. 34, Article 19, Freedoms of opinion and expression’ (21 July 2011) UN Doc CCPR/C/GC/34.

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.”¹¹

Article 19 of the International Covenant on Cultural and Political Rights provides:

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.¹²

By a plain reading, Article 19 reaffirms the natural right of freedom expression, incorporating the language from the Universal Declaration of Human Rights, and then sets two possible restrictions on that right, for protection of the rights or reputations of others or for protection of national security, public order, or public health and morals. It requires that any such restrictions be provided by law and be necessary.

Article 20 of the International Covenant on Cultural and Political Rights additionally provides:

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.¹³

The United Nations Human Rights Committee has noted in its most recent guidance, “General comment no. 34, Article 19, Freedoms of opinion and expression” that

¹¹ Universal Declaration of Human Rights (adopted 10 December 1948) UNGA Res 217 A(III) (UDHR), art 19.

¹² International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR), art 19. Please note that this commentary will primarily be addressing prohibitions on hate speech as encompassed under Article 20(2) of the ICCPR, although, in practice, state restrictions on expression under Article 19 also result in the silencing of religious and political minorities.

¹³ *Ibid.*, art 20. Commentators have noted that Article 20(2) does not codify a fundamental right, but instead, sets forth an obligation of the member state to prohibit speech in the narrow confines of that Article. See, e.g., Jeroen Temperman, ‘The International Covenant on Civil and Political Rights and the “Right to be Protected against Incitement”’ *Journal of Law, Religion and State*, vol 7 no 1 (2019), pp. 89-103.

freedom of expression is a right that is not subject to derogation.¹⁴ Further, it is of the opinion that there is a positive duty on state parties to the agreement to protect individuals “from any acts of private persons or entities that would impair the enjoyment of the freedoms of opinion and expression to the extent that these Covenant rights are amenable to application between private persons or entities.”¹⁵

The Human Rights Committee has expressed its professional opinion in the General comment that the right of freedom of expression as set forth in paragraph 2 of Article 19 is subject to restriction pursuant to the provisions of paragraph 3 of Article 19, as well as paragraph 2 of Article 20 of the ICCPR. It further is of the opinion that the scope of expression within paragraph 2 of Article 19 “embraces even expression that may be regarded as deeply offensive, although such expression may be restricted in accordance” subject to Article 19(3) or 20(2).¹⁶

Regarding the application of paragraph 3 of Article 19, the Committee has noted that there may be restrictions placed on freedom of expression for purposes of protecting the rights or reputations of others or for protection of national security, public order, or public health and morals.¹⁷ However, while imposing such restrictions, a state “may not put in jeopardy the right itself,” and it cautions that “the relation between right and restriction and between norm and exception must not be reversed.”¹⁸

As set out in General comment no. 34, the Human Rights Committee is further of the opinion that the requirements of Paragraph 3 are narrow and mandate that restrictions pursuant to the Paragraph must be provided for by law, must be for one of the reasons set forth in the Paragraph and are subject to “strict tests of necessity and proportionality.”¹⁹ It specifically notes that Paragraph 3 ***“may never be invoked as a justification for the muzzling of any advocacy of multi-party democracy, democratic tenets, and human rights”***²⁰ and observes that ***“[s]ince any restriction on freedom of expression constitutes a serious curtailment of human rights, it is not compatible with the Covenant for a restriction to be enshrined in traditional, religious or other such customary law.”***²¹

¹⁴ UN Human Rights Committee, ‘General comment no. 34, Article 19, Freedoms of opinion and expression’ (21 July 2011) UN Doc CCPR/C/GC/34, para 5.

¹⁵ Ibid., para 7.

¹⁶ Ibid., para 11.

¹⁷ Ibid., para 21.

¹⁸ Ibid.

¹⁹ Ibid., para 22.

²⁰ Ibid., para 23 (emphasis added).

²¹ Ibid., para 24 (emphasis added).

Regarding the application of Paragraph 3 to protect individuals who are of members of an ethnic or religious community, General comment no. 34 specifically addresses the restriction of the right of expression on grounds of respect for the “rights and reputations of others” noting that “[t]he term ‘others’ relates to other persons individually or as members of a community. Thus, it may, for instance, refer to individual members of a community defined by its religious faith or ethnicity.”²²

However, the General comment then makes clear that:

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, as well as such articles as 2, 5, 17, 18 and 26. Thus, for instance, it would be impermissible for any such laws to discriminate in favour of or against one or certain religions or belief systems, or their adherents over another, or religious believers over non-believers. ***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.***²³

Interestingly, the Committee goes on to state further that “[l]aws that penalise the expression of opinions about historical facts are incompatible with the obligations that the Covenant imposes” and that the “Covenant does not permit general prohibition of expressions of an erroneous opinion or an incorrect interpretation of past events.”²⁴

Based upon General comment no. 34, as well as the UDHR and ICCPR, it would appear that regarding religious and political minorities:

- (1) They may not be subject to restriction of their right to freedom of expression for advocacy of democracy or human rights;
- (2) They may not be subject to restriction of their right to freedom of expression based upon restrictions enshrined in religious or customary law of the state;
- (3) They may be protected pursuant to Paragraph 3 of Article 19 from the state as part of a unique ethnic or religious community;

²² UN Human Rights Committee, ‘General comment no. 34, Article 19, Freedoms of opinion and expression’ (21 July 2011) UN Doc CCPR/C/GC/34, para 28.

²³ Ibid., para 48 (emphasis added).

²⁴ Ibid., para 49.

- (4) They may not be subject to restriction for displaying lack of respect for a religion except in the limited circumstances where Paragraph 2 of Article 20 applies, and even then, they could not be prevented, nor would be allowed to be punished, for criticizing religious leaders or commenting on doctrine or tenets of faith; and
- (5) They may not be subject to restriction of their right to freedom of expression of past facts, even if erroneous.

IV. The History of “Hate Speech” as Defined by Article 20(2) of the ICCPR

The machinations regarding a prohibition on hate speech – as encompassed in Article 20(2) of the ICCPR at the United Nations had a long history. While the UDHR does not have an express prohibition on hate speech, this was not for lack of trying – primarily through efforts of the Soviet Union in support of such a prohibition – and the efforts of the Western Democracies against – at the time of drafting.²⁵

The battle regarding hate speech continued with the drafting of the ICCPR. Again, subject to heated debate between the Soviet Bloc and the Western Democracies which focused on the prohibition of speech which functioned as an incitement to nationalistic, racial, or religious “hatred” or “hostility.”²⁶ Critics at the time were concerned with the protection of freedom of expression, along with the nebulous nature of a positive obligation placed on the state to prohibit on speech, and the subjectivity of the definitions of “hatred” and “hostility.”²⁷ Eleanor Roosevelt presciently opined that there was a significant risk of totalitarian governments using such language “to punish all criticism under the guise of protecting against religious or national hostility.”²⁸

Article 20(2) of the ICCPR was the result of these efforts and embodies the first codification addressing “hate speech” at the United Nations. The vote for the adoption of the language of Article 20(2) again broke down upon ideological lines, with the Soviet Bloc and non-western nations voting in favor, and most Western Democracies voting against.²⁹ Additionally, many of these same Western Democracies lodged reservations to the language, especially its mandatory nature.³⁰

²⁵ See generally Jacob Mchangama, ‘The Sordid Origins of Hate-Speech Laws’ Policy Review (Dec 2011/Jan 2012), p. 45.

²⁶ Ibid.

²⁷ Ibid.

²⁸ Ibid, p. 50.

²⁹ Ibid.

³⁰ Ibid.

As adopted in the ICCPR, Article 20(2) reads in *toto* “[a]ny advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law.”³¹

As noted above, Article 20(2) is unique in that it does not address an individual’s right against government interference, but instead creates an obligation on the part of a state to restrict freedom of expression of an individual in the narrow circumstances addressed – a power that can be wielded and abused by the state to silence criticism, further exacerbated by, as already at issue before its adoption, the lack of definition of “hatred” or “hostility,” thus allowing these terms to be subjectively interpreted against a religious or political minority by that same state.

V. The History of Defamation of Religion Efforts at the United Nations

On April 20, 1999, Pakistan introduced a draft resolution before the United Nations Commission on Human Rights on behalf of itself and member states of the Organization of the Islamic Conference regarding “Defamation of Islam.”³² The resolution urged “all States, within their national legal framework, in conformity with international human rights instruments, to take all necessary 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.*”³³

After an amendment process, changing the name of the resolution to “Defamation of Religions,” but keeping the language of the resolution otherwise intact, it was adopted by the United Nations Commission on Human Rights without vote on April 30, 1999.³⁴

³¹ International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR) art 20; Interestingly, this language as adopted mirrors the language of a failed proposal made by Alexandre Borisov to the Sub-Commission on the Prevention of Discrimination and the Protection of Minorities of UN Commission on Human Rights regarding Article 7 of the UDHR during its drafting which read “[a]ny advocacy of national, racial and religious hostility or of national exclusiveness or hatred and contempt, as well as any action establishing a privilege or a discrimination based on distinctions of race, nationality or religion constitute a crime punishable under the law of the state.” This was rejected, but obviously foreshadowed the efforts of the USSR to have such language adopted in the ICCPR. See Johannes Morsink, ‘World War II as Catalyst’ in ‘The Universal Declaration of Human Rights: Origins, Drafting, and Intent’ (University of Pennsylvania Press, 2010), p. 70.

³² UN Commission on Human Rights ‘Pakistan, on behalf of the States Members of the United Nations that are members of the Organization of the Islamic Conference: draft resolution on Defamation of Islam’ (20 April 1999) UN Doc. E/CN.4/1999/L.40.

³³ *Ibid.*, para 3 (emphasis added) (note similarities to definition of hate speech in United Nations Strategy and Plan of Action on Hate Speech, n. __, *supra*.)

³⁴ UN Commission on Human Rights ‘Defamation of Religions’ UN Doc E/CN.4/RES/1999/82 (30 April 1999).

This effort by the OIC was based upon a desire to be able to establish a right against defamation of religion using the well-known language of human rights standards as set forth in the various instruments of the United Nations.³⁵ As commented on by Claudia Baumgart-Ochse, the focus of the resolution was not on individual rights – the normative structure of the international human rights system – but on collective rights or a belief system.³⁶

This resolution was reintroduced yearly in the Commission for Human Rights, and its successor Human Rights Council, from 1999 to 2010, and passed each year, although with waning support due to growing opposition by western member states and human rights advocates.³⁷

Due to the waning support for the resolution, and as a compromise between the supporting and opposing member states, the resolution was superseded by Human Rights Council Resolution 16/18 entitled “Combating Intolerance, Negative Stereotyping and Stigmatization of, and Discrimination, Incitement to Violence and Violence Against, Person Based on Religion and Belief.”³⁸ A companion resolution was passed in the UN General Assembly.³⁹

The purpose of Resolution 16/18 was to shift the focus from defamation of religion to individuals harmed by anti-religious speech.⁴⁰ Regarding hate speech, the Resolution in its preamble condemned *“any advocacy of religious hatred that constitutes incitement to discrimination, hostility or violence, whether it involves the use of print, audio-visual or electronic media or any other means.”*⁴¹ In its operative language, it called on member states to adopt *“measures to criminalize incitement to imminent violence based on religion or belief.”*⁴² This language clearly sought to allow restrictions regarding irreligious speech only in those circumstances where Article 20(2) of the ICCPR would apply.

³⁵ Claudia Baumgart-Ochse, ‘Preventing a Global Blasphemy Law: Religious NGOs at the UN and the ‘Defamation of Religions’ Campaign,’ in ‘Religious NGOs at the UN: Polarizers or Mediators?’ (Routledge, 2018), p. 151.

³⁶ Ibid.

³⁷ Meghan Fisher, ‘Hate Speech Laws and Blasphemy Laws: Parallels Show Problems with the U.N. Strategy and Plan of Action on Hate Speech’ Emory International Law Review, Vol. 35, No. 2 (2021), p. 194.

³⁸ UN Human Rights Council ‘Combating Intolerance, Negative Stereotyping and Stigmatization of, and Discrimination, Incitement to Violence and Violence Against, Person Based on Religion and Belief.’ (12 April 2011) UN Doc A/HRC/RES/16/18.

³⁹ UNGA Res 66/167 (19 December 2011) UN Doc. A/RES/66/167.

⁴⁰ Meghan Fisher, ‘Hate Speech Laws and Blasphemy Laws: Parallels Show Problems with the U.N. Strategy and Plan of Action on Hate Speech’ Emory International Law Review, Vol. 35, No. 2 (2021), p. 195.

⁴¹ UN Human Rights Council ‘Combating Intolerance, Negative Stereotyping and Stigmatization of, and Discrimination, Incitement to Violence and Violence Against, Person Based on Religion and Belief.’ (12 April 2011) UN Doc A/HRC/RES/16/18 (emphasis added).

⁴² Ibid., para 5(f) (emphasis added).

On February 21, 2013, the UN Office of the High Commissioner for Human Rights (OHCHR) commenced the Rabat Plan of Action on the prohibition of advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence. Its purpose was to provide guidance regarding the interplay between Articles 19 and 20 of the ICCPR. The Rabat Plan advocated for a narrow interpretation of Article 20(2).⁴³ It further stated that “at the national level, blasphemy laws are counterproductive, since they may result in de facto censure of all inter-religious or belief and intra-religious or belief dialogue, debate and criticism, most of which could be constructive, healthy and needed,” and that “the right to freedom of religion or belief, as enshrined in relevant international legal standards, does not include the right to have a religion or a belief that is free from criticism or ridicule.”⁴⁴

The Rabat Plan recommended that member states use definitions for “hatred,” “hostility,” “advocacy” and “incitement,” as developed by NGO Article 19 in its “Camden Principles” when applying Article 20(2) of the ICCPR.⁴⁵ It specifically noted that:

[T]he terms “hatred” and “hostility” refer to intense and irrational emotions of opprobrium, enmity and detestation towards the target group; the term “advocacy” is to be understood as requiring an intention to promote hatred publicly towards the target group; and the term “incitement” refers to statements about national, racial or religious groups which create an imminent risk of discrimination, hostility or violence against persons belonging to those groups.⁴⁶

Additionally, the Rabat Plan set forth a six-part threshold test – as established by NGO Article 19 – in analyzing speech that may be subject to prohibition under Article 20(2) of the ICCPR.⁴⁷ It noted that “[i]n order to establish severity as the underlying consideration of the thresholds, incitement to hatred must refer to the most severe and deeply felt form of opprobrium” and “[t]o assess the severity of the hatred, possible elements may include the cruelty or intent of the statement or harm advocated, the frequency, quantity and extent of the communication.”⁴⁸ The six part threshold analysis was to consider: (1) the context of the statement; (2) the speaker of the statement; (3) the

⁴³ UN Human Rights Council ‘Report of the United Nations High Commissioner for Human Rights on the expert workshops on the prohibition of incitement to national, racial or religious hatred’ (11 January 2013) UN Doc A/HRC/22/17/Add.4, para 18.

⁴⁴ Ibid., para 19.

⁴⁵ Ibid., para 21, note 5 and note 6.

⁴⁶ Ibid., note 5.

⁴⁷ Ibid., para 29.

⁴⁸ Ibid.

intent of the speaker; (4) the content and form of the statement; (5) the extent of the statement; and (6) the likelihood of incitement from the statement, including imminence of harm.⁴⁹

The Rabat Plan as well recommended that member states with blasphemy laws 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.”⁵⁰

As a follow-up mechanism to the Rabat Plan, a series of meetings have been held named the ‘Istanbul Process’ after the city where the first such meeting took place. The effectiveness of the process remains to be seen, and in the words of its own official website on the approach of “the ten-year anniversary of the adoption of resolution 16/18 and against a worrying backdrop of heightened intolerance based on religion or belief worldwide, maintaining consensus around the ‘16/18 framework’ is of the utmost importance. However, that consensus remains fragile.”⁵¹

VI. History of Hate Speech Efforts at the United Nations Since Adoption of the UN Hate Speech Strategy

On June 18, 2019, United Nations Secretary General Antonio Guterres launched the United Nations Strategy and Plan of Action on Hate Speech.⁵²

In his Forward to the Plan, the Secretary General noted that “[a]round the world, we are seeing a disturbing groundswell of xenophobia, racism and intolerance – including rising anti-Semitism, anti-Muslim hatred and persecution of Christians.”⁵³ He continued noting “[h]ate speech is a menace to democratic values, social stability, and peace. As a matter of principal, the United Nations must confront hate speech at every turn. Silence can signal indifference to bigotry and intolerance, even as a situation escalates and the vulnerable become victims.”⁵⁴

⁴⁹ UN Human Rights Council ‘Report of the United Nations High Commissioner for Human Rights on the expert workshops on the prohibition of incitement to national, racial or religious hatred’ (11 January 2013) UN Doc A/HRC/22/17/Add.4, para 29.

⁵⁰ Ibid., para 25. The reality is that as of 2022, very few countries have repealed their blasphemy laws, the majority of them being western democracies.

⁵¹ ‘About the Istanbul Process’ (Istanbul Process 16/18) < <https://www.istanbulprocess1618.info/about/> > accessed 28 August 2022.

⁵² United Nations Secretary General ‘United Nations Strategy and Plan of Action on Hate Speech’ (May 2019) <https://www.un.org/en/genocideprevention/documents/advising-and-mobilizing/Action_plan_on_hate_speech_EN.pdf> accessed 2 August 2022.

⁵³ Ibid., p. 1.

⁵⁴ Ibid.

He then paid lip service to the concerns of restrictions on freedom of expression, noting that “[a]ddressing hate speech does not mean limiting or prohibiting freedom of speech. It means keeping hate speech from escalating into something more dangerous, particularly incitement to discrimination, hostility and violence, which is prohibited under international law.”⁵⁵

The Plan itself, on its first substantive page, under the heading of “What is Hate Speech” 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 with reference to a person or a group on the basis of who they are, in other words, based on their religion, ethnicity, nationality, race, colour, descent, gender or other identity factor.*** This is often rooted in, and ***generates intolerance*** and hatred and, in certain contexts, ***can be demeaning and divisive.***

...

Rather than prohibiting hate speech as such, international law prohibits the incitement to discrimination, hostility and violence (referred to here as ‘incitement’). Incitement is a very dangerous form of speech, because it explicitly and deliberately aims at triggering discrimination, hostility and violence, which may also lead to or include terrorism or atrocity crimes. Hate speech that does not reach the threshold of incitement is not something that international law requires States to prohibit. It is important to underline that even when not prohibited, hate speech may be harmful.⁵⁶

Quick on the heels of the Plan, some 38 days later, was the adoption by the General Assembly of Resolution 73/328, sponsored by Morocco, with a slate of mostly Islamic and non-western states as cosponsors, regarding “Promoting interreligious and intercultural dialogue and tolerance in countering hate speech.”⁵⁷ The resolution consisted of 16

⁵⁵ United Nations Secretary General ‘United Nations Strategy and Plan of Action on Hate Speech’ (May 2019) <https://www.un.org/en/genocideprevention/documents/advising-and-mobilizing/Action_plan_on_hate_speech_EN.pdf> accessed 2 August 2022, p. 1.

⁵⁶ Ibid., p. 2 (emphasis added).

⁵⁷ UNGA Res 73/28 (25 July 2019) UN Doc A/RES/73/328. Cosponsors included Afghanistan, Albania, Angola, Antigua and Barbuda, Austria, Azerbaijan, Bahrain, Bangladesh, Belgium, Benin, the Plurinational State of Bolivia, Bosnia and Herzegovina, Brazil, Bulgaria, Burkina Faso, Burundi, Cabo Verde, Cameroon, Canada, Congo, Côte d’Ivoire, Croatia, Cyprus, Czech Republic, Djibouti, Ecuador, Egypt, Equatorial Guinea, Eritrea, Estonia, Finland, France, Gabon, Gambia, Germany, Ghana, Greece, Guatemala, Guinea,

preambular paragraphs and 11 operative paragraphs.⁵⁸ Of particular note is its focus on religious intolerance, and not the broader issue of hate speech as defined by the UN Hate Speech Strategy.

Among other things in the resolution's preamble, it reaffirmed "the obligation of States to prohibit discrimination and violence on the basis of religion or belief and to implement measures to guarantee the equal and effective protection of the law."⁵⁹ It further reaffirmed "the positive role that the exercise of the right to freedom of opinion and expression and full respect for the freedom to seek, receive and impart information can play in strengthening democracy and combating religious intolerance," and "that the exercise of the right to freedom of expression carries with it special duties and responsibilities, in accordance with article 19 of the International Covenant on Civil and Political Rights."⁶⁰ It then expressed ***"deep concern at all acts of hate speech that undermine the spirit of tolerance and respect for diversity and constitute a serious common concern for all Member States, and convinced that there is no justification for hate speech, whatever be the motivation."***⁶¹ It further noted both the Rabat Plan of Action and the Fez Plan of Action.⁶²

In its operative text, the resolution, *inter alia*, called upon member states to "reject the spread of hate speech, that constitutes incitement to discrimination, hostility and violence," and encouraged:

[A]ll States and international organizations to generate public awareness, to enlighten the public about the dangers of intolerance and sectarian violence and to react with renewed commitment and action in support of the promotion of tolerance and human rights, and invites them to continue to pay attention to the importance of mutual cooperation, understanding and dialogue in ensuring the promotion of moderation and tolerance and respect for human rights . . .⁶³

Hungary, Iceland, Iraq, Ireland, Israel, Italy, Japan, Jordan, Kazakhstan, Kenya, Kuwait, Latvia, Lebanon, Liberia, Lithuania, Luxembourg, Mali, Malta, Monaco, Montenegro, Nigeria, North Macedonia, Norway, Oman, Pakistan, Panama, Papua New Guinea, Poland, Portugal, Qatar, Romania, Rwanda, Saint Lucia, Saint Vincent and the Grenadines, San Marino, Saudi Arabia, Senegal, Serbia, Slovakia, Slovenia, Spain, Suriname, Tajikistan, Tunisia, Turkmenistan, Uganda, United Arab Emirates, United Kingdom of Great Britain and Northern Ireland, Uzbekistan, the Bolivarian Republic of Venezuela and Yemen. UNGA Official Record (25 July 2019) UN Doc A/73/PV.101, p. 5/17.

⁵⁸ UNGA Res 73/28 (25 July 2019) UN Doc A/RES/73/328.

⁵⁹ *Ibid.*, p. 1/3.

⁶⁰ *Ibid.*, p. 2/3.

⁶¹ *Ibid.*

⁶² *Ibid.*

⁶³ *Ibid.*, p. 3/3.

At the outset of the deliberations on the resolution, the delegate from Morocco, Mr. Hilale, speaking in support of the resolution, argued, quite surprisingly, that the free exercise of expression violated the rights of others' freedom of expression, stating:

Indeed, ***religious and political extremism violate the rights of people to freedom of expression and run counter to the values of coexistence, respect for others and tolerance*** by indulging in discourse that appeals to hatred in all of its forms. In this way, some use religion to create divisions and satisfy their reprehensible, obscurantist ideologies. ***Others use political discourse based on racial, ethnic and religious discrimination and xenophobia to foment exclusion, stoke divisions in societies, fuel conflict and feed terrorism and anarchy.***⁶⁴

He further suggested that “[t]hose forms of speech ***inspire*** violence and terrorism,” and demanded ***“a collective response in order to stamp out hate speech.”***⁶⁵

While briefly mentioning the guarantees of Article 19 of the ICCPR, he expounded further that the text restated ***“the obligation that Member States have to ban discrimination and violence based on religion or faith”*** and that ***“[t]he profound concern about the increase in hate speech threatening tolerance and respect for diversity is also deeply conveyed in the draft resolution . . . ”***⁶⁶

The sole delegate to speak in opposition of the resolution was Mr. Mack of the United States. Noting the effect of speech prohibitions on those who hold minority viewpoints, he stated that the US stood in opposition to ***“any attempts to unduly limit the exercise of . . . fundamental freedoms,”*** and specifically referenced the United States' concerns with the use of the term “moderation” in paragraph 5 of the operative language of the resolution, stating that:

[W]e are concerned that the implementation of moderation-focused programmes and policies could undermine enjoyment of freedoms of expression and thought, conscience and religion or belief. ***Protecting the freedoms of religion or belief and of expression includes protecting the rights of those who hold minority viewpoints and the rights of those with whom we disagree.***⁶⁷

⁶⁴ UNGA Official Record (25 July 2019) UN Doc A/73/PV.101, p. 4/17 (emphasis added).

⁶⁵ Ibid. (emphasis added).

⁶⁶ Ibid. (emphasis added).

⁶⁷ Ibid., p. 5/17.

In September 2020, the UN published its “Detailed Guidance on Implementation for United Nations Field Presences” regarding the UN Hate Speech Strategy.⁶⁸ In its introduction, it noted that ***“[h]ate speech has been shown to result in a range of real harms, attacking tolerance, inclusion, social cohesion and shared values”*** while adding ***“[h]ate speech is also often linked to disinformation, misinformation and malinformation.”***⁶⁹ It then reiterated the definition of hate speech under the strategy as “any kind of communication in speech, writing or behaviour, that attacks or uses pejorative or discriminatory language with reference to a person or a group on the basis of who they are, in other words, based on their religion, ethnicity, nationality, race, colour, descent, gender or other identity factor.”⁷⁰ It then qualified the definition, stating ***“[w]hile the above is not a legal definition and is broader than the notion of ‘incitement to discrimination, hostility or violence’, which is prohibited under international human rights law, the definition in the Strategy provides a single, unified framework for how the United Nations system should address hate speech globally.”***⁷¹

The Guidance then explains that the definition of hate speech under the UN Hate Speech Strategy “is for the purposes of supporting a common basis for the implementation of the Strategy by the United Nations, only. It does not give rise to any binding obligations upon States. There is no universally accepted definition of hate speech under international law,” yet then goes on to explain and parse the definition of hate speech into three elements: (1) “‘Any kind of communication,’ whether in the form of ‘speech, writing or behaviour;” (2) that “attacks or uses pejorative or discriminatory language;” and (3) “makes reference to an ‘identity factor.’”⁷²

Regarding the first element, the Guidance notes that “hate speech can be conveyed through any form of expression, including images, cartoons, memes, art objects, gestures and symbols.”⁷³ Regarding the second element, the Guidance provides that “hate speech is communication which is biased, bigoted, intolerant or prejudiced (‘discriminatory’) or contemptuous or demeaning (‘pejorative’) of an individual or group based on their

⁶⁸ ‘United Nations Strategy and Plan of Action on Hate Speech: Detailed Guidance on Implementation for United Nations Field Presences’ (September 2020) <https://www.un.org/en/genocideprevention/documents/UN%20Strategy%20and%20PoA%20on%20Hate%20Speech_Guidance%20on%20Addressing%20in%20field.pdf> accessed August 22, 2022.

⁶⁹ Ibid., p. 7.

⁷⁰ Ibid., p. 8.

⁷¹ Ibid. (emphasis in the original).

⁷² Ibid., pp. 10-11.

⁷³ Ibid.

identity.”⁷⁴ Regarding the third element, the Guidance provides that “[h]ate speech is communication that makes reference to a person or group’s ‘religion, ethnicity, nationality, race, colour, descent, gender or other identity factor’” but notes that the “list of identity factors (often called ‘protected characteristics’) laid down in the Strategy is clearly non-exhaustive, given that ‘any other identity factor’ is included.”⁷⁵

The Guidance then sets forth three levels of “hate speech” covered by the Strategy. The first is numbered “top level” and consists of expression which constitutes “incitement” defined as “any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence, as defined in article 20(2) of the International Covenant on Civil and Political Rights,” subject to the definitions of those terms as set forth in the Camden Principles and the Rabat Plan six part threshold test.⁷⁶ Interestingly, the Guidance is silent on the need for *mens rea* needed for advocacy that constitutes incitement.

The second is numbered “intermediate level” or “unlawful hate speech” and consists of expression meeting the Strategy’s definition of hate speech that may be prohibited pursuant to Article 19 of the ICCPR, which given the Strategy’s definition, includes references “to a person or group’s ‘religion, ethnicity, nationality, race, colour, descent, gender or other identity factor.’”⁷⁷

The third is numbered “bottom level” or “lawful hate speech” and consist of expression meeting the Strategy’s definition of hate speech that ***may not be prohibited***, including ***“[b]lasphemous speech, including insult to religious feelings, lack of respect for a religion or other belief system, and defamation of religions,”*** as well as ***“[d]isinformation (and misinformation and malinformation).”***⁷⁸ In a footnote regarding the former, it notes that such ***“blasphemous expression should not be considered hate speech.”***⁷⁹ It then provides an exception to non-prohibition providing ***“unless*** such forms of expression constitute incitement to hostility, discrimination or violence under article 20(2)⁸⁰

⁷⁴ ‘United Nations Strategy and Plan of Action on Hate Speech: Detailed Guidance on Implementation for United Nations Field Presences’ (September 2020) <https://www.un.org/en/genocideprevention/documents/UN%20Strategy%20and%20PoA%20on%20Hate%20Speech_Guidance%20on%20Addressing%20in%20field.pdf> accessed August 22, 2022, p. 11.

⁷⁵ Ibid.

⁷⁶ Ibid., pp. 12-13.

⁷⁷ Ibid., pp. 11, 14.

⁷⁸ Ibid., pp. 14-15 (emphasis added).

⁷⁹ Ibid., p. 14, note 28 (emphasis added).

⁸⁰ Ibid., p. 15. In the immortal words of Tom Waits, “[t]he large print giveth and the small print taketh away.” See Tom Waits, ‘Step Right Up’ Small Change (1976) at 4:34 as can be found at <<https://www.youtube.com/watch?v=kTdScE3Rqh8>> accessed August 24, 2022.

A second resolution, once again introduced by Morocco, and co-sponsored primarily by Islamic and non-western countries was passed on July 21, 2021, using the same title.⁸¹ However, the language of the resolution was significantly expanded, consisting of 24 preambular paragraphs and 19 operative paragraphs.⁸²

In its preamble, regarding religious intolerance, the resolution expressed “concern at the growing manifestations of intolerance based on religion or belief, which can generate hatred and violence among individuals from and within different nations and which may have serious implications at the national, regional and international levels”⁸³

Also new and expanded language in its preamble, now addressing UN efforts in countering “misinformation and disinformation” noted **“with appreciation the efforts of the United Nations system in helping to counter the proliferation of hate speech, misinformation and disinformation,** including during the coronavirus disease (COVID-19) pandemic . . . as reflected in the COVID-19 communications response initiative of the Department of Global Communications”⁸⁴

It further broadly expressed “deep concern **at all acts of hate speech that undermine the spirit of tolerance and respect for diversity**” and “convinced [sic] that there is no justification for hate speech, whatever be the motivation”⁸⁵

Continuing in its preamble, the resolution, again regarding the new categories of “hate speech, disinformation and misinformation” highlighted **“the global concerns about the exponential spread and proliferation of hate speech, disinformation and misinformation, thereby increasing the need for the dissemination of factual, timely, targeted, clear, accessible, multilingual and science-based information, and emphasizing the need for all Member States to stand together to address the challenge of disinformation and misinformation.”**⁸⁶

⁸¹ UNGA Res 75/309 (21 July 2021) UN Doc A/RES/75/309. Cosponsors included Afghanistan, Armenia, Azerbaijan, Bahrain, Bangladesh, Bolivia (Plurinational State of), Burkina Faso, Burundi, Cameroon, Canada, Chad, China, Comoros, Congo, Costa Rica, Côte d’Ivoire, Djibouti, Dominica, Egypt, Equatorial Guinea, Eritrea, Eswatini, Gabon, the Gambia, Ghana, Grenada, Guatemala, Guinea, Guyana, India, Iraq, Israel, Jordan, Kazakhstan, Kenya, Kiribati, Kuwait, Kyrgyzstan, Lebanon, Mali, Marshall Islands, Mauritania, Mauritius, Monaco, Mozambique, Nepal, the Niger, Oman, Pakistan, Panama, Papua New Guinea, the Philippines, Qatar, Saint Lucia, Sao Tome and Principe, Saudi Arabia, Senegal, Sierra Leone, South Africa, Spain, Sri Lanka, the Sudan, Suriname, Tajikistan, Togo, Tunisia, Turkmenistan, Uganda, the United Arab Emirates, Uzbekistan, Viet Nam, Yemen and Zambia. UNGA Official Record (21 July 2021) UN Doc A/75/PV.92.

⁸² UNGA Res 75/309 (21 July 2021) UN Doc A/RES/75/309.

⁸³ Ibid., p. 2/5.

⁸⁴ Ibid. (emphasis added).

⁸⁵ Ibid. (emphasis added).

⁸⁶ Ibid.

It further took note, in the preamble, “of the Cross-Regional Statement on “Infodemic” in the Context of COVID-19 that called upon Member States to fight the “infodemic” to build a healthier, more equitable, just and resilient world.”⁸⁷

In the operative language, the resolution proclaimed June 18th as the International Day for Countering Hate Speech.⁸⁸

It condemned “any advocacy of hatred that constitutes incitement to discrimination, hostility or violence, whether it involves the use of print, audiovisual or electronic media, social media or any other means,” and further expressed its concern - not just about Article 20(2) violative advocacy – but broader categories including religious intolerance and negative racial and religious stereotyping:

[T]hat incidents of racial and **religious intolerance**, discrimination and related violence, as well as of **negative racial and religious stereotyping**, continue to rise around the world, and condemns, in this context, any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence, and urges States to take effective measures, consistent with their obligations under international human rights law, to address and combat such incidents⁸⁹

It further took note “of the United Nations Strategy and Plan of Action on Hate Speech, in which it is proposed that the United Nations system establish and strengthen partnerships with new and traditional media to promote the values of tolerance, non-discrimination, pluralism and freedom of opinion and expression, and to address hate speech narratives”⁹⁰

The resolution then called upon member states to:

[E]ngage with all relevant stakeholders to promote the virtues of interreligious and intercultural dialogue, respect and acceptance of differences, tolerance, respect for diversity, peaceful coexistence and cohabitation, inclusion and respect for human rights, to reject the spread of hate speech, that constitutes incitement to discrimination, hostility and violence;

As well as encouraged:

⁸⁷ UNGA Res 75/309 (21 July 2021) UN Doc A/RES/75/309, p. 2/5.

⁸⁸ Ibid., p. 3/5.

⁸⁹ Ibid., p. 4/5 (emphasis added).

⁹⁰ Ibid.

[A]ll Member States and international organizations to generate public awareness, to enlighten the public about the dangers of intolerance and sectarian violence and to react with renewed commitment and action in support of the promotion of tolerance and human rights, and invites them to continue to pay attention to the importance of mutual cooperation, understanding and dialogue in ensuring the promotion of moderation and tolerance, and respect for human rights . . .⁹¹

The resolution then invited member states “to support . . . transparent and accessible systems to identify, track, collect data and analyse trends on hate speech, both in person and in digital contexts, at all national levels, as appropriate, to support effective responses.”⁹²

It then called upon:

Member States, who have the primary responsibility to counter discrimination and hate speech, and all relevant actors, including political and religious leaders, to promote inclusion and unity in response to the COVID-19 pandemic and to speak out and take strong action against racism, *xenophobia, hate speech*, violence, discrimination, including on the basis of age, *and stigmatization* . . .⁹³

At the outset of the deliberations on the resolution, the delegate from Morocco, Mr. Hilale, speaking in support of the resolution, noted that there had been an “exacerbation and exponential increase in hate speech” during the Covid-19 pandemic.⁹⁴ He further noted that His Majesty, King Mohammed VI of Morocco, “became aware early on of the danger of hate speech spread by violent extremism, obscurantism, and populism as well as racism of all types,” and referenced a previous statement by the King that:

[S]everal regions around the world are following the logic of exclusion, isolation and rejection of others. *Hate speech is increasing, fuelling racism, xenophobia, Islamophobia, anti-Semitism and many other forms of discrimination. It creates a breeding ground for violent extremism and thereby spreads insecurity.*⁹⁵

Mr. Hilale then set forth three concrete proposals contained in the resolution: (1) the establishment of June 18th as the “International Day for Countering Hate Speech;” (2) the convening of a high-level meeting of the General Assembly on June 18, 2022 in commemoration of the same; and (3) the establishment at a national level of “transparent

⁹¹ UNGA Res 75/309 (21 July 2021) UN Doc A/RES/75/309, p. 4/5.

⁹² Ibid., p. 5/5. This provision certainly raises issues of privacy and the invasiveness of state surveillance.

⁹³ Ibid. (emphasis added).

⁹⁴ UNGA Official Record (21 July 2021) UN Doc A/75/PV.92, p. 10/14.

⁹⁵ Ibid. (emphasis added).

and accessible systems for identifying, tracking and collecting data and analysing trends regarding hate speech in order to support effective responses.”⁹⁶

Speaking first, and of note, in explanation of position was the delegate for Slovenia, Ms. Košir, “on behalf of the European Union and its member states.”⁹⁷ She noted as well that various EU candidate and potential candidate states aligned themselves with her statement.⁹⁸

Ms. Košir’s first criticism was the “proliferation of initiatives on interreligious and intercultural dialogues outside the Third Committee.”⁹⁹ She then noted the scope of the UN Strategy and Plan of Action on Hate Speech and reflected that the text of the resolution only addressed hate speech “in the context of religious intolerance.”¹⁰⁰

She then set forth the position of the EU that:

Only a comprehensive approach tackling all aspects and grounds of discrimination and violence can have a real impact. In that regard, we insist on the vital importance of ensuring respect for the right to freedom of opinion and expression, to access to information, and to privacy, which are all interlinked. Attempts to restrict or violate those rights can only fuel violence and hatred. For that reason, the EU made several proposals aimed at reflecting those rights in the text. We are disappointed that they were not all taken on board.¹⁰¹

As well as:

The final text also includes unclear concepts that are designed to question the rules-based international order and the universality of human rights. The EU reiterates its full support for multilateralism, with the United Nations at its core. We reaffirm the universality, indivisibility, interdependence and interrelatedness of all human rights and fundamental freedoms.¹⁰²

The delegate for the United Kingdom, Mr. Reed, spoke next, raising an issue with one of the references in the preambular statement regarding the principal of mutual respect, and specifically commenting that ***“people must be allowed to freely discuss and debate issues, peacefully challenge their Governments, exercise their right to freedom of***

⁹⁶ UNGA Official Record (21 July 2021) UN Doc A/75/PV.92, p. 10/14.

⁹⁷ Ibid., p. 11/14.

⁹⁸ Ibid. These countries were North Macedonia, Montenegro, Albania, Bosnia and Herzegovina, Ukraine and the Republic of Moldova.

⁹⁹ Ibid.

¹⁰⁰ Ibid., p. 12/14.

¹⁰¹ Ibid. (emphasis added).

¹⁰² Ibid. (emphasis added).

thought, conscience and religion and speak out against violations of human rights wherever they occur.¹⁰³

Australia's delegate, Ms. Brisbane, commented that the resolution could have been strengthened through the adoption of language consistent within the "overarching United Nations framework on peace and security."¹⁰⁴

After adoption, Monsignor Hansen of the Holy See was given the floor and made two very salient points. The first was that the issue of interreligious dialogue was a "competence of religious leaders and believers, and not of the United Nations, which has no mandate to establish the confines or purpose of such religious dialogue."¹⁰⁵

The second point was that:

The negotiations on the resolution ***showed clearly that issues surrounding hate speech, discrimination, freedom of religion or belief, freedom of expression and privacy are subject to ongoing discussions and disagreements among States, as today's discussions have also confirmed. That unfortunately points to a lack of a shared understanding of the broader issues on the table, including the protection of the right to freedom of opinion and expression, the right to freedom of assembly and association and the right to privacy, all of which are inextricably linked to the exercise of the right to freedom of religion or belief.***¹⁰⁶

On June 22, 2022, the UN General Assembly convened its Informal High-level Meeting to Mark the Commemoration of the First International Day for Countering Hate Speech.¹⁰⁷

The representative for the OIC member states apart from Albania, in his address, specifically raised the issue of defamation of religion. He stated:

While hate speech has proliferated across the globe, the OIC is particularly alarmed at the sharp rise in Islamophobia and anti-Muslim hatred in many parts of the world. Recalling the recent statements issued by the OIC on "Republishing of Abusive Cartoons of Prophet Muhammad, peace be upon him, by French Charlie Hebdo Newspaper," "Burning of Copies of Holy Qur'an during Anti-Muslim Demonstrations in Sweden," and "Denigration of Prophet Muhammad (PBUH) by

¹⁰³ UNGA Official Record (21 July 2021) UN Doc A/75/PV.92, p. 12/14.

¹⁰⁴ Ibid.

¹⁰⁵ Ibid., p. 13/14.

¹⁰⁶ Ibid. (emphasis added).

¹⁰⁷ Video of this session can be found at <<https://media.un.org/en/asset/k1y/k1ywfx7kau>> accessed August 29, 2022. Since no official record exists of this session, the author has relied on published statements of the participants found at <<https://statements.unmeetings.org/>> or elsewhere.

India Ruling Party's Official,” and other similar acts, ***the OIC remains concerned about willful provocations and defamation of Islamic holy personalities and religious symbols. Such Islamophobic acts hurt the sensitivities of over 1.5 billion Muslims and constitute a gross abuse of the right of freedom of expression. They also reinforce extremist narratives.***¹⁰⁸

The Representative that went further, and condemned the practice of insulting religions, and called for the universal outlawing of ***“wilful provocations and incitement to hate and violence.”***¹⁰⁹

The representative of the United States commented:

While taking steps to address hate speech, the United States considers freedom of expression, whether exercised offline or online, a critical component of a vibrant, functioning democracy.

...

In the United States, we have long believed ***the strongest weapon against hateful speech is more speech that promotes tolerance and unity. We recognize that suppressing the expression of such ideas doesn't make them go away.*** In fact, banning intolerant or offensive speech can be counter-productive, often significantly raising the profile of the offensive speech as well as forcing hateful ideologies to fester in dangerous ways. ***We have learned through our own experience that banning offensive speech is not useful in promoting a vibrant democracy, in respecting human dignity, or in creating space for change.***

...

Our belief in the freedom of expression requires us to address hate speech not with repression, but with more speech, not less. This may take many forms, but two of the most essential are truth-telling – standing up and responding to hate speech with facts – and promoting education to counteract the negative effects of hate speech.¹¹⁰

Other statements were given at the session, which ultimately devolved into an exchange of accusations between countries, with the representative from Israel accusing

¹⁰⁸ ‘Joint Statement on behalf of the OIC Member States, International Day for Countering Hate Speech’ (20 June 2022) <https://estatements.unmeetings.org/estatements/10.0010/20220620/P7Jw8svokS2f/yIWRkPjfuKUu_en.pdf> accessed 31 August 2022 (emphasis added).

¹⁰⁹ Ibid. (emphasis added).

¹¹⁰ ‘Remarks at a UN General Assembly Informal High-level Meeting to Mark the Commemoration of the First International Day for Countering Hate Speech’ (20 June 2022) <<https://usun.usmission.gov/remarks-at-a-un-general-assembly-informal-high-level-meeting-to-mark-the-commemoration-of-the-first-international-day-for-countering-hate-speech/>> accessed 1 September 2022 (emphasis added).

Iran of using hate speech just days prior to the informal meeting, specifically Supreme Leader of Iran Sayyid Ali Hosseini Khamenei tweeting “pure antisemitism on his Twitter account” by writing “[t]he Zionist have always been a plague on the world, even before establishing the fraudulent Zionist regime,” as well as criticizing the Palestinian Authority’s use of hate speech.¹¹¹

In turn, Iran decried “the politicization and restriction of the Hijab, the burning of the Holy Qur’an, and the desecration of Islamic symbols and holy sites [that] are being pursued in certain countries,” recalled Article 20(2) of the ICCPR, and then responded to Israel in kind by stating “[w]e just heard outrageous allegations made by the representative of the Zionist regime against my country. We reject these allegations which are made to deflect attention from Israeli crimes and atrocities in our region. The Zionist regime is well known for its racist policies and spread of hate speech and it [sic] propaganda cannot hide this very fact.”¹¹²

VII. The Opinions of the Special Rapporteurs in Addressing Critical Religious Expression at the United Nations

There are two special rapporteurs that are primarily involved regarding the issue of hate speech and the UN Plan of Action: (1) the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, currently held by Ms. Irene Khan of Bangladesh, who was appointed in June of 2020, her predecessor being Mr. David Kaye, of the United States, from 2014 until 2020; and (2) the Special Rapporteur on freedom of religion or belief, currently held by Mr. Ahmed Shaheed of the Maldives, who was appointed in June of 2016, his predecessor being Mr. Heiner Bielefeldt of Germany from 2010 until 2016.

¹¹¹ ‘GA Hate Speech Event – 20.6.22’ (20 June 2022) <https://estatemnts.unmeetings.org/estatemnts/10.0010/20220620/P7Jw8svokS2f/SuHGXq46cDzU_en.pdf> accessed 1 September 2022.

¹¹² ‘Statement by H.E. Mr. Majid Takht Ravanchi, Ambassador and Permanent Representative of the Islamic Republic of Iran to the United Nations at informal High-level Meeting to mark the commemoration of the first

International Day for Countering Hate Speech’ <https://estatemnts.unmeetings.org/estatemnts/10.0010/20220620/P7Jw8svokS2f/KCdDwUcN9EFh_en.pdf> accessed 31 August 2022.

On March 5, 2019, Mr. Shaheed authored a report on “Freedom of religion or belief” with a specific focus on the interplay between freedom of religion or belief and freedom of expression.¹¹³ In his introduction, Mr. Shaheed noted at the outset that:

*[T]here has been a resurgence of old constraints along with the emergence of new legal and extralegal limitations on freedom of expression wielded by State and non-State actors. Those include a revival of anti-blasphemy and anti-apostasy laws, the proliferation of, and increasing reliance on, public order laws to restrict the freedom to express views deemed offensive to religious or belief communities, along with increasing investments in strategies to combat incitement to discrimination, hostility or violence on the basis of religion or belief.*¹¹⁴

Mr. Shaheed noted further that “For many, equating an affront to religious sensibilities to a criminal offence stands in stark contrast to the fundamental role of freedom of expression, which can be limited only in exceptional circumstances regardless of its potential to offend, shock or disturb” and thus *“some States have been inclined to enact laws that protect religious sensibilities or criminalize ‘hate speech.’ The impact that such steps have had on freedom of religion or belief is manifold.”*¹¹⁵ He then expressed concern about *“the many reports he has received detailing surveillance, intimidation, harassment, prosecution, threats of bodily harm, torture or murder following acts that had exceeded the limits imposed by law or social convention on peaceful manifestations of thoughts, conscience, and religion or belief, and/or that had offended the sensitivities of others by denigrating what they held sacred.”*¹¹⁶

He further noted the “extent to which States misconstrue the grounds for imposing the limitations provided for in articles 18 and 19 of the International Covenant on Civil and Political Rights and the degree to which they conflate intentional incitement with hostile or violent acts.”¹¹⁷

In discussion the international human rights framework, Mr. Shaheed noted “under international law that *freedom of expression is so fundamental to democratic society that even the triggers for enforcing restrictions that protect persons against incitement to myriad harms must be set at a very high threshold.*”¹¹⁸ He then referenced both the Rabat

¹¹³ UN Human Rights Council ‘Report of the Special Rapporteur on freedom of religion or belief’ (5 March 2019) UN Doc A/HRC/40/58.

¹¹⁴ Ibid., para 4 (emphasis added).

¹¹⁵ Ibid., para 10 (emphasis added).

¹¹⁶ Ibid., para 11 (emphasis added).

¹¹⁷ Ibid., para 12.

¹¹⁸ Ibid., para 18.

Plan and the Fez Plan and other initiatives to address religious intolerance, before reaching the conclusion that the:

[G]rowing consensus in the international human rights community that anti-blasphemy laws run counter to the promotion of human rights for all persons. As such, the international normative standard is clear: States may not impose punishment for insults, criticism or giving offence to religious ideas, icons or places, nor can laws be used to protect the feelings of religious communities . . . It is important to note, however, that anti-blasphemy laws remain in force in many countries, and that Governments throughout the world are resorting to laws to protect people’s feelings or indeed religious doctrine, or are attempting to legislate civility.”¹¹⁹

Mr. Shaheed then went on to address the “nearly 47% of countries and territories in the world [which] have laws or policies that penalize blasphemy, apostasy, or the defamation of religions.”¹²⁰ He noted that such laws were in two broad categories: laws aimed at protecting religions, and laws ***“enacted in an attempt to protect persons against ‘hate speech’ motivated by religion or belief.”***¹²¹ Regarding the latter category, he noted that “anti-blasphemy laws have increasingly fallen out of favour. Instead, States appear to be tending towards enacting laws on ‘hate speech’” warning that:

[A]n uncritical approach to the development and application of laws against “hate speech” can be problematic. If they are formulated in vague terms or focus on banning specific content, such laws can be an effective way to prohibit blasphemy. When laws against “hate speech” limit the subject matter of free speech, rather than contextual assessments to decide whether violence is imminent or whether there is intent to incite discrimination or hostility through free speech, the effects can be similar to that of a law against blasphemy. Laws formulated in this way are often applied to reinforce the dominant political, social and moral narrative and opinions of a given society. They are frequently used to target opposition voices and dissent, and to censor minorities. Thus, States use “hate speech” laws against the very minorities those laws have been designed to protect. In some cases, “hate speech” laws are even used to restrict minorities from

¹¹⁹ UN Human Rights Council ‘Report of the Special Rapporteur on freedom of religion or belief’ (5 March 2019) UN Doc A/HRC/40/58, paras 19-23 (emphasis added).

¹²⁰ Ibid., para 24.

¹²¹ Ibid., para 28 (emphasis added).

promoting their culture and identity, or from expressing concern about discrimination against them by the majority.¹²²

In his conclusions and recommendations, Mr. Shaheed noted that:

Increasingly, limitations on freedom of expression related to religion or belief take the form of anti-“hate speech” laws. Article 20(2) of the International Covenant on Civil and Political Rights provides that States must prohibit by law any advocacy of religious hatred that constitutes incitement to discrimination, hostility or violence. At the same time, General comment no. 34 (2011) stresses that prohibitions under article 20(2) must comply with the regime for limitations under article 19(3). Moreover, advocacy of hatred requires a nuanced response that includes criminal sanctions as well civil, administrative and policy measures. States must ensure that criminal sanctions are imposed only in the most serious cases and be, based on a number of contextual factors, including intent.¹²³

On October 9, 2019, Mr. Kaye authored a report on “Promotion and protection of the right to freedom of opinion and expression.”¹²⁴ In the report, he addressed the law that applied to regulation of “hate speech” online.¹²⁵

In his introduction, the first point he made was that “‘Hate speech,’ a shorthand phrase that conventional international law does not define, has a double ambiguity. *Its vagueness and the lack of consensus around its meaning can be abused to enable infringements on a wide range of lawful expression. Many Governments use “hate speech,” similar to the way in which they use “fake news,” to attack political enemies, non-believers, dissenters and critics.*”¹²⁶

Addressing hate speech regulation under the international human rights scheme, and referencing a report on hate speech by his predecessor, Frank La Rue, he noted that:

“[L]imitation of hate speech seems to demand a reconciliation of two sets of values: democratic society’s requirements to allow open debate and individual autonomy and development with the also compelling obligation to prevent attacks on vulnerable communities and ensure the equal and non-discriminatory participation of all individuals in public life. *Governments often exploit the resulting*

¹²² UN Human Rights Council ‘Report of the Special Rapporteur on freedom of religion or belief’ (5 March 2019) UN Doc A/HRC/40/58, para 33 (emphasis added) .

¹²³ Ibid., para 57.

¹²⁴ UN Human Rights Council ‘Promotion and protection of the right to freedom of opinion and expression’ (9 October 2019) UN Doc A/74/486.

¹²⁵ Ibid., p. 1/23.

¹²⁶ Ibid., para 1 (emphasis added).

uncertainty to threaten legitimate expression, such as political dissent and criticism or religious disagreement.¹²⁷

Going on to address the application of Article 20(2) of the ICCPR, he explained that:

Under article 20 (2) of the Covenant, States parties are obligated to prohibit by law “any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence.” States are not obligated to criminalize such kinds of expression. The previous Special Rapporteur explained that article 20(2) relates to (a) advocacy of hatred, (b) advocacy which constitutes incitement, and (c) incitement likely to result in discrimination, hostility or violence.¹²⁸

Mr. Kaye then made the point that “[a] person who is not advocating hatred that constitutes incitement to discrimination, hostility or violence, ***for example, a person advocating a minority or even offensive interpretation of a religious tenet or historical event, or a person sharing examples of hatred and incitement to report on or raise awareness of the issue, is not to be silenced under article 20 (or any other provision of human rights law).***”¹²⁹ He noted further that “Such expression is to be protected by the State, even if the State disagrees with or is offended by the expression. There is no “heckler’s veto” in international human rights law.”¹³⁰

Mr. Kaye referenced General Comment No. 34 and the Rabat Plan of Action as guides for interpretation of hate speech under Article 20(2) of the ICCPR.¹³¹ He then addressed the UN Strategy on Hate Speech specifically noting:

The question arises as to whether States may restrict advocacy of hatred that does not constitute incitement to discrimination, hostility or violence. In other words, the question is whether States may restrict hate speech when defined, as was done recently in the United Nations Strategy and Plan of Action on Hate Speech, as speech “that attacks or uses pejorative or discriminatory language with reference to a person or a group on the basis of who they are, in other words, based on their religion, ethnicity, nationality, race, colour, descent, gender or other identity factor”. ***Clearly such language stops short of the article 20(2) . . . meanings of***

¹²⁷ UN Human Rights Council ‘Promotion and protection of the right to freedom of opinion and expression’ (9 October 2019) UN Doc A/74/486, para 4 (emphasis added).

¹²⁸ Ibid., para 8 (citation omitted).

¹²⁹ Ibid., para 10 (emphasis added).

¹³⁰ Ibid.

¹³¹ Ibid., paras 12-14.

*incitement, and . . . legal restrictions will need to meet the strict standards of international human rights law.*¹³²

Mr. Kaye went on to note, citing General Comment No. 34, the disfavored status of “prohibitions of displays of lack of respect for a religion or other belief system, including blasphemy laws,” further stating that *“neither article 19(3) nor article 18 of the Covenant protect ideas or beliefs from ridicule, abuse, criticism or other “attacks” seen as offensive.”*¹³³ He further noted the “call to repeal blasphemy laws because of the risk they pose to debate over religious ideas and the role that such laws play in enabling Governments to show preference for the ideas of one religion over those of other religions, beliefs or non-belief systems.”¹³⁴

Mr. Kaye then emphasized “that expression that may be offensive or characterized by prejudice and that may raise serious concerns of intolerance may often not meet a threshold of severity to merit any kind of restriction,” further noting *“[t]here is a range of expression of hatred, ugly as it is, that does not involve incitement or direct threat, such as declarations of prejudice against protected groups.”*¹³⁵

In summary of the United Nations framework governing hate speech, Mr. Kaye, noted that “restrictions on the right to freedom of expression *must be exceptional*, and the State bears the burden of demonstrating the consistency of such restrictions with international law; *prohibitions under article 20 of the Covenant . . . must be subject to the strict and narrow conditions established under article 19(3) of the Covenant, and States should generally deploy tools at their disposal other than criminalization and prohibition . . .*”¹³⁶

On March 23, 2021, the United Nations Office of the High Commissioner on Human Rights issued a press release entitled “Historic consensus on freedoms of religion and expression at risk, say UN experts.”¹³⁷

The release noted that, on the tenth anniversary of Resolution 16/18, that:

[A] new wave of stigma, racism, xenophobia and hate has been amplified by digitalisation, social networks, and aggravated in the context of the pandemic,

¹³² UN Human Rights Council ‘Promotion and protection of the right to freedom of opinion and expression’ (9 October 2019) UN Doc A/74/486, para 19 (emphasis added).

¹³³ Ibid., para 21 (emphasis added).

¹³⁴ Ibid. (citation omitted).

¹³⁵ Ibid., para 24 (emphasis added).

¹³⁶ Ibid., para 28 (emphasis added).

¹³⁷ UNOHCHR ‘Historic consensus on freedoms of religion and expression at risk, say UN experts’ (UNOHCHR, 23 March 2021) <<https://www.ohchr.org/en/press-releases/2021/03/historic-consensus-freedoms-religion-and-expression-risk-say-un-experts>> accessed August 30, 2022.

targeting minorities and those seen as 'others' with impunity. *At the same time, the policing of opinions and expressions online, the targeting of certain religious communities for reasons of national security, the use of counter-terrorism or public order laws to suppress legitimate expression have reinforced negative stereotypes and may contribute to incidents of intolerance, discrimination and violence against persons based on their religion, belief or opinions in any region of the world.*¹³⁸

The release further noted that “[m]any States have resorted to restricting free speech as a way to addressing hate speech but any limitation of speech must remain an exception and strictly follow international human rights standards” as well as *“[t]his remains highly relevant today in light of State actions that are incompatible with freedoms of religion, belief, opinion and expression, including the use of anti-blasphemy and anti-apostasy laws, which render religious or belief minorities, including atheists and dissenters, vulnerable to discrimination and violence.”*¹³⁹

It then voiced its deep concern about “the recently updated Cairo Declaration of the Organization of Islamic Cooperation on Human Rights, which provides in its article 21 that ‘freedom of expression should not be used for denigration of religions and prophets or to violate the sanctities of religious symbols.’”¹⁴⁰

The release then stated that “[o]n that point, the Special Rapporteur on freedom of religion or belief has emphasised in his most recent report . . . *that criticism of the ideas, religious leaders, symbols or practices should not be prohibited or criminally sanctioned*” as well as “in another report . . . the Special Rapporteur on freedom of opinion and expression reiterated the Human Rights Committee's jurisprudence that *this right does embrace expressions that may be regarded as deeply offensive, such as blasphemy.*”¹⁴¹

The release then cautioned that *“[s]tates must not revive the dangerous notion of 'defamation of religions' and the divisive debate that had undercut efforts to combat religious discrimination and intolerance prior to achieving this consensus agreement 10 years ago.”*¹⁴²

¹³⁸ UNOHCHR ‘Historic consensus on freedoms of religion and expression at risk, say UN experts’ (UNOHCHR, 23 March 2021) <<https://www.ohchr.org/en/press-releases/2021/03/historic-consensus-freedoms-religion-and-expression-risk-say-un-experts>> accessed August 30, 2022 (emphasis added).

¹³⁹ Ibid. (emphasis added).

¹⁴⁰ Ibid.

¹⁴¹ Ibid. (emphasis added).

¹⁴² Ibid. (emphasis added).

VIII. Issues Raised by the United Nations Strategy and Plan of Action on Hate Speech

a. The issue of the scope of the definition of hate speech under the UN Hate Speech Strategy

The scope of “hate speech” has been proscribed at an international level pursuant to Article 20(2) of the ICCPR to the advocacy of national . . . or religious hatred that constitutes incitement to . . . hostility or violence.”¹⁴³ The terms “hatred,” “hostility,” “advocacy” and “incitement,” are not defined within that instrument. While persuasive authority exists through the efforts of the Rabat Plan and the work of NGO Article 19 as to the meanings of those terms, definition of those terms at a national level is subjectively at the hands of the member states.

As interpreted by the Human Rights Committee, any restriction pursuant to Article 20(2) must also meet the requirements of Article 19(3), which “may never be invoked as a justification for the muzzling of any advocacy of multi-party democracy, democratic tenets, and human rights,”¹⁴⁴ and further “*[n]or 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.*”¹⁴⁵

As observed by the Special Rapporteur on the promotion and protection of freedom of religion or belief, Mr. Shaheed:

[T]here has been a resurgence of old constraints along with the emergence of new legal and extralegal limitations on freedom of expression wielded by State and non-State actors. Those include a revival of anti-blasphemy and anti-apostasy laws, *the proliferation of, and increasing reliance on, public order laws to restrict the freedom to express views deemed offensive to religious or belief communities*, along with increasing investments in strategies to combat incitement to discrimination, hostility or violence on the basis of religion or belief.¹⁴⁶

Regarding the use of hate speech laws “motivated by religion or belief, he has warned:

¹⁴³ International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR), art 20.

¹⁴⁴ UN Human Rights Committee, ‘General comment no. 34, Article 19, Freedoms of opinion and expression’ (21 July 2011) UN Doc CCPR/C/GC/34, para 23 (emphasis added).

¹⁴⁵ Ibid., para 48 (emphasis added).

¹⁴⁶ UN Human Rights Council ‘Report of the Special Rapporteur on freedom of religion or belief’ (5 March 2019) UN Doc A/HRC/40/58, para 4 (emphasis added).

[A]n uncritical approach to the development and application of laws against “hate speech” can be problematic. If they are formulated in vague terms or focus on banning specific content, such laws can be an effective way to prohibit blasphemy. When laws against “hate speech” limit the subject matter of free speech, rather than contextual assessments to decide whether violence is imminent or whether there is intent to incite discrimination or hostility through free speech, the effects can be similar to that of a law against blasphemy. Laws formulated in this way are often applied to reinforce the dominant political, social and moral narrative and opinions of a given society. They are frequently used to target opposition voices and dissent, and to censor minorities. Thus, States use “hate speech” laws against the very minorities those laws have been designed to protect,

As well as noting further:

*Article 20(2) of the International Covenant on Civil and Political Rights provides that States must prohibit by law any advocacy of religious hatred that constitutes incitement to discrimination, hostility or violence. At the same time, General comment no. 34 (2011) stresses that prohibitions under article 20(2) must comply with the regime for limitations under article 19(3) . . . States must ensure that criminal sanctions are imposed only in the most serious cases and be, based on a number of contextual factors, **including intent**.*¹⁴⁷

As observed by the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, Mr. Kaye:

Under article 20 (2) of the Covenant, States parties are obligated to prohibit by law “any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence.” States are not obligated to criminalize such kinds of expression. The previous Special Rapporteur explained that article 20(2) relates to (a) advocacy of hatred, (b) advocacy which constitutes incitement, and (c) incitement likely to result in discrimination, hostility or violence.¹⁴⁸

Further of note is his opinion that “[a] person who is not advocating hatred that constitutes incitement to discrimination, hostility or violence, **for example, a person**

¹⁴⁷ UN Human Rights Council ‘Report of the Special Rapporteur on freedom of religion or belief’ (5 March 2019) UN Doc A/HRC/40/58, paras 33 and 57.

¹⁴⁸ UN Human Rights Council ‘Promotion and protection of the right to freedom of opinion and expression’ (9 October 2019) UN Doc A/74/486, para 8 (citation omitted).

advocating a minority or even offensive interpretation of a religious tenet or historical event, or a person sharing examples of hatred and incitement to report on or raise awareness of the issue, is not to be silenced under article 20 (or any other provision of human rights law).¹⁴⁹

The take from all of this is that the use of Article 20(2) to limit advocacy of a minority viewpoint, especially when dealing with religious sentiment, at least in the eyes of the Human Rights Committee and the Special Rapporteurs, should be circumscribed to the very limited circumstances where the incitement to imminent violence standard applies, if at all.

Indeed, the difficult enough problem that the definition of “hate speech” under Article 20(2) presents, now the efforts under imprimatur of the United Nations seek to expand that definition, with the Orwellian statement in the Strategy and Plan of Action on Hate Speech that ***“[t]here is no international legal definition of hate speech, and the characterization of what is ‘hateful’ is controversial and disputed,” followed by a definition of hate speech that significantly broadens the scope*** to “any kind of communication in speech, writing or behaviour, that attacks or uses pejorative or discriminatory language with reference to a person or a group on the basis of who they are, in other words, ***based on their religion***, ethnicity, nationality, race, colour, descent, gender or other identity factor.”¹⁵⁰

Additionally, the Guidance is exquisitely unclear on its application to irreligious expression, stating on one hand that ***“[b]lasphemous speech, including insult to religious feelings, lack of respect for a religion or other belief system, and defamation of religions,”*** as well as ***“[d]isinformation (and misinformation and malinformation)”*** is non-actionable hate speech, including going so far as to say that ***“blasphemous expression should not be considered hate speech,”*** but then providing an exception to non-prohibition ***“unless*** such forms of expression constitute incitement to hostility, discrimination or violence under article 20(2) . . .”¹⁵¹

As observed by Mr. Kaye regarding the UN Hate Speech Strategy and its definition of hate speech:

¹⁴⁹ UN Human Rights Council ‘Promotion and protection of the right to freedom of opinion and expression’ (9 October 2019) UN Doc A/74/486, para 10 (emphasis added).

¹⁵⁰ ‘United Nations Strategy and Plan of Action on Hate Speech: Detailed Guidance on Implementation for United Nations Field Presences’ (September 2020)

<https://www.un.org/en/genocideprevention/documents/UN%20Strategy%20and%20PoA%20on%20Hate%20Speech_Guidance%20on%20Addressing%20in%20field.pdf> accessed August 22, 2022, pp. 10-11.

¹⁵¹ Ibid., pp. 14-15 and note 28 (emphasis added).

The question arises as to whether States may restrict advocacy of hatred that does not constitute incitement to discrimination, hostility or violence. In other words, the question is whether States may restrict hate speech when defined, as was done recently in the United Nations Strategy and Plan of Action on Hate Speech, as speech “that attacks or uses pejorative or discriminatory language with reference to a person or a group on the basis of who they are, in other words, based on their religion, ethnicity, nationality, race, colour, descent, gender or other identity factor”. ***Clearly such language stops short of the article 20(2) . . . meanings of incitement, and . . . legal restrictions will need to meet the strict standards of international human rights law.***¹⁵²

Of further note is his observation “that expression that may be offensive or characterized by prejudice and that may raise serious concerns of intolerance may often not meet a threshold of severity to merit any kind of restriction,” as well as that “[t]here is a range of expression of hatred, ugly as it is, that does not involve incitement or direct threat, such as declarations of prejudice against protected groups.”¹⁵³

The UN Hate Speech strategy prohibits pejorative language referencing any identity factor of another individual, meaning that any ill words spoken by another are actionable as hate speech, and are exactly the type of prohibitions, those that “displays of lack of respect for a religion or other belief system” that the Human Rights Committee noted “***are incompatible with the Covenant.***”¹⁵⁴

One just needs to observe the efforts of the OIC and others in broadening the prohibition on hate speech through the use of the resolutions “Promoting interreligious and intercultural dialogue and tolerance in countering hate speech” to understand that they are seeking to revive their campaign – if it has really ever stopped – of criminalizing defamation of religion.

Witness the change in rhetoric from Mr. Hilale’s initial statement of “profound concern about the increase in hate speech threatening tolerance and respect for diversity” upon introduction of A/RES/73/328 to addressing the added categories of “disinformation”

¹⁵² ‘United Nations Strategy and Plan of Action on Hate Speech: Detailed Guidance on Implementation for United Nations Field Presences’ (September 2020) <https://www.un.org/en/genocideprevention/documents/UN%20Strategy%20and%20PoA%20on%20Hate%20Speech_Guidance%20on%20Addressing%20in%20field.pdf> accessed August 22, 2022, para 19 (emphasis added).

¹⁵³ Ibid., para 24 (emphasis added).

¹⁵⁴ UN Human Rights Committee, ‘General comment no. 34, Article 19, Freedoms of opinion and expression’ (21 July 2011) UN Doc CCPR/C/GC/34.

and “misinformation” and “the danger of hate speech spread by violent extremism, obscurantism, and populism as well as racism of all types” upon introduction of A/RES/75/309. If there were any doubt, the cards were played though, upon the commemoration of the International Day for Countering Hate Speech, when the OIC delegate condemned “willful provocations and defamation of Islamic holy personalities and religious symbols,” while calling for the universal outlawing of such “wilful provocations and incitement to hate and violence.”

As they say, there is more than one way to skin a cat and leveraging the definition of hate speech in the soft law efforts of the Secretary General within the UN Hate Speech Strategy which “provides a single, unified framework for how the United Nations system should address hate speech globally” certainly is one of those.

b. The issues of subjectivity and vagueness in interpretation of the language of the UN Hate Speech Strategy

As set forth above, the UN Hate Speech Strategy defines hate speech as (1) “‘Any kind of communication,’ whether in the form of ‘speech, writing or behaviour;” (2) that “attacks or uses pejorative or discriminatory language;” and (3) “makes reference to an ‘identity factor.’”¹⁵⁵ It provides that “hate speech can be conveyed through any form of expression, including images, cartoons, memes, art objects, gestures and symbols . . . which is biased, bigoted, intolerant or prejudiced (‘discriminatory’) or contemptuous or demeaning (‘pejorative’) of an individual or group based on their identity” and makes reference to “a person or group’s ‘religion, ethnicity, nationality, race, colour, descent, gender or other identity factor’”¹⁵⁶

As opined to by Special Rapporteur Kaye “[h]ate speech,’ a shorthand phrase that conventional international law does not define, has a double ambiguity. *Its vagueness and the lack of consensus around its meaning can be abused to enable infringements on a wide range of lawful expression. Many Governments use “hate speech,” similar to the way in which they use “fake news,” to attack political enemies, non-believers, dissenters and critics.*”¹⁵⁷ Of import as well, is his opinion as noted above that “[c]learly such language

¹⁵⁵ ‘United Nations Strategy and Plan of Action on Hate Speech: Detailed Guidance on Implementation for United Nations Field Presences’ (September 2020) <https://www.un.org/en/genocideprevention/documents/UN%20Strategy%20and%20PoA%20on%20Hate%20Speech_Guidance%20on%20Addressing%20in%20field.pdf> accessed August 22, 2022, pp. 10-11.

¹⁵⁶ Ibid.

¹⁵⁷ UN Human Rights Council ‘Promotion and protection of the right to freedom of opinion and expression’ (9 October 2019) UN Doc A/74/486, para 1 (emphasis added).

stops short of the article 20(2) . . . meanings of incitement, and . . . legal restrictions will need to meet the strict standards of international human rights law.¹⁵⁸

As opposed to – or similarly – to the problems with the definition of hate speech contained in Article 20(2) of the ICCPR, this breadth of these definitions leave them ripe for abuse, encompass almost any type of minimally offensive speech, and give incredible discretion to national authorities to make the determination of what may constitute hate speech, presenting a very real risk that such a determination will be to the detriment of religious and political minorities.

IX. Analysis of and Commentary on the Dangers Posed by the United Nations Hate Speech Strategy and Current Hate Speech Efforts on Religious and Political Minorities

Current efforts at the United Nations to address hate speech are illiberal and ill advised, and place unwarranted power in the hands of states to silence minority religious and political voices. The promise that the right to freedom of expression would be robust and unfettered upon the adoption of the Universal Declaration of Human Rights in 1948 has slowly been chipped away in a political process that has inured to the benefit of the state and the detriment of religious and minority political voices. The concerned words of Eleanor Roosevelt that restrictions on the right would place too much power in the hands the state are being proven true.

Adoption of Articles 19(3) and especially 20(2) of the ICCPR represented the first of those compromises. The latter represented a gratuitous power to criminalize speech placed in the hands of the state in a human rights scheme that otherwise was focused on the individual against the state, and not the state against the individual. All over the world, from Europe to the former Soviet Bloc to the OIC states, restrictions are being placed on minority voices to the benefit of those in power. Unfortunately, based upon the political process of international treaty making, it appears that this provision is simply one that the world will have to live with. The Rabat plan and its guidance and definitions applicable to Article 20(2) are a welcome interpretation, although its non-binding nature and questionable effectiveness leave much to be desired, and the reality on the ground is much

¹⁵⁸ UN Human Rights Council ‘Promotion and protection of the right to freedom of opinion and expression’ (9 October 2019) UN Doc A/74/486, para 19 (emphasis added).

different than the Plan's aspirations, with very little or no movement in curbing continued groundless prosecutions for alleged irreligious expression or repeal of blasphemy laws.

Observing the machinations of the OIC and others in their campaign to vest even more power in the state which sought establish the right of the state to suppress irreligious sentiment, it appears that those countries still vested with the spirit and power of liberal democracy were able to win a temporary reprieve with the adoption of the Resolution 16/18 and the ensuing Rabat Plan, as well as the opinion of the Human Rights Committee in General comment no. 34 of the appropriateness – or inappropriateness – of silencing dissenting voices. The Rabat plan, while not a panacea - especially given the continued and abused power given to states pursuant to Article 20(2) – at least constitutes a process in place seeking to address abuses of the very critical natural and democratic rights of dissent and religious criticism.

An additional thorny problem – especially in our world of hypersensitivity – impacting the right of freedom of expression has raised its ugly head which is the adoption of hate speech laws at a national level throughout the world. These laws represent secularized versions of blasphemy laws that allow states to silence minorities couched in the words of “human rights” but applying not just to irreligious speech, but also other speech undesirable in the eyes of the state.

That mantel was clearly seized by Secretary General Guterres with the UN Hate Speech Strategy – a strategy that seeks to broaden the powers of the state against the individual with an overexpansive definition of hate speech that could apply to almost any sentiment uttered that might cause offense to another. Add to that its additional focus on “misinformation, disinformation and malinformation” – buzz words that again just mean expression undesirable to those in power – and one is faced with an unprecedented plan of action which will take the power away from dissenting religious and political voices and place that power in the hands of the state. One just need to observe the illiberal behavior of governments all over the world during the Covid-19 pandemic in censoring minority voices to understand the significant threat that such language presents to those who are not in power.

As set forth in this commentary, the OIC and others have, very conveniently and understandably seized on this “human rights” friendly language in the UN Hate Speech Strategy to advocate once again to vest power in the state to censor and punish dissenting religious and minority political voices simply for “willful provocations and defamation of Islamic holy personalities and religious symbols.” Their efforts, and the efforts of the

Secretary General in advancing the UN Hate Speech Strategy stand in opposition to the purpose of the international instruments under which they labor, which is to protect the right of the individual against the state and represent a true threat to religious and political minorities worldwide.

X. Conclusion

The current UN Hate Speech Strategy, and its broad definition of hate speech, is antithetical to the natural right of freedom of expression, and especially critical religious and political expression. It is ill-advised, illiberal and antithetical to the human rights that the United Nations is charged with protecting, and any efforts to expand hate speech beyond the strictures of Article 20(2) of the International Covenant on Cultural and Political Rights – an already illiberal restraint on freedom of expression – as set forth above are flawed, non-democratic, and will inure to the benefit of those in power, at the cost of those who are not. It vests power in the state against and threatens to marginalize just the individuals whom it should be most concerned about protecting – religious and political minorities.

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