ALLIANCE DEFENSE FUND
Defending Our First Liberty

CONSULTATION ON THE INTERRELATIONSHIP BETWEEN ICCPR ARTICLES 19 AND 20 WITH RESPECT TO FREEDOM OF EXPRESSION AND ADVOCACY OF NATIONAL, RACIAL OR RELIGIOUS HATRED THAT CONSTITUTES INCITEMENT TO DISCRIMINATION, HOSTILITY OR VIOLENCE

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I) Statement of the Issues and Summary of Conclusions

The Alliance Defense Fund (ADF), Christian Legal Fellowship (CLF), Jubilee Campaign (JC), World Evangelical Alliance (WEA) and Advocates International (AI, and together with ADF, CLF, JC and WEA, the "NGO Contributors") make this submission following the call by the Office of the High Commissioner for Human Rights (OHCHR) for a series of expert workshops on the linkage between articles 19 and 20 of the International Covenant on Civil and Political Rights (ICCPR). As part of this process, the United Nations (UN) High Commissioner for Human Rights has invited the submission of papers addressing the interplay between ICCPR article 20, which prohibits "advocacy of national, racial or religious hatred that calls for incitement to discrimination, hostility or violence," and ICCPR article 19, which acknowledges the right of everyone "to hold opinions without interference" and the "right to freedom of expression." In particular, the OHCHR seeks to better understand "what constitutes 'incitement' in the sense of article 20 of the ICCPR" and "how to effectively address it while ensuring full respect for freedom of expression as enshrined in article 19 of the ICCPR."

As set forth below, the NGO Contributors call upon the OHCHR to:

- Clarify and, if necessary, reformulate the topic of inquiry so that it is properly focused upon "advocacy of national, racial or religious hatred that calls for incitement to discrimination, hostility or violence," and *not* "incitement to national, racial or religious hatred," which improperly alters the language used in the ICCPR and lowers protection for freedom of expression;

- Consider expanding the scope of inquiry to include the interplay between and among ICCPR articles 20, 19 and 18, which concerns "freedom of thought, conscience and religion;"

- Protect freedom of expression, even if it entails protecting certain odious speech, due to the important role free expression plays as a catalyst for reform and the search for truth;

- Interpret "incitement" as contained in ICCPR article 20 in a manner that protects religious minorities from actual, imminent harm;

- Reject the call for vague "hate speech" codes that penalize speech which makes the listener uncomfortable; and

- Urge States Parties to fulfill their obligations under the ICCPR by protecting groups such as national, racial and religious minorities that are the victims of violence directly attributable to the advocacy of hatred.

II) Who We Are

ADF is a not-for-profit international legal alliance of more than 1700 lawyers dedicated to the protection of fundamental human rights. ADF has argued cases before the United States Supreme Court and the European Court of Human Rights. It has also provided expert testimony to the European Parliament and United States Congress. ADF has full accreditation with the United Nations' Economic and Social Council (ECOSOC), as well as the Organization for Security and Co-operation in Europe and the European Union (Fundamental Rights Agency and European Parliament). As a result, ADF is fully-versed in rights under the International Covenant on Civil and Political Rights and the international law issues that bear upon this submission.

CLF, founded in the mid-1970s, is a Canadian not-for-profit association of lawyers, law students, professors, and friends dedicated to exploring the complex interrelationships between the practice and theory of law and the Christian faith. While having no direct denominational affiliation, CLF has over 550 active members from over 40 denominations. CLF strives to help its members grow spiritually, do justice with

compassion, facilitate advocacy and promote Christian values and morality within Canada and around the world. CLF has special consultative status with ECOSOC.

JC promotes the human rights and religious liberty of ethnic and religious minorities; advocates the release of prisoners of conscience imprisoned on account of their faith; advocates for and assists refugees fleeing religion-based persecution; seeks to protect human dignity and the right to life for every human being from conception to natural death; and protects and promotes the freedom and safety of children from bodily harm and sexual exploitation. JC holds special consultative status with ECOSOC at the United Nations.

WEA is made up of 128 national evangelical alliances located in seven regions and 104 associate member organizations and global networks. The WEA is the world's largest association of evangelical Christians serving a constituency of 420 million people. The WEA is a voice to governments, media and other faith communities, and holds consultative status at the United Nations.

AI is an international organization of staff and volunteer attorneys in over 150 nations who seek to do justice with compassion, including through its Religious Freedom Global Task Force, working to assure, in the words of Article 18 of the Universal Declaration of Human Rights, that "everyone has the right to freedom of thought, conscience and religion, including the freedom to change his religion or belief, and freedom, either alone or in community with others and in public or private, to manifest his religion or belief in teaching, practice, worship and observance."

As human rights organizations particularly concerned with incidents of persecution and violence visited upon minority religions, the NGO Contributors are

especially cognizant of the effects of incitement to violence motivated by religious hatred. As religious liberty depends on the ability to engage in freedom of expression – the ability to preach and teach – the NGO Contributors are also highly aware of the exalted position of such a freedom amid the constellation of fundamental human rights.

The NGO Contributors urge the OHCHR to safeguard the liberty right recognized in ICCPR article 19 and to interpret "incitement" as contained in ICCPR article 20 in a manner that protects religious minorities from actual, imminent harm while preserving freedom of expression. They strongly urge the OHCHR to reject the call for vague "hate speech" codes that would result in curtailment of freedom of expression.

In reaching this conclusion, the NGO Contributors summarize the generally successful approach adopted by the United States Supreme Court in balancing these interests, and in creating guidelines for understanding "incitement" that could help deepen understandings of the term as used in the ICCPR. It also addresses the danger posed to free expression by such "hate speech" codes by citing examples from Canada and elsewhere. Finally, the submission details real-life examples of incitement of violence directed at religious minorities as examples of the harm that the ICCPR was intended to address, and requests that OHCHR encourage states parties to fulfill their obligations to protect members of minority religious groups from such violence.

III) Establishing Governing Interpretive Principles: Fidelity to Text, Context, and the Need to View Human Rights as "Interdependent and Indivisible"

The Vienna Convention on the Law of Treaties sets forth interpretive principles that govern analysis of a treaty such as the ICCPR: "A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in

their context and in light of its object and purpose."[1]

It is a standard principle of interpretation that a treaty, like a contract, should not be interpreted in a manner that creates a contradiction between terms so as to render one or both of them a nullity, but rather in a manner that gives meaning to all terms of a treaty, the presumption being that the treaty was intended to be internally consistent.

This common-sense interpretive principle is implicit in a statement of principle that the OHCHR elsewhere highlights: "All human rights are indivisible, whether they are civil and political rights, such as the right to life, equality before the law and freedom of expression; economic, social and cultural rights, such as the rights to work, social security and education, or collective rights, such as the rights to development and self-determination, are indivisible, interrelated and interdependent. The improvement of one right facilitates the advancement of others. Likewise, the deprivation of one right adversely affects the others."[2]

In the context of this call for submissions, it is important to address the interplay between ICCPR article 19 and article 20 in a holistic manner, and not to pit one provision against the other. Thus, the strictures referenced in article 20 therefore may not be expanded so as to swallow the negative rights acknowledged in article 19, namely "the right to hold opinions without interference" from states parties (or transnational entities, for that matter) and the "right to freedom of expression."[3] As the General Assembly

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[1] Vienna Convention on the Law of Treaties, art. 31(1).

[2] Office for the High Commissioner for Human Rights, "What are Human Rights?," *available at* http://www.ohchr.org/EN/Issues/Pages/WhatareHumanRights.aspx.

[3] Given the need for a holistic approach to interdependent and indivisible rights, it is perplexing why the discussion does not include ICCPR article 18 as well, as "freedom of thought, conscience and religion" is also implicated by an overbroad interpretation of article 20, no less than article 19. ***Accordingly, the NGO***

noted in granting the OHCHR its mandate to address human rights, "all human rights are universal, indivisible, interdependent and interrelated and that as such *they should be given the same emphasis.*" [4]

This need for holistic interpretation that maintains the integrity of the ICCPR as an organic whole has also been acknowledged, at least by inference, by the Human Rights Committee (HRC) in General Comment 11, which reads article 20 to be "fully compatible with the right of freedom of expression as contained in article 19."[5]

In view of this need for interpretive balance, it is extremely important that the OHCHR not adopt an overly-expansive interpretation of article 20 unwarranted by a holistic reading of the ICCPR. This is particularly true, since article 20 is *sui generis*, and one must therefore guard against any tendency to view it in isolation. Viewed as a whole, the ICCPR is by and large a statement of negative rights, protecting citizens from actions taken by government actors. Article 20, however, is different, insofar as it calls

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Contributors call for the OHCHR to expand the scope of the workshops to include discussion of article 18.

[4] General Assembly Resolution 48/141, "High Commissioner for the Promotion and Protection of All Human Rights," preamble (Dec. 20, 1993), *available at* http://www.un.org/documents/ga/res/48/a48r141.htm; *see also* Vienna Declaration and Programme of Action, A/Conf. 157/23 at ¶ 5 (July 12, 1993)("All human rights are universal, indivisible and interdependent and interrelated. The international community must treat human rights globally in a fair and equal manner, on the same footing, and with the same emphasis. While the significance of national and regional particularities and various historical, cultural and religious backgrounds must be borne in mind, it is the duty of States, regardless of their political, economic and cultural systems, to promote and protect all human rights and fundamental freedoms.") For a general discussion on the emergence of the "holistic" approach, *see* International Law, Conflict and Development: The Emergence of a Holistic Approach in International Affairs (Maurice D. Voyame et al., eds.) (Brill 2010).

[5] HRC, "General Comment No. 11: Prohibition of Propaganda for War and Inciting National, Racial or Religious Hatred" (July 29, 1983), *available at* http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/60dcfa23f32d3feac12563ed00491355?Opendocument. It should be noted that while the title of the General Comment shorthands the article as prohibition of "inciting national, racial or religious hatred," the comment itself cites the text of article 19 fully.

upon states to prohibit certain conduct "by law."[6] This led to a significant number of countries stating reservations with respect to this article.[7] Whether they did so out of an excess of caution or whether out of prescience remains to be seen, and depends in part on whether the workshops result in a recommendation that freedom of expression be unduly curtailed. *Any* interpretation of article 20 that reads it in isolation from the rest of the ICCPR – in particular, article 19, but also article 18 – would exacerbate fears concerning article 20 and concerns over incompatibility with freedom of expression protections in national constitutions and international documents. Moreover, such an interpretation would militate against OHCHR's and HRC's expressed desire for countries to remove reservations and implement the ICCPR in its entirety, as is routinely requested of states parties by the HRC in its concluding observations.[8]

IV) Defining the Issues Properly: Fidelity to the Text of the ICCPR

a) Article 20

Article 20 of the ICCPR, as drafted, states:

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[6] *See* Ivan Hare, "Extreme Speech Under International and Regional Human Rights Standards," *in* Extreme Speech and Democracy at 70 (I. Hare and J. Weinstein eds.)(Oxford 2009) ("Article 20 is singular in that it is the only provision of the ICCPR which requires (rather than prohibits) action by the state parties."); Implementation of General Assembly Resolution 60/251 of 15 March 2006 Entitled "Human Rights Council: Report of the Special Rapporteur on Freedom of Religion or Belief, Asma Jahangir, and the Special Rapporteur on Contemporary Forms of Racism, Racial Discrimination, Xenophobia, and Related Intolerance, Doudou Diène, Further to Human Rights Council Decision 1/107 on Incitement to Racial and Religious Hatred and the Promotion of Tolerance, A/HRC/2/3 (Sept. 20, 2006) at ¶ 46 ("Compared to other provisions of the Covenant, this provision is unusual because it does not provide for a human right but establishes limitation on other rights and requires States parties to enact legislative restrictions.").

[7] Namely Australia, Belgium, Denmark, Finland, France, Iceland, Ireland, Luxembourg, Malta, the Netherlands, New Zealand, Norway, Sweden, Switzerland, Thailand (interpretive declaration), the United Kingdom, and the United States. *See* http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-4&chapter=4&lang=en.

[8] *See, e.g.*, Human Rights Committee, Consideration of Reports Submitted by States Parties Under Article 40 of the Covenant: Concluding Observations: Australia, 95th Session, at ¶ 9 (May 7, 2009) (calling upon Australia to consider withdrawing its reservations to the ICCPR, including to article 20).

1. Any propaganda for war[9] shall be prohibited by law.

2. Any advocacy of national, racial or religious hatred *that constitutes incitement to* discrimination,[10] hostility or violence shall be prohibited by law.

It is vital to clarify what precisely article 20 prohibits, and what it does not, as the actual wording of the ICCPR is what constitutes the extent of obligation that sovereign states parties undertook when they ratified the convention. By extension, it also delineates what is the proper scope of review by the OHCHR. The OCHCR must remain within its mandate and not act *ultra vires*, as the General Assembly acknowledged when it directed the High Commissioner to: "Function within the framework of the Charter of the United Nations, the Universal Declaration of Human Rights, other international instruments of human rights and international law, including the obligations, within this framework, to respect the sovereignty, territorial integrity and domestic jurisdiction of States."[11] The OHCHR therefore may not amend treaty language drafted by States Parties binding upon nations that have ratified it and thereby create new obligations.

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[9] Certain states parties have pointed out that use of the term "war" should properly be understood as "war in contravention of international law," in other words, "war" that does not meet *ius ad bellum* principles. *See e.g.,* Declarations and Reservations of France to the ICCPR, *available at* http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-4&chapter=4&lang=en ("The Government of the Republic declares that the term 'war,' appearing in article 20, paragraph 1, is understood to mean war in contravention of international law."). Implicitly acknowledging this deficiency in draftsmanship, the HRC has sought to clarify that this provision does not "prohibit advocacy of the sovereign right of self-defence or the right of peoples to self-determination and independence." HRC, General Comment 11.

[10] As with the term "war" in the preceding clause, the bald word "discrimination" is inartful. "Discrimination," *i.e.,* the ability to draw distinctions and to make judgments, is not in and of itself intrinsically problematic, but rather "unjust discrimination" – the treatment of like- or similarly-situated individuals or classes or people in a dissimilar matter – is what is problematic. Rather than untangling what the drafters may have meant with respect to "discrimination," this submission addresses incitement to "hostility or violence," which is a realtime phenomenon in much of the world, calling for a realtime and effective response.

[11] *See* GA Resol. 48/141at ¶ (3)(a). The same holds true for the Human Rights Committee as the treaty compliance committee set up under the ICCPR. The HRC is empowered to receive reports from states parties, to study them and then to "transmit its reports, and such general comments as it may consider

Unfortunately, the OHCHR has introduced an ambiguity which ***must*** be addressed at the outset. While the Concept Paper properly defines the "scope" of the expert workshops as focusing on "legislative and judicial practices as well as policies conducive to effectively prohibit and prevent *advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence,*" in its executive summary and elsewhere the Concept Paper states the issue as one concerning "*the prohibition of incitement to national, racial or religious hatred.*"[12] Likewise, the High Commissioner, in her Message to Civil Society, echoes this misstatement, incorrectly characterizing the issue as "prohibiting incitement to national, racial or religious hatred." That is *not*, however, the language which appears in the ICCPR, and therefore, should not be the focus of the workshops.

As a threshold matter, therefore, it is important to clarify that what article 20 prohibits is *neither* "incitement to national, racial or religious hatred," nor even "advocacy of national, racial or religious hatred" in the abstract without anything more. As odious as such advocacy may be, what is required is rather a two-step process whereby (1) "*advocacy* of national, racial or religious hatred" is coupled with (b) "*incitement* to discrimination, *hostility* or *violence*," before state sanction is incurred.

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appropriate, to the States Parties." ICCPR art. 40(2), (4). The HRC may also receive and consider reports from a State Party concerning another State Party's failure to fulfill its obligations, issue a report on such a complaint, and, where the parties consent, convoke a Conciliation Commission. ICCPR arts. 41-42. For those countries that have ratified the optional protocol, the HRC may receive petitions from individuals once domestic remedies have been exhausted, conduct a proceeding, and, upon conclusion, issue its non-binding "views" on the matter. ICCPR Optional Protocol art. 5.

[12] *See* Concept Paper on OHCHR's Expert Workshops on the Prohibition of Incitement to National, Racial or Religious Hatred; Follow-up to the Expert Seminar on Articles 19 and 20 of the ICCPR with Regard to Freedom of Expression and Incitement to Hatred," at 1. Indeed, even the very title of the Concept Paper misstates the issue.

To hold otherwise (a) disregards the language of the text, in contravention of the canons of construction contained in the Vienna Convention referenced above, and (b) would undermine the principle of freedom of expression that Article 19 properly safeguards. In other words, mere "advocacy of national, racial or religious hatred" without more is insufficient to incur prohibition by the state, per the ICCPR. Moreover, any workshop studying "incitement to national, racial or religious hatred" should be a non-starter.

Insofar as the issue as stated by the OHCHR alters the existing text of the ICCPR, it is overstepping its mandate. This must be addressed *ab initio*, for if the agenda is incorrectly set at the outset, the conclusion reached by the workshops will be different. ***Indeed, what the Contributing NGOs fear is that this change in wording would "stack the deck" in favor of a conclusion in favor of vague "hate speech" codes – or its kin, "defamation of religion"-type proscriptions – that will result in restrictions upon legitimate freedom of expression and upon the ability of minority groups to challenge reigning religious and political orthodoxies.***[13] In other words, if the issue to be examined is defined as "the prohibition of incitement to national, racial or religious hatred" in the abstract and without reference to the incitement of violence, then one sets up an unwarranted and counter-productive clash between "hate speech" codes and "freedom of expression."

[13] As the Special Rapporteur on freedom of religion or belief, Asma Jahangir, has pointed out, "defamation of religion" restrictions threaten the rights acknowledged by both ICCPR article 18 and 19 by creating an "atmosphere of religious intolerance" where certain non-violent expressions of religious opinion are deemed offensive to the majority orthodoxy and thereby "might stifle legitimate criticism or even research on practices and laws appearing to be in violation of human rights but are, or are at least perceived to be, sanctioned by religion." Asma Jahangir, Interim report of the Special Rapporteur on freedom of religion or belief, UN Doc. A/62/280 (Aug. 20, 2007), at ¶ 77.

b) Article 19

Article 19 of the ICCPR states as follows:

1. Everyone shall have the right to hold opinions without interference.
2. Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.
3. The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:
   (a) For the 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.

Clause 1 sets forth an absolute right, which may never be infringed upon. Clause 2 sets forth a fundamental right, but one that may be qualified only in certain limited circumstances, enumerated in clause 3.

"Freedom of expression" includes the "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 other media of his choice." Implicit in the right to impart "information and ideas of all kinds" is the right to challenge and to criticize, including the right to attack (even ridicule and mock) the ideas and beliefs of others, including their deeply-held religious beliefs. The criticism might be factually accurate, or it might be factually inaccurate and muddle-headed. Likewise, across cultures, it is a staple of humor to mock foreign nationalities – the English mock the French, the French mock the English, and so forth. Such humor can be cutting and sarcastic; it can demean, and it can perpetuate and propagate national, racial or religious stereotypes. And of course freedom of expression can be used to fight against bigotry based on national,

racial or religious stereotypes as well, which in part is what makes it such an essential and fundamental right.

The importance of freedom of expression has been emphasized on numerous occasions by international courts and bodies alike. As early as 1946, at its very first session, in the UN General Assembly adopted Resolution 59(I) which states: "Freedom of information is a *fundamental human right* and ... *the touchstone of all the freedoms to which the United Nations is consecrated.*"[14]

Likewise, the HRC has acknowledged: "The right to freedom of expression is of paramount importance in any democratic society."[15]

This theme has been echoed by various international courts. The European Court of Human Rights has recognized the vital role of freedom of expression as an underpinning of democracy: "Freedom of expression constitutes one of the essential foundations of [a democratic] society, one of the basic conditions for its progress and for the development of every man."[16]

The democratic significance of freedom of expression was also recalled by the Inter-American Court of Human Rights:

> Freedom of expression is a cornerstone upon which the very existence of a democratic society rests. It is indispensable for the formation of public opinion. It is also a *conditio sine qua non* for the development of political parties, trade union, scientific and cultural societies and, in general, those who wish to influence the public. It represents, in short, the means that enable the community, when exercising its opinions, to be sufficiently

[14] GA Resol. 59(I), first preambl. para. (Dec. 14, 1946) (emphasis added).

[15] *Tae-Hoon Park v. Republic of Korea*, 20 October 1998, Communication No. 628/1995, para. 10.3.

[16] *Handyside v. United Kingdom*, 7 December 1976, Application No. 5493/72, ¶ 49.

> informed. Consequently, it can be said that a society that is not well informed is not a society that is truly free.[17]

With respect to expressing ideas about religion, it is a truism that by propagating one's faith, the speaker is making an exclusive claim about the truth of one's religion, and therefore at least implicitly, the falseness, in whole or in part, of other religions (*e.g.*, "Muhammad is God's prophet" *vs.* "Muhammad is *not* God's prophet").[18] In seeking to proselytize, one may also directly state that what another religion teaches is false. Such expression, especially if put forward forcefully and unambiguously, may be interpreted by the listener as "hatred" for his existing religion. Such expression must nevertheless be protected.

"Freedom of expression" is not, of course, an absolute right, and it can be restricted, though the grounds for restricting it are limited; as the Special Rapporteur on Freedom of Expression, Ameba Legato, has stated, restrictions upon the right of freedom expression "can only be imposed in rather exceptional circumstances."[19] Per article 19, it can be limited where such restrictions are necessary to respect "the rights or reputations of others" (*i.e.*, situations implicating traditional torts such as libel and slander). It may also be restricted for "the protection of national security or of public order (ordre public), or of public health or morals" – with the issue of "public order" being most germane to the immediate issue, given article 20's concern with incitement to "hostility or violence."

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[17] *Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism (Arts 13 and 29 American Convention on Human Rights)*, Advisory Opinion OC-5/85, 13 November 1985, Series A, No 5, para 70.

[18] As noted above, ICCPR article 18, concerning "freedom of thought, conscience and religion," is also implicated in the OHCHR's call for workshops and submissions. Thus it should have been included within the ambit of the inquiry initiated by the OHCHR.

[19] Amyebi Ligabo, "Report of the Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression," A/HRC/7/14 (Feb. 28, 2008), at ¶49, *available at* http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G08/112/10/PDF/G0811210.pdf?OpenElement.

As the Special Rapporteur on Freedom of Expression has pointed out: "these limitations are not designed to suppress the expression of critical views, controversial opinions or politically incorrect statements," nor "are they designed to protect belief systems form external or internal criticism."[20]

Thus, provided it is read holistically and with fidelity to the text as actually written, article 20 confirms this understanding of the proper limits that can be placed on freedom of expression – advocacy of hatred *combined with* incitement "to discrimination, *hostility or violence.*" It is by maintaining such a strict textual construction that article 20 can be said to be "fully compatible with the right of freedom of expression as contained in article 19."[21]

V) The Balanced Approach of the United States Supreme Court – Banning "Incitement" to Immediate Violence While Respecting "Freedom of Expression" as a Fundamental Right

The following section discusses how the United States Supreme Court has balanced the need to protect the fundamental liberty of free expression as protected by the First Amendment to the United States Constitution on the one hand (even if it means tolerating advocacy of ideas that may be equated with hatred), with the need to proscribe "incitement" to *immediate* acts of violence that endanger the safety of particular members of the citizenry on the other. In particular, it focuses on three landmark "extreme speech" cases germane to the issue: (a) *Brandenburg v. Ohio*, 395 U.S. 444 (1969), which concerned race hatred and anti-Semitism expressed by members of the white supremacist group the Ku Klux Klan; (b) *Cantwell v. Connecticut*, 310 U.S. 296 (1940), which

[20] *Id.* at ¶ 85.

[21] HRC General Comment 11.

concerned proselytism by members of a religious sect who denounced members of other religions as "instruments of Satan;" and (c) *Virginia v. Black*, 538 U.S. 343 (2002), which concerned "cross burning" by members of the Ku Klux Klan as a form of expression intended in significant part to intimidate racial minorities.[22]

a. ***Brandenburg v. Ohio*** – This case concerned an appeal by a Ku Klux Klan leader convicted under a "criminal syndicalism" statute that prohibited advocacy of violence as a means of accomplishing industrial or political reform, as well as outlawing voluntarily assembly "with any society, group or assemblage of persons formed to teach or advocate the doctrines of criminal syndicalism."

The appellant klansman was one of 12 hooded figures, some armed, who burned a cross in an isolated rural area. The cross-burning was filmed by a local news crew that had been invited to attend. In a speech to those gathered, the appellant stated "We are not a revengent organization, but if our President, our Congress, our Supreme Court, continues to suppress the white, Caucasian race, it's possible that there might have to be some revengence taken." Other unidentified speakers made statements that were derogatory of African Americans, and in one instance, Jews.

In a second gathering that was also filmed, six klansmen, some armed, the appellant (who was unarmed) stated: "Personally, I believe the [derogatory term for African Americans] should be returned to Africa, and the Jew returned to Israel."

The Supreme Court held that "constitutional guarantees of free speech and free press do not permit a State to forbid or proscribe advocacy of the use of force or law violation except where such advocacy is directed to inciting or producing *imminent* lawless action and is likely to incite or produce such action."[23] What the appellant had engaged in was "mere advocacy" of racial hatred, unaccompanied by the necessary "incitement" to imminent violence.

Therefore under *Brandenburg,* the State may not punish "mere advocacy" of violence directed toward a racial group, if it is not accompanied by (a) "incitement," that is, speech *expressly inciting* violence, (b) "imminent harm," that is, speech raising an immediate threat of harm.[24]

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[22] The burning of the cross is not intended to desecrate a religious symbol in this particular context.

[23] *Brandenburg*, 395 U.S. at 448 (emphasis added).

[24] Thus in *Hess v. Indiana*, 414 U.S. 105 (1973),the Supreme Court overturned the conviction of an anti-war protestor arrested for disorderly conduct after he said "We'll take the [obscenity] street later," due to

b. ***Cantwell v. Connecticut*** – At issue in *Cantwell* was a charge of the common law offense of breach of the peace brought against a member of the Jehovah's Witness, a minority religious sect, who had gone into a predominantly Catholic neighborhood to proselytize.

Going from house-to-house and accosting people on the street, the Jehovah's Witness asked for permission to play a recording. One recording in particular, promoting a book called "Enemies," attacked the Catholic Church and other Christian denominations as "instruments of Satan" in patently offensive terms. Two Catholics who heard this were, not unsurprisingly, "incensed" by this crude attack upon their deeply-held beliefs, and, per the Court, "were tempted to strike" the appellant unless he went away. The appellant withdrew without argument. He was nevertheless arrested and charged with "inciting others to breach of the peace."

Breach of the peace at common law includes "not only violent acts but acts and words likely to produce violence in others." The Court weighed the state's "obvious interest in the preservation and protection of peace and good order within her borders" with the First Amendment's requirement that "the free exercise of religion be not prohibited and that freedom to communicate information and opinion be not abridged," concluding that the liberty interest in free expression was paramount.

In language germane to the OHCHR's immediate inquiry, the Court clarified that in no way does "the principle of freedom of speech sanction[] incitement to riot or that religious liberty connotes the privilege to exhort others to physical attack upon those belonging to another sect. Yet it may also "not unduly suppress free communication of views, religious or other," under the pretext of preserving peace.

The Court concluded that despite subjecting his Catholic listeners to speech "which naturally would offend not only persons of that persuasion, but all others who respect the honestly held religious faith of their fellows," the appellant was trying to persuade his audience of what he perceived to be "true religion," however "misguided others may think him."

The Court further counseled that one tolerates offensiveness and even error because the principle of free expression is essential if democracy is to be preserved: "In the realm of religious faith, and that of political belief, sharp differences arise. In both fields the tenets of one man may seem the rankest error to his neighbor. To persuade others to his own point of view, the pleader ... resorts to exaggeration, to vilification of men who have been, or are, prominent in church or state, and even to false statement. But the people of this nation have ordained in the light of history, that, in spite of the probability

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the lack of immediacy of the threat. The Court reasoned that "at worst, the statement amounted to nothing more than advocacy of illegal action at some indefinite future time."

of excesses and abuses, these liberties are, in the long view, essential to enlightened opinion and right conduct on the part of the citizens of a democracy."[25]

c. ***Virginia v. Black*** – At issue in this case was a state statute that criminalized the burning of "a cross on the property of another, a highway or other public place," and further provided that "Any such burning of a cross shall be prima facie evidence of an intent to intimidate a person or group of persons." Here, the form of expression was not speech, but an act, or a "symbolic expression."

Historically, white supremacists have used the burning of crosses to intimidate African-Americans in particular, but also others who opposed their racist ideology. Cross burnings also served a secondary role as "potent symbols of shared group identity and ideology, serving as a central feature of Klan gatherings," according to the Court. In either case, this form of expression was a "symbol of hate."

In *Virginia v. Black*, Klansmen gathered in a rural area for a rally that was to culminate in a cross-burning with the permission of the landowner. At the rally, some participants spoke of hatred of African Americans and also people of Mexican nationality. One said he "would love to take a .30/.30 and just random[ly] shoot the blacks." Upon the conclusion, a cross was burned, and the leader of the burning was charged with a violation of the statue for "burning a cross with the intent of intimidating a person or group of persons."

In a second, non-related incident, two white men unaffiliated with the Klan partially burned the cross on the lawn of their African American neighbor. They were charged with attempted cross burning and conspiracy to commit cross burning.

The Court held that the State may outlaw cross burning done with the intent to intimidate, consistent with the Constitution. However, the portion of the statute that said that "any such burning of a cross shall be prima facie evidence of an intent to intimidate a person or group of persons" was unconstitutional, as the act of burning a cross may also be a "core political" statement, albeit one that is odious. Accordingly, the conviction of the leader involved in a rally that concluded in a cross burning on property with the

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[25] Though the law in this area has been settled for 70 years, this does not stop zealous prosecutors from attempting to halt constitutionally-protected attempts at evangelization. Recently, four Christian missionaries charged with breach of the peace for peacefully attempting to evangelize Muslims at the annual Arab festival in Dearborn, Michigan, were acquitted. *See* Naomi R. Patton and Niraj Warikoo, 4 Missionaries Acquitted of Inciting Crowd: They Proselytized at Dearborn Arab Festival, Detroit Free Press, Sept. 25, 2010, *available at* http://www.freep.com/article/20100925/NEWS02/9250493/4-missionaries-acquitted-of-inciting-crowd#ixzz10lzDKap4. In light of the controlling precedent of *Cantwell*, charges should never have been brought, and now the city itself will likely be the subject of a lawsuit for having violated the constitutional rights of the evangelists. *See* Jonathan Oosting, Attorney: Acquitted Christian Missionaries Plan to Sue Dearborn Over Arrests at Arab Festival, mlive.com, Sept. 27, 2010, *available at* http://www.mlive.com/news/detroit/index.ssf/2010/09/attorney_acquitted_christian_m.html.

> permission of the landowner was overturned, as there was no evidence of an intent to intimidate, whereas in the second non-related instance, the case was remanded to the lower court for retrial.
>
> The Supreme Court also clarified that expressions of hatred that constituted a "true threat" could also be banned. "True threats" encompass statements "where the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals." The Court went on to say that "intimidation in the constitutionally proscribable sense of the word is a type of true threat, where a speaker directs a threat to a person or a group of persons with the intent of placing a victim in fear of bodily harm or death."

From the above cases, one can discern certain principles *a propos* to an analysis of the two provisions of the ICCPR. *First*, commitment to the principle of "freedom of expression," which on the whole is a good, requires tolerating certain forms of extreme expression that are morally repugnant. Failure to do so results in the erosion of a cornerstone principle upon which democracies depend – the ability to challenge and criticize reigning orthodoxies and express viewpoints – in order to thrive and ultimately survive. *Second*, the State has an obligation to protect its constituents. Thus when a group is threatened with imminent harm due to national, racial or religious hatred, the State has an obligation to act.

This need that the harm be "imminent" has been underscored by the Special Rapporteurs on Freedom of Religion or Belief and on Contemporary Forms of Racism, Racial Discrimination, Xenophobia, and Related Intolerance, jointly:

> The Special Rapporteur notes that article 20 of the Covenant was drafted against the historical background of the horrors committed by the Nazi regime during the Second World War. The threshold of the acts that are referred to in article 20 is relatively high because they have to constitute advocacy of national, racial or religious hatred. Accordingly, the Special Rapporteur is of the opinion that expressions should *only be prohibited* under article 20

> if they constitute incitement to *imminent* acts of violence or discrimination against a specific individual or group.[26]

With respect to ICCPR, therefore, the notion of "incitement" is best understood as conveying an *express* call for inflicting *imminent* harm upon a target that is the object of national, racial or religious hatred. Consistent with the above, it cannot be "incitement" in the abstract, but rather, the express preaching of hatred to a passionate mob that is set on fire to go down the street to attack a foreigner, a member of different race, or worshippers of a minority religion.[27]

Thus the OHCHR must be careful not to define "incitement" too broadly, however, so as to hobble otherwise protected speech. For, as the American jurist Justice Oliver Wendell Holmes (grandiloquently) once said:

> *Every idea is an incitement. If offers itself for belief and if believed it is acted upon unless some other belief outweighs it or some failure of energy stifles the movement at its birth. The only difference between the expression of an opinion and an incitement in the narrower sense is the speaker's enthusiasm for the result. Eloquence may set fire to reason.*

But, according to Holmes, it becomes actionable only where such a fire has a "chance of starting a present conflagration."

To illustrate when otherwise protected speech crosses the line, the great nineteenth century proponent of liberty, John Stuart Mill, distinguished between someone arguing that "corn-dealers are starvers of the poor" in an article or in a parliamentary

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[26] Implementation of General Assembly Resolution 60/251 of 15 March 2006 Entitled "Human Rights Council: Report of the Special Rapporteur on Freedom of Religion or Belief, Asma Jahangir, and the Special Rapporteur on Contemporary Forms of Racism, Racial Discrimination, Xenophobia, and Related Intolerance, Doudou Diène, Further to Human Rights Council Decision 1/107 on Incitement to Racial and Religious Hatred and the Promotion of Tolerance, A/HRC/2/3 (Sept. 20, 2006) at ¶ 47 (emphasis added).

[27] *Gitlow v. New York*, 268 U.S. 652, 673 (1923)(Holmes, J., *dissenting*)(italics added). *Gitlow* concerned advocacy of class warfare and the legitimacy of political violence as a revolutionary tactic.

speech, with someone delivering such an opinion "to an excited mob assembled before the house of a corn dealer."[28] Analogously, speech that advocates national, racial or religious hatred without more is protected; but if such speech is delivered in circumstances to incite direct hostility or violence upon such groups, it may – nay, *must* – be squelched by the State.

VI) What is "Incitement" and What Isn't: Vague "Hate Speech" Codes vs. Specific Calls for Religious Pogroms

a) "Hate Speech" Codes

In contrast to actual incitements to imminent violence against persons based on their religion (discussed below) are arguments concerning the truth or falsity of a particular religion or system of belief, which may offend listeners who disagree, similar to what took place in *Cantwell*. Such expressions may take the form of proselytism, and seek converts to a religious or political position.[29]

The right to engage in such an exchange of ideas, even if the debate is rigorous, is essential for democracy. Sometimes such arguments are factual, but sometimes they are not. Indeed, when one makes claims about the truth of a particular religion or system of belief, one makes, at least implicitly, a statement about the at least partial falsity or incompleteness of other religions or systems of belief. Such statements may offend, but they fall within the ambit of protected speech and cannot be regulated without doing violence to the principle of freedom of expression enshrined in ICCPR article 19. Indeed, as the Special Rapporteur on Contemporary Forms of Racism, Racial Discrimination,

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[28] J.S. Mill, *On Liberty and Other Essays* 61 (Oxford 1991).

[29] Yet again, this is reason for including a discussion of ICCPR article 18 within the ambit of the workshops.

Xenophobia, and Related Intolerance has recently noted, even negative "stereotyping" of religions and their followers which may be "provocative" and convey a "distorted" vision, "should always be tolerated" provided they do not fall under the restrictions delineated in articles 19 and 20.[30] Further, "vigourously interrogating and criticizing religious doctrines and their teachings is thoroughly legitimate and constitutes a significant part of their exercise of the right to freedom of opinion or expression."[31]

Unfortunately, in recent years we have seen greater restrictions on speech, with codes that seek to regulate and ban so-called "hate speech." Such attempts at restriction often depend on perceptions of disparagement by someone listening to such speech, which is a subjective rather than objective standard. We even see such efforts in countries that traditionally have stood for freedom of expression, and even those who expressed concerns in reservations to article 20 of the ICCPR.

For example, the Committee of Ministers of the Council of Europe, in seeming disregard for the constitutions of many of its member states and the European Convention on Human Rights (ECHR)[32] to which many of its member states subscribe, has stated that "hate speech" "shall be understood as covering all forms of expression which spread, incite, promote or justify racial hatred, xenophobia, anti-Semitism or other forms of

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[30] Githu Muigai, Report of the Special Rapporteur on Contemporary Forms of Racism, Racial Discrimination, Xenophobia, and Related Intolerance on the Manifestations of the Defamation of Religions, and in Particular on the Ongoing Serious Implications of Islamophobia, for the Enjoyment of All Rights by their Followers, A/HRC/15/53 (July 12, 2010), at ¶ 76. What is the scope of restrictions contained in articles 19 and 20 is of course the subject of the instant inquiry.

[31] *Id.* at ¶ 90.

[32] The first clause of ECHR art. 10 states the right to freedom of expression, whereas the second lists traditional cases in which such a right may be circumscribed.

hatred based on intolerance..."[33] According to an explanatory fact sheet, "concrete expressions...insulting to particular individuals or groups can be restricted by governments in their national law."[34] In a statement that resembles a form of Orwellian newspeak, the Counsel observed that "The identification of expressions...[of] hate speech is sometimes difficult because this kind of speech does not necessarily manifest itself through the expression of hatred or of emotions. *It can also be concealed in statements which at a first glance may seem to be rational or normal.*"[35]

The emergence of such "hate speech" codes has created a situation of conflict with the principle of freedom of expression. For example, in Canada, all provinces and territories have human rights legislation and human rights commissions. As a rule, the legislation forbids certain enumerated discrimination in a number of contexts, including publications. The context of publications in some of this legislation[36] is where the issue of hate speech arises. For example, the human rights codes of Alberta, British Columbia, the Northwest Territories, and Saskatchewan include provisions that prohibit signs, notices, and other representations that are likely to expose the members of an identifiable group to hatred or contempt.[37] In addition, the *Canadian Human Rights Act*, section 13(1) addresses the issue of hate speech.[38]

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[33] Council of Europe Committee of Ministers, Recommendation No. R (97) 20 of the Committee of Ministers to Member States on "Hate Speech," at 107, *adopted* Oct. 30, 1997, *available at* https://wcd.coe.int/com.instranet.InstraServlet?command=com.instranet.CmdBlobGet&InstranetImage=568168&SecMode=1&DocId=582600&Usage=2.

[34] Council of Europe, Hate Speech Factsheet at 1 (updated November 2008).

[35] *Id.* at 2 (emphasis added).

[36] For example, section 12 of Prince Edward Island's *Human Rights Act* and section 7 of British Columbia's *Human Rights Code*.

[37] Section 14 of the Saskatchewan *Human Rights Code* is potentially broader in its scope since it extends not simply to material that exposes, or tends to expose, the individual to hatred but also to material that

One has seen "human rights tribunals" engage in proceedings and issue judgments that have had the effect of curtailing free speech rights and generally chilling speech. When brought before higher courts, the silenced speakers' rights have often been vindicated, as section 2(b) of Canada's *Charter of Rights*[39] offers a broad and robust protection for freedom of expression. Nonetheless, the threat of having to undergo such expensive and time consuming proceedings has had a significant chilling effect on freedom of speech.

In particular, we have seen "hate speech" codes used to suppress actual and accurate information about Islam if it is presented in a critical context. Indeed, one must squarely ask whether this present inquiry is inspired by certain constituencies desiring to silence religious speech it deems critical and challenging to its truth claims, either under the guise of proscribing "defamation" of a particular religion or prohibiting "incitement to national, racial or religious hatred" – the latter being a lower standard than what is contained in the ICCPR and more akin to the concept being pushed under the "defamation" rubric.

The Special Rapporteur on Contemporary Forms of Racism, Racial Discrimination, Xenophobia, and Related Intolerance has linked the two concepts, recently urging a movement away from "the notion of defamation of religions towards

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"ridicules, belittles, or otherwise affronts the dignity of [the] person." However, the section only applies to communication in the form of a "notice, sign, symbol, emblem, article, statement or other representation."

[38] At the extreme end of the scale of legal restrictions on hate speech in Canada is the *Criminal Code*. Hate propaganda is criminalized, which prohibits the willful promotion of hatred and contempt against identifiable groups in a public place. The *Criminal Code* also prohibits advocacy of genocide and incitement to violence. *See* sections 318, 319 and 320 of the *Criminal Code of Canada*.

[39] Section 2 of the Canadian *Charter* grants to everyone, among other things, freedom of conscience and religion, and freedom of thought, belief, opinion and expression, including freedom of the press and other media. Section 1 restricts the granted freedoms by making them subject "only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society."

the legal concept of advocacy of racial or religious hatred that constitutes incitement to discrimination, hostility or violence in order to anchor the debate in the relevant existing international framework, and in particular that provided in the International Covenant on Civil and Political Rights."[40] Insofar as this aims to extend protection to the expression of ideas that the "defamation of religion" rubric seeks to censor, such a movement is to be welcomed; insofar as it might erode free expression by pushing the international framework towards countenancing "hate speech" codes, however, it is to be deplored.

Some examples of censorship of perfectly legitimate opinion under the guise of suppressing "hate speech" include the following:

- **The Australian Pastor Case** – Daniel Scot and Danny Nalliah were both Christian pastors in Melbourne, Australia. Scot was born in Pakistan and was a mathematician by training. He was among the first Pakistanis accused under that nation's "Blasphemy" law – the penalty for which is death – and had to flee the country. Before then, he was reportedly one of only two Christian lecturers in mathematics in Pakistan, having achieved a perfect score in his knowledge of Islam, a prerequisite for the post. Nalliah was born in Sri Lanka, but spent time in Saudi Arabia, where the practice of Christianity is banned and punishable, and where *shar'ia* law is practiced. His firsthand experience with how Islam is practiced in Saudi Arabia significantly impacted his views of the religion.

  In March 2002, the pastors held a religious seminar that factually critiqued Islam and compared and contrasted Christianity and Islam. They made a number of controversial statements, and presented printed material that did the same. [41]

[40] Report of Special Rapporteur on Contemporary Forms of Racism, at ¶ 90.

[41] Among the remarks attributed to them were that: (1) the Qur'an promotes violence, killing and looting; (2) it demeans women, and (in *hadith*) states that women, dogs and donkeys are of equal value; (3) Muslims are liars. *See Islamic Council of Victoria v. Catch the Fire Ministries, Inc.*, [2004] VCAT 2501 (Dec. 22, 2004), ¶ 383, *available at* http://www.austlii.edu.au/au/cases/vic/VCAT/2004/2510.html, *rev'd sub nom. Catch the Fire Ministries, Inc. & Ors v. Islamic Council of Victoria, Inc.*, [2006] VSCA 284 (Dec. 14, 2006), *available at* http://www.austlii.edu.au/au/cases/vic/VSCA/2006/284.html.

Three Muslims attending the seminar reported what they heard to the local Islamic Council. They had been enlisted to attend by a member of the Equal Opportunity Commission, who also attended and monitored the seminar.[42] They alleged that they felt "hurt, embarrassed and distressed," as well as "shocked, disturbed, insulted and outraged" by the presentation.[43] One said he felt "intimidated and frightened and apprehensive for his own safety had it been discovered that he was a Muslim;" there was no indication that at anytime did anyone threaten him with violence, however.[44]

Soon afterward, the Islamic Council brought suit against Scot and Nalliah under the state's then-new "hate speech" law, the *Racial and Religious Tolerance Act of 2001*. The Act mandates that "A person must not, on the ground of the religious belief or activity of another person or class of persons, engage in conduct that *incites hatred against*, serious contempt for, or revulsion or severe ridicule of, that other person or class of persons."[45] (*N.b.* the proscription of incitement of hatred, in language substantively similar to how the High Commissioner and portions of the Concept Paper have misstated the language of the ICCPR.)

The Victorian Civil and Administrative Tribunal ruled that the pastors, in criticizing Islam, had violated the statute. The Court found the seminar was not conducted "in good faith," nor was it "conducted reasonably because it was 'excessive.'" Rather, "It was a one-sided delivery of a view of the Qur'an and Muslims' beliefs, which were not representative. It was designed to put Muslim people and their beliefs in a bad light."[46] Similarly, an article distributed at the seminar and posted online written shortly after the September 11, 2001 attack on the Twin Towers and the Pentagon that labeled Islam an "inherently violent religion" was an "example of the type of conduct which the

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[42] *See id.* at ¶¶ 63, 67, 73.

[43] *See id.* at ¶¶ 46 and 60.

[44] *See id.* at ¶ 69.

[45] *Available at* http://www.austlii.edu.au/au/legis/vic/consol_act/rarta2001265/s8.html (as amended).

[46] *See Council v. Catch the Fire* at ¶ 389.

legislature is seeking to prohibit," and that Nalliah's "act of placing it on the internet was an act that incites hatred, ridicule and contempt of Muslims in general, including Muslims in Australia."

In a separate consideration of remedies, the court ordered them to apologize publicly and banned them from making similar comments anywhere in Australia.

Following a higher court reversal and remanding of the decision,[47] after years of litigation, the Islamic group dropped its lawsuit. A point, however, had been made…

- **The Geert Wilders Incident** – Dutch politician Geert Wilders was criminally prosecuted under "hate speech" laws for his film *Fitna*, a critical documentary about Islam in the Netherlands. The film accuses Islam of encouraging, among other things, terrorism, anti-Semitism and violence against women. Interspersed among images of acts of violence performed by Muslims, including the murder of Dutch politician and critic of Islam Theo Van Gogh, are passages from the Qur'an and other Muslim teachings that appear to condone violence.

  In directing that prosecution be brought against Wilders, the Court stated "In a democratic system, hate speech is considered so serious that it is in the general interest to … draw a clear line." The Court found Wilder to be "inciting hatred and discrimination, based on comments by him in various media on Muslims and their beliefs." It further found criminal prosecution appropriate due to "insulting Muslim worshippers because of comparisons between Islam and Nazism made by Wilders."[48]

  It should be pointed out that the offense is "incitement of hatred" – *i.e.*, expression unaccompanied by any call to imminent violence. No regard is given to protection of freedom of speech. This underscores the need for the High Commissioner to adhere to the actual language contained in the ICCPR, and not create new language that lowers free

[47] *Catch the Fire Ministries, Inc. & Ors v. Islamic Council of Victoria, Inc.*, [2006] VSCA 284 (Dec. 14, 2006), *available at* http://www.austlii.edu.au/au/cases/vic/VSCA/2006/284.html. The appellate court found numerous errors of law and fact.

[48] Islam Film Dutch MP to Be Charged, BBC News (Jan. 21, 2009), *available at* http://news.bbc.co.uk/2/hi/europe/7842344.stm.

speech protections and in effect predetermines the outcome of the workshops.

- **The Prosecution of Mark Steyn** – In 2007, a complaint was filed with the Ontario Human Rights Commission in Canada related to an article *"The Future Belongs to Islam,"* written by Mark Steyn and published in *Maclean's* magazine. In a straight-forward and factual way the article outlined the growing influence of Islam in Europe and the West. An Islamic group filed a complaint alleging that his work was "hate speech."[49] Following a series of hearings where Steyn and his publisher were forced to testify and defend themselves, the commission ruled that it had no jurisdiction to hear the complaint. However, the commission nevertheless issued a public statement that condemned and characterized the article as "hate speech." There was never an allegation that anything contained in the article was *factually* incorrect.

The above examples are all drawn from the supposedly tolerant West with its tradition of free speech protections, yet further examples could be drawn from around the world, simply culling the reports of Special Rapporteurs. Even more serious, however – and in contrast to the responsible, albeit vigorous, expression of ideas by the Australian pastors, Wilders and Steyn – are actual incitements to hostility and violence directed at religious minorities, where advocacy of national, racial and especially religious hatred is used to whip up a mob into a frenzy. This is what should be the proper focus of the workshops, and indeed the type of irresponsible speech subject to proscription by states parties.

[49] Complaints were filed by Muslim organizations in the human rights commissions of British Columbia, Ontario, and Canada against *Maclean's* magazine. Only one went to a hearing, as they were either dismissed or found to be without jurisdiction to hear the complaint.

b) Incitement to Imminent Violence

While it may be true, as the children's nursery rhyme claims, that "words will never hurt me," it is also true that "words" followed by "sticks and stones" can indeed break bones.[50]

Consider the following examples of incitement to hostility or violence which may legitimately be proscribed:

- **Orissa, India** – Orissa is a predominantly Hindu area of India which has seen a large number of *dalits*, or members of the "untouchable" caste, convert to Christianity in recent years, due in part to the entrenched discrimination they encounter in the Hindu caste system. This has led to Hindu resistance, including the passing of anti-conversion laws at the state level, in apparent violation of India's secular constitution, which safeguards freedom of religion. Two incidents within a year of each other serve as examples of inflammatory speech directed at a religious minority which directly incites violence.

  During Christmas 2007, local Christians received permission from the state government to erect a "make-shift gate." This apparently led to a clash between Christians and Hindu nationalist protestors. Swami Laxmanandanda Saraswati, leader of the Vishwa Hindu Parishad (VHP, or World Hindu Council) and a vocal opponent of Christian missionary activity among *dalits*, claimed that he had been attacked, and gave a speech apparently designed to stoke the fury of his adherents. Within three hours of his speech, Hindu mobs began a series of riots that led to 15 days of violence, in which 8000 families in 68 villages were affected. Six people were killed, and hundreds of churches, hospitals and houses were burned. Many displaced Christians were forced to hide in the forest for days. Christian women, including nuns, were molested.[51]

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[50] "Sticks and stones may break my bones but words will never hurt me."

[51] Christian Legal Association, Anti-Christian Mayhem in India's Orissa State: A Report at 1 (Feb. 20, 2010).

In August 2008, the Swami himself was assassinated; left-wing Maoist extremists quickly admitted culpability for the act.[52] Despite this admission, Hindu radicals went on a murder, rape and looting rampage directed at India's Christian minority. This too was sparked by words designed to enflame passions. The day following the killing, VHP General Secretary issued an ominous, inaccurate statement: "Christians have killed Swami. We would give a fitting reply soon.... We would be forced to opt for violent protest if action is not taken against the killers."[53] Following this inflammatory statement amid a very tense situation, other VHP members as well as members of VHP's youth wing, Bajrang Dal, embarked upon premeditated "anti-Christian tirade," according to the Indian government's National Commission for Minorities chairman, Mohamed Shafi Qureshi. The day after the assassination, 10,000 people participated in the Swami's funeral procession, marching through Christian neighborhoods. Chanting "highly abusive and provocative slogans," the procession stopped before churches, with the mob incited into attacking churches and other Christian institutions along the way, assaulting people who got in the way while the police reportedly looked on.[54] In the ensuing anti-Christian violence, 75 people (nearly all Christian) were reportedly killed, and 4500 Christian houses, 100 churches and 20 other Christian institutions were destroyed, according to the Christian Legal Association. 50,000 were displaced by the rioting, and at least one nun was raped by the mob.[55]

- **Pakistan** – The Islamic Republic of Pakistan, a country with a blasphemy law in its penal code, § 295(C), provides several examples of mob incited violence instigated by mere rumors or by calls from mosque microphones for violence because someone allegedly contravened this code section. From the infamous February 1997 mass destruction of more than 200 Christian homes and places of worship in Shantinagar, Multan District, Punjab Province

[52] *See* U.S. Department of State, Bureau of Democracy, Human Rights and Labor, International Religious Freedom Report 2009, India; *see also* CLA, Anti-Christian Mayhem at 2.

[53] CLA, Anti-Christian Mayhem at 2.

[54] CLA, Anti-Christian Mayhem at 2.

[55] CLA, Anti-Christian Mayhem at 6.

following an alleged tearing of pages from the Qur'an an accusation never proven; to the November 2005 destruction in Sangla Hill, Punjab Province of four churches and a Catholic convent run school and chapel; to the July 2010 murder of two pastors in Faisalabad, the pattern is all too similar. One of the undersigned authors, Ann Buwalda, visited Sangla Hill within days of the destruction of five Christian places of worship and convent school. She found that Mullahs using mosque loudspeakers incited the violence by claiming pages of the Qu'ran had been burned, which accusations began after several Muslims lost a gambling game to a Christian. The day after the declarations from the loudspeakers, busloads of Muslims joined a local mob to go on their torching rampage with incendiary devices. The more recent event of July 2010 likewise was clearly a result of incitement. The initial protests on July 11, led by Muslim religious leaders from surrounding mosques, involved accusing two pastors of blasphemy for publishing a pamphlet critical of Islam, chanting for the death sentence of the pastors, rallying a group of 400 protestors, and burning tires in the streets. Reverend Rashid Emmanuel, 32, and his 30-year-old brother Sajid Emmanuel, were shot and killed on July 19 while being led in handcuffs under police custody back to jail after their hearing.

- **Jos, Nigeria** – In the city of Jos, Plateau state, located in northern Nigeria, more sophisticated technology was used in January 2010 to incite mob violence against Muslim villagers. Several news articles describing the massacre of between 150 and 300 victims reported that text-messages perpetrated "rumours and inflammatory statements by officials" which prompted a mob to attack the Fulani Muslim settlement at Kuru Karama located south of Jos.[56] In apparent retaliation, on March 8, 2010, reportedly hundreds of Christian villagers were killed at night in their homes by machete-wielding ethnic Fulani Muslims chanting "Allah Akbar."[57] SMS text messages were blamed for contributing to both massacres.[58]

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[56] Daniel Howden, The Independent, March 13, 2010.

[57] Lekan Otufodunrin, "Islamic Assailants Kill Hundreds of Christians Near Jos, Nigeria," Compass Direct News, March 8, 2010.

[58] Nick McMaser, "Texting Incites Nigerian Violence," Newser, September 23, 2010.

Where such incidents becomes imminent due to the incitement of hostility or violence based on advocacy of hatred, states parties have an obligation to step up and fulfill their obligations under the ICCPR. *Thus the NGO Contributors recommends that the OHCHR urge the States Parties to fulfill their obligations under the ICCPR by protecting groups such as national, racial and religious minorities that are the victims of violence directly attributable to the advocacy of hatred.*

VII) Maintaining a Holistic Balance

Freely expressed ideas are essential prods toward progress, personal growth, political reform and, indeed, towards a more profound apprehension of truth. Unfortunately, freedom of expression can also be used to spread odium.

When confronted with speech advocating national, racial or religious hatred, one has a natural instinct to either cover one's ears or, with one's blood pressure rising, cover the mouth of the speaker spewing vitriol. When the vitriol so spewed appears to incite imminent violence towards someone of a different nationality, race or religion – as we see in the examples from India, Pakistan and Nigeria – then the State must step in to protect life. Where there is no such imminent threat, however, then we tolerate evil speech because of the importance of the principle of free expression, and because we recognize that if left to its own devices, the State may seek to drown out voices it disagrees with or which legitimately challenges the existing political or religious orthodoxy simply by labeling them "hate speech."

In such instances, the counsel offered by U.S. Supreme Court Justice Louis Brandeis is wise advice: "If there be time to expose through discussion the falsehood and

fallacies, to avert the evil by processes of education, the remedy to be applied is more speech, not enforced silence."[59]

VIII) Conclusion

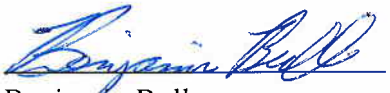
For the reasons set forth above, Alliance Defense Fund, Christian Legal Fellowship, Jubilee Campaign, World Evangelical Alliance and Advocates International urge that the Office of the High Commissioner for Human Rights:

- Clarify and, if necessary, reformulate the topic of inquiry so that it is properly focused upon "advocacy of national, racial or religious hatred that calls for incitement to discrimination, hostility or violence," and *not* "incitement to national, racial or religious hatred," which improperly alters the language used in the ICCPR;
- Consider expanding the scope of inquiry to include the interplay between and among ICCPR articles 20, 19 and 18, which concerns "freedom of thought, conscience and religion;"
- Protect freedom of expression, even if it entails protecting certain odious speech, due to the important role free expression plays as a catalyst for reform and the search for truth;
- Interpret "incitement" as contained in ICCPR article 20 in a manner that protects religious minorities from actual imminent harm;
- Reject the call for vague "hate speech" codes that penalize speech which makes the listener uncomfortable; and
- Urge States Parties to fulfill their obligations under the ICCPR by protecting groups such as national, racial and religious minorities that are the victims of violence directly attributable to the advocacy of hatred.

[59] Whitney v. California, 274 U.S. 357 (1927) (Brandeis, J., *concurring*).

Respectfully submitted,

ALLIANCE DEFENSE FUND



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