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## Molding the Matrix: The Historical and Theoretical Foundations of International Law concerning Hate Speech

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# Molding The Matrix:<sup>1</sup> The Historical and Theoretical Foundations of International Law Concerning Hate Speech

By  
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1. The title is derived from Justice Cardozo's statement that "[f]reedom of expression is the matrix, the indispensable condition, of nearly every other form of freedom." *Palko v. Connecticut*, 302 U.S. 319, 327 (1937). A matrix is "something within which something else originates or develops." WEBSTER'S NINTH NEW COLLEGIATE DICTIONARY 733 (1986). This article examines the molding of a limitation on the right to freedom of expression, a right within which many other rights may develop.

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I wish to dedicate this work to Professor Goler Teal Butcher, beloved mentor, colleague and friend. Goler, who was the initial chair of the Amnesty International Task Force on Hate Speech of which I later became co-chair, provided warm encouragement and sage counsel as I began research on this subject. She is deeply missed.

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I.

INTRODUCTION

Freedom of expression is cherished in international human rights law.<sup>3</sup> However, this freedom does not enjoy such a position of primacy among rights that it trumps equality rights. International law permits restrictions on hate speech,<sup>4</sup> and two human rights instruments even require governments to prohibit hate speech.<sup>5</sup> What led the drafters of those treaties to give governments the power to restrict hate speech, and on what theories did they base their decision to do so?

Freedom of expression is guaranteed in Article 19 of both the Universal Declaration of Human Rights (Universal Declaration)<sup>6</sup> and the International Covenant on Civil and Political Rights (Civil and Political Rights Covenant)<sup>7</sup>, which sets out in more detail the rights outlined in the Universal Declaration.

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3. Freedom of expression is declared a fundamental human right in all the major human rights instruments: Article 19 of the Universal Declaration of Human Rights, Dec. 10, 1948, G.A. Res. 217 A(III), U.N. Doc. A/810, at 71 (1948) [hereinafter Universal Declaration]; Article 19 of the International Covenant on Civil and Political Rights, U.N.G.A. Res. 2200A (XXI), Dec. 16, 1966, 21 U.N. GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171, *entered into force* March 23, 1976 [hereinafter Civil and Political Rights Covenant]; Article 10 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 213 U.N.T.S. 222, *entered into force* Sept. 3, 1953 [hereinafter European Convention]; Article 13 of the American Convention on Human Rights, Nov. 22, 1969, O.A.S. Treaty Series No. 36, at 1, OEA/Ser. L/V/II.23 Doc. Rev. 2, *entered into force* July 18, 1978 [hereinafter American Convention]; and Article 9 of the African [Banjul] Charter of Human and Peoples' Rights, June 26, 1981, OAU Doc. CAB/LEG/67/3/Rev.5.

4. The European Commission on Human Rights and the European Court have interpreted Articles 10 and 17 of the European Convention as permitting governments to prohibit hate speech. *See infra text accompanying notes 388-90.*

"Hate speech," as used in this article, refers to expression that is "abusive, insulting, intimidating, harassing and/or which incites to violence, hatred or discrimination" against a group or a person based on race, religion, ethnicity or national origin. *See* Sandra Coliver, *Editorial Note to STRIKING A BALANCE: HATE SPEECH, FREEDOM OF EXPRESSION AND NON-DISCRIMINATION v* (Sandra Coliver ed., 1992) [hereinafter *STRIKING A BALANCE*].

5. Article 20(2) of the Covenant on Civil and Political Rights, *supra* note 3; Article 4 of the International Convention on the Elimination of All Forms of Racial Discrimination, 660 U.N.T.S. 195, *entered into force* Jan. 4, 1969 [hereinafter CERD Convention] (requiring governments to outlaw "all dissemination of ideas based on racial superiority or hatred" as well as "organizations . . . which promote and incite racial discrimination"); Article 13(5) of the American Convention, *supra* note 3.

6. Universal Declaration, *supra* note 3.

7. Civil and Political Rights Covenant, *supra* note 3.

Both documents also set out certain limits on that freedom. The Universal Declaration provides in Article 7 that everyone is entitled to protection against "incitement" to any discrimination that is prohibited in the Declaration.<sup>8</sup> The Universal Declaration also declares in Article 29 that the rights it sets forth are subject to certain restrictions, e.g., to secure recognition and respect for the rights and freedoms of others and to protect the public order (*ordre public*).<sup>9</sup> The International Covenant on Civil and Political Rights limits free expression in a similar manner in Article 19(3).<sup>10</sup>

A more detailed restriction on freedom of expression appears in Civil and Political Rights Covenant Article 20(2), which provides that "any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law."<sup>11</sup> A similar clause appears in the American Convention on Human Rights,<sup>12</sup> and a more detailed hate speech clause appears in the Convention on the Elimination of All Forms of Racial Discrimination.<sup>13</sup> In addition, the European Convention contains a limitation in its freedom of expression provision<sup>14</sup> that has been interpreted to prohibit hate speech.<sup>15</sup>

The relevant instruments do not disregard the importance of the right to freedom of expression.<sup>16</sup> Prohibiting hate speech is, however, deemed a permissible limitation on a right that no one would argue is absolute. The principal theory underlying this limitation is that no one may engage in an activity aimed at destroying the rights of others.<sup>17</sup> Thus, for example, the European Commission on Human Rights has determined that it is permissible to punish someone for slurring ethnic groups and calling for their deportation, because such expression aims to convince people to violate the rights of others, in that case, members of those ethnic groups.<sup>18</sup> International law therefore requires a contextual

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8. Universal Declaration, *supra* note 3, art. 7.

9. *Id.* art. 29.

10. Civil and Political Rights Covenant, *supra* note 3, art. 19(3).

11. *Id.* art. 20(2). Note that it does not require a criminal sanction against such speech; a civil sanction (e.g. a fine rather than imprisonment) would satisfy the requirement of Article 20.

12. Article 13(5) of the American Convention, *supra* note 3, reads:

Any . . . advocacy of national, racial, or religious hatred that constitutes incitement to lawless violence or to any other similar illegal action against any person or group of persons on any ground including those of race, color, religion, language, or national origin shall be considered as offenses punishable by law.

13. CERD Convention, *supra* note 5, art. 4. For the full text of this provision as well as a discussion of its history, see *infra* text accompanying notes 283-99.

14. European Convention, *supra* note 3.

15. See *infra* text accompanying notes 389-91.

16. See *supra* note 3.

17. The Universal Declaration, Civil and Political Rights Covenant and European Convention all contain a virtually identical clause stating that there is no right to engage in activities aimed at the destruction of the rights of others. Universal Declaration, *supra* note 3, art. 30, Civil and Political Rights Covenant, *supra* note 3, art. 5, European Convention, *supra* note 3, art. 17. The American Convention notes in a related provision that "the rights of each person are limited by the rights of others." American Convention, *supra* note 3, art. 32(2). See *infra* for discussion of this clause in the various instruments.

18. *Glimmerveen v. Netherlands*, Eur. Comm'n on Human Rts, Decision of 11 October 1979. For a discussion of this case, see *infra* notes 407-14 and accompanying text.

analysis, wherein the right to freedom of expression is examined in relation to the other rights enumerated in a human rights instrument, and in particular to the right to equality. The use of the right to freedom of expression, if aimed to destroy the rights of others, constitutes an abuse of that right and as such may be restricted by law.

The *travaux préparatoires*<sup>19</sup> of human rights instruments prohibiting hate speech reveal that the drafters recognized well the complexity of crafting a specific limitation on freedom of expression. As the drafters debated what particular form this matrix of human rights should take, issues common to human rights discourse arose: how to reconcile competing rights, how to determine permissible limits on a given right, whether to account for cultural relativism, and whether to require the state to control the behavior of private individuals. The debates in the *travaux* also exemplify the challenges inherent in assessing the normative consequences of a provision designed to be applied in countries with very different received traditions, and thus, different perspectives on the dangers of prohibiting or not prohibiting hate speech.

To characterize the question as pitting freedom of expression against the principles of equality and non-discrimination oversimplifies the issue. The first inquiry should be one of ends and means.<sup>20</sup> Through a series of human rights instruments,<sup>21</sup> the international community in effect has declared that there are certain Truths,<sup>22</sup> among the most fundamental of which is the need to ensure equality and non-discrimination.<sup>23</sup> Thus, there is no room for metaethical rela-

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19. The *travaux préparatoires* are the drafting documents and other preparatory papers of a treaty. They are similar to the legislative history of Congressional enactments. Under international law, the *travaux* serve as one of supplementary means of interpreting a treaty's provisions. See Vienna Convention on the Law of Treaties, Art. 32, 1155 U.N.T.S. 331, T.S. No. 58 (1980), 8 I.L.M. 679 (1969), entered into force Jan. 27, 1980.

20. On the question whether international law should prohibit hate speech, Professor Butcher framed the issue as follows: "At stake here is not merely the balancing between the right of free speech and the rights of minorities not to be subjected to hate speech, but . . . the consequent issue of how are the human rights of minorities better protected in the final analysis." Memorandum of Oct. 28, 1991, copy on file with author.

21. E.g., Universal Declaration, *supra* note 3; Covenant on Civil and Political Rights, *supra* note 3; CERD Convention, *supra* note 5; Convention on the Elimination of All Forms of Discrimination Against Women, U.N.G.A. Res. 34/180, U.N. GAOR Supp. (No. 46) at 193, U.N. Doc. A/RES/34/180, entered into force Sept. 3, 1981; Convention on the Rights of the Child, G.A. Res. 44/25, Nov. 20, 1989, entered into force Sept. 2, 1990. See also Charter of the United Nations, June 26, 1945, 59 Stat. 1031, T.S. No. 993, 3 Bevans 1153, entered into force Oct. 24, 1945, Articles 1(3), 13, 55, 56, 62, 68.

22. As for those who believe that more debate is needed for the Truth to emerge, I ask whether they truly believe that rigorous debate is in fact needed to determine, for example, whether African-Americans are not inferior. I am reminded of Eben Moglen's statement finding it "more than slightly repellent" that Herbert Wechsler's TOWARD NEUTRAL PRINCIPLES OF CONSTITUTIONAL LAW "depends for its entire intellectual enterprise on the proposition that the pursuit of human equality is not a neutral principle of law" and is thus an insufficient basis for ending school segregation. Eben Moglen, *The Transformation of Morton Horwitz (Reviewing THE TRANSFORMATION OF AMERICAN LAW. . . etc)*, 93 COLUM. L. REV. 1042, 1057 n.36 (1993). On the other hand, the disturbingly hearty welcome recently given to THE BELL CURVE shows the need for eternal vigilance in proclaiming the Truth of equality of all human beings. See RICHARD HERRUSTEIN & CHARLES MURRAY, THE BELL CURVE: THE RESHAPING OF AMERICAN LIFE (1994).

23. The U.N. Charter declares in Article 1 that one of its purposes is to "achieve international cooperation in promoting and encouraging respect for human rights and fundamental freedoms for

tivism<sup>24</sup> in the international human rights perspective on hate speech.<sup>25</sup> Freedom of expression is indeed a fundamental right. While its protection may sometimes be an end in itself,<sup>26</sup> its exercise may not disturb the fundamental goals underlying human rights law.<sup>27</sup> One of the most fundamental of those goals is achieving equality and non-discrimination.<sup>28</sup> In fact, if there is any right which enjoys primacy among rights, it is arguably the principle of equality and non-discrimination.<sup>29</sup> The pivotal question is how best to achieve the goal of non-discrimination.

Intrinsically related to the ends-means issue is the question of how to determine permissible limitations on rights. In an effort to achieve a given end, one must take care that limitations on rights do not obliterate the rights themselves. International law has resolved the hate speech issue by placing the right to freedom of expression in context, viewing it in relation to a range of other rights.

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all without distinction as to race, sex, language or religion"; this theme is reiterated in Articles 55 and 76(c) of the Charter. In addition, Article 2 of the Universal Declaration, Civil and Political Rights Covenant and International Covenant on Economic, Social and Cultural Rights, U.N.G.A. Res. 2200A (XXI), Dec. 16, 1966, 21 U.N. GAOR Supp. (No. 16) at 49, U.N. Doc. A/6316 (1966), 983 U.N.T.S. 3, *entered into force* 3 Jan. 1976, all prohibit discrimination on the basis of "race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth, or other status"; almost identical provisions appear in Article 1 of the American Convention on Human Rights, Article 14 of the European Convention on Human Rights, Article 2 of the African [Banjul] Charter on Human and Peoples' Rights, and Article 2 of the Convention on the Rights of the Child.

24. Metaethical relativism asserts that it is impossible to discover moral truth. See Brandt, *Ethical Relativism*, 3 *ENCYCLOPEDIA OF PHILOSOPHY* 75 (1967), cited in Fernando Teson, *International Human Rights and Cultural Relativism*, 25 *VA. J. INT'L L.* 869, 882 (1985).

25. Contrast this with one of the theories underlying First Amendment jurisprudence. "[T]he practice of toleration of verbal acts under free speech may help inculcate" what Dean Bollinger calls "the tolerance ethic. . . . [T]hrough the first amendment our judges have sought to constrain our desire to impose our own notions of the public good on others who have a different conception of it." Lee Bollinger, *The Tolerant Society: A Response to Critics*, 90 *COLUM. L. REV.* 979, 984-85 (1990).

26. The European Court of Human Rights has stated that one basis for the right to freedom of expression is "the need of a democratic society to promote the individual self-fulfillment of its members." *Handyside v. United Kingdom*, 24 *EUR. CT. H.R. (Ser. A)* (1976).

27. A corollary to this notion is that since freedom of expression is such a fundamental means of achieving other rights, any limits on that freedom must be carefully and cautiously drawn.

28. As Irwin Cotler has put it, hate propaganda constitutes "an assault on Equality Rights." Irwin Cotler, *Freedom of Expression*, in *THE LIMITATION OF HUMAN RIGHTS IN COMPARATIVE CONSTITUTIONAL LAW* 353, 377 (Armand de Mestral et al. eds., 1986) [hereinafter *LIMITATION OF HUMAN RIGHTS*].

29. See *supra* note 22. General Comment 18 on Non-Discrimination of the Human Rights Committee states that non-discrimination and equality "constitute a basic and general principle relating to the protection of human rights." *Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies*, U.N. Doc. HRI/GEN/1 (4 Sept. 1992) at 25. This right is "so basic," in fact, "that Article 3 obligates each state party to ensure the equal right of men and women to the enjoyment of the rights set forth in the Covenant. *Id.* para. 2. The Committee points out that Article 4 permits no derogation from Article 3 [though states may derogate from Article 19, freedom of expression], and specifies that any measures taken in derogation of other Articles may not involve discrimination. At the same time, the Committee notes that Article 20(2) obligates states to prohibit advocacy of national, racial or religious hatred which constitutes incitement to discrimination, thus indicating the need to restrict this one aspect of speech in order to protect against discrimination.

Allowing governments to restrict expression does, however, have serious potential for abuse.<sup>30</sup>

The ends-means question also raises the question whether one can legislate morality, an issue directly addressed during the drafting of Civil and Political Rights Covenant Article 20(2).<sup>31</sup> As the *travaux* make clear, the majority of drafters would have agreed with Martin Luther King, Jr.'s statement: "It may be true that morality cannot be legislated, but behavior can be regulated. The law may not change the heart, but it can restrain the heartless."<sup>32</sup> One might ask whether international hate speech law has achieved the transformative potential to which the drafters aspired. It may be difficult, however, to prove whether and to what degree such law has "restrained the heartless."<sup>33</sup>

An additional issue raised by international law concerning hate speech is that of cultural relativism. Human rights norms are supposed to set common guidelines for behavior in all cultures. The debates over Civil and Political Rights Covenant Article 20(2) reveal two divisions of thought over what guidelines were considered appropriate when it came to free speech and the limitation on hate speech. One is the familiar division between those who believe hate speech may be prohibited, and those who believe that such a prohibition would violate the right to freedom of expression. The other division poses a more interesting question. During the drafting of the Civil and Political Rights Covenant, this division arose between those who believed the Covenant should re-

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30. See, e.g., S. Abeyesejera and K.L. Cain, *Incitement to Inter-Ethnic Hatred in Sri Lanka, in STRIKING A BALANCE*, *supra* note 2 (minority demands for protection have been seen as "an affront calculated to inflame communal passions" under anti-hatred laws and have hence been stifled). See also Sandra Coliver, *Hate Speech Laws: Do They Work?* in *id.* at 363 (citing abuse of hate speech regulations in Sri Lanka, South Africa, Soviet Union, but also noting that such laws have not been used or abused in stable democracies); Kevin Boyle, *Overview of a Dilemma: Censorship versus Racism*, in *id.* at 1-8 ("There is evidence in this book of the abuse of restrictions which would justify the conclusion that little is gained and much is put at risk by punishing the expression of ideas however loathsome.").

South Africa provides an example of abuse not only of anti-hate speech regulations, but also of the limitations clause of Article 19, which allows governments to restrict expression where necessary to protect the "public order." When that clause was being drafted, the Yugoslav representative to the Commission on Human Rights warned of the potential for abuse, because the term "public order" had different connotations in different countries. He gave as an example South Africa, which used public order as one justification for Apartheid. U.N. General Assembly, 16th Sess., Third Committee, U.N. Doc. A/C.3/SR.1073 (13 Oct. 1961) para. 59. Indeed, the South African representative to the Third Committee of the U.N., speaking in favor of Article 20(2) on the ground that his government was "firmly opposed to any incitement to hatred and violence," asserted that South African policies "were aimed at avoiding national, racial and religious hostility." U.N. General Assembly, 16th Sess., Third Committee, U.N. Doc. A/C.3/SR.1078 (19 Oct. 1961), para. 45.

31. See *infra* notes 187-205 and accompanying text.

32. Martin Luther King, Jr., *An Address Before the National Press Club*, in *A TESTAMENT OF HOPE: THE ESSENTIAL WRITINGS OF MARTIN LUTHER KING, JR.* 99, 100 (James Melvin Washington ed., 1986).

33. Sandra Coliver notes that the question of whether hate speech laws are effective is "on one level virtually impossible to answer," though she does indicate anecdotally that "since his conviction, M Le Pen's language has become more restrained and there seems to be less acceptance of the espousal by academics of revisionist theories." Sandra Coliver, *Hate Speech Laws: Do They Work?*, in *STRIKING A BALANCE*, *supra* note 4, at 366 (1992). Given the potential for abuse by governments of hate speech laws, one must query whether the same result would have been achieved through means less restrictive of freedom of expression.



quire states to prohibit hate speech, and those who thought that, although governments were permitted to prohibit hate speech under the general limitations clause of Article 19 on freedom of expression, countries had different histories and political cultures, and thus should be permitted to choose other methods of countering hate speech.<sup>34</sup> Thus, if the goal was to bring about an end to hate speech,<sup>35</sup> the question was whether specific means should be mandated, or left to the discretion of individual states.<sup>36</sup>

This latter issue raises a fundamentally important question in human rights theory, that is, whether public international law should govern the behavior of private individuals. Article 20(2) does not declare a right that individuals hold vis-à-vis the government; instead, it requires governments to prohibit certain behavior of private actors vis-à-vis other private actors. Although this provision is not the only one that addresses private behavior,<sup>37</sup> it is more controversial than the others because it involves government control of expression, with the attendant risk of government abuse of that control.<sup>38</sup>

International law on hate speech recognizes group rights,<sup>39</sup> and indeed, this point was made during the drafting of Civil and Political Rights Covenant Arti-

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34. See *infra* notes 200-03 and accompanying text. Although the matter can be resolved with a reservation to the relevant provision in the human rights treaty, this second division reflects a significant difference over theory in selecting what to include in a human rights treaty.

35. I would argue that most of those who believe in countering hate speech with "good speech" share the goal of ultimately ending hate speech. The ends sought are the same; disagreement arises over what might be the best means of achieving those ends.

36. This issue can be seen as a less problematic corollary to one of the thorniest theories for human rights activists, that of normative relativism, which asserts that people should have different rights depending on their different cultures. See El Westermarck, *ETHICAL RELATIVITY* ch. 5 (1932), cited in Teson, *supra* note 24, at 874. One might style this corollary "regulatory relativism," under which, even if there is agreement on the right to be protected, the means to achieve protection of that right might best be determined according to the particular political-social culture involved. For remarks suggesting this approach in the hate speech context, see *infra* at note 200 (remarks of U.K. representative in drafting the right to freedom of expression in the Civil and Political Rights Covenant).

37. For example, Article 2 of the Civil and Political Rights Covenant sets forth a positive obligation on the part of states to ensure that individuals can enjoy the rights in the Civil and Political Rights Covenant. This obligation would seem to entail ensuring that private individuals do not discriminate against others on the ground of race, color, sex, etc. For a discussion of this and other Articles with a similar effect on private behavior, see *infra* notes 128-37 and accompanying text. In the United States, domestic law requires the government to regulate private behavior toward other private individuals in an array of matters, including housing, employment etc. See ELIZABETH DEFEIS & MALVINA HALBERSTAM, *WOMEN'S LEGAL RIGHTS: INTERNATIONAL COVENANTS AN ALTERNATIVE TO ERA?* 34-49 (1987).

38. Paul Bender has addressed the risk of abuse by private individuals: "If freedom of expression is as central to the democratic process as many people believe it is," although "government censorship may be the most obnoxious and dangerous form of suppression of opinion, private suppression carries enough of the same dangers that it ought to be subject to constitutional scrutiny as well." Paul Bender, *Free Expression, in THE LIMITATION OF HUMAN RIGHTS IN COMPARATIVE CONSTITUTIONAL LAW* 433, 439-40 (1986).

39. In the United States, the Supreme Court has based few decisions on an explicit recognition of group rights. The case best known for this recognition is, of course, *Beauharnais v. Illinois*, 343 U.S. 250 (1952), in which the Court upheld a group defamation statute as not violative of the First Amendment. Another case recognizing group rights is *Wisconsin v. Yoder*, 406 U.S. 205 (1972). There, the Court based its decision striking down a statute requiring school attendance on the ground that the statute posed a "very real threat of undermining the Amish community." *Id.* at 218. Thus,

cle 20(2).<sup>40</sup> The discussion focussed not on group rights *per se*, however, but on the notion that hate speech would lead to the destruction of individuals' rights<sup>41</sup> and ultimately of democratic society as a whole.

These provisions were not uncontroversial. The hate speech clause of the Civil and Political Rights Covenant, for example, was adopted by a vote of 50 to 18, with 15 abstentions.<sup>42</sup> It has been pointed out that the clause "did not receive a single affirmative vote from any Members States of the Council of Europe. Indeed, ten of them voted against it."<sup>43</sup> The implication that hate speech prohibitions lacked support among Western European nations, however, is misleading. In fact, the push for such a clause was led by René Cassin of France.<sup>44</sup> Several European countries voted against the provision as ultimately adopted simply because of disagreement over language added in the final debates, not because of opposition to the concept of prohibiting hate speech.<sup>45</sup> Indeed, many of those countries have hate speech legislation.<sup>46</sup>

Another aspect of international hate speech law meriting attention is the categories of persons against whom advocacy of hatred is prohibited. The Civil and Political Rights Covenant and the American Convention on Human Rights require governments to prohibit certain advocacy of national, racial or hatred or

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the statute violated the Amish group's right to free exercise of religion. For a discussion of these cases, see Calvin Massey, *Hate Speech, Cultural Diversity, and the Foundational Paradigms of Free Expression*, 40 U.C.L.A. L. Rev. 103, 108 (1992). As Massey points out, the U.S. Supreme Court has hardly been consistent in its decisions involving group rights. Cf. *Employment Division v. Smith*, 494 U.S. 872, 878 (1990) (upholding state law prohibiting use of Peyote in religious rights on ground that infringement on free exercise of religion was merely "incidental"); discussed in Massey at 107.

Massey's article provides an analysis of three approaches to the hate speech problem: The Civil Libertarian (suppression of hate speech permissible only when directed at an individual and immediate breach of the peace is likely to result), Egalitarian (harm resulting from hate speech usually outweighs harm resulting from its suppression, even absent an individual target), and Accommodationist (permissible limitations must be narrowly-drawn, aimed at speech targeting individuals on the basis of specific, enumerated characteristics, e.g., race, gender, religion, etc.)

40. See *infra* note 66 and accompanying text.

41. Voicing a similar view, Irwin Cotler has written that "[l]egislation against hate propaganda can be characterized, in effect, as legislation protective of human rights law." Irwin Cotler, *Hate Literature*, in *JUSTICE BEYOND ORWELL* 117, 120 (Rosalie S. Abell et al. eds., 1985) (also stating that "protecting freedom from certain forms of expression, may well be the basis of, and indeed involve fidelity to freedom of expression itself, as both principle and reality"). As for where to draw the line in drafting hate speech on restrictions, Cotler proposes eight criteria as a normative framework for identifying this non-protected speech. *Id.* at 120-23.

42. For the roll call vote by country, see *infra* note 234.

43. Rowel Genn, *Beyond the Pale: Council of Europe Measures Against Incitement to Hatred*, 13 ISRAEL Y.B. HUM. RTS. 189, 190 (1983).

44. A winner of the Nobel Prize for Peace, René Cassin is considered, along with Eleanor Roosevelt, to be one of the people most responsible for drafting and achieving adoption of the Universal Declaration of Human Rights.

45. See *infra* text accompanying notes 236-40.

46. Among the countries that have recently adopted legislation on hate speech or Holocaust revisionism are: Argentina (1988), Brazil (1985), China (1987), Colombia (1988), Cuba (1987), France (1990), F.R. Germany (1985), Senegal and Sweden (1989), the U.K. (1986), and the USSR (1990). In 1992, the following states had such legislation in the drafting stage: Australia, Cameroon, Chile, Mexico, the Netherlands, Niger, Spain, Sweden and Venezuela. "The Right to Freedom of Opinion and Expression: Final Report by Mr. Danilo Türk and Mr. Louis Joinet, Special Rapporteurs," U.N. Doc.E/CN.4/Sub.2/1992/9 (14 July 1992) para. 90.

discrimination; the International Convention on the Elimination of All Forms of Racial Discrimination contains a similar provision with reference to discrimination on the basis of race, colour or ethnic origin.<sup>47</sup>

Gender is not mentioned in the hate speech provisions of any of these instruments, even though equality of the sexes appears as a fundamental principle in the Charter of the United Nations,<sup>48</sup> and non-discrimination on the basis of sex is a requirement in the International Bill of Human Rights.<sup>49</sup> During the drafting of Article 20(2) of the Civil and Political Rights Covenant, the Philippines proposed an amendment adding several categories, including "sex," to the prohibited bases for advocating hatred and discrimination, but the proposal was not adopted.<sup>50</sup>

Among the central provisions of the Convention on the Elimination of All Forms of Racial Discrimination is the requirement in Article 4 that governments prohibit speech that incites racial discrimination. In striking contrast, the Convention on the Elimination of All Forms of Discrimination Against Women contains no provision regarding statements that incite discrimination against women. A strong argument exists, however, that the limitations clauses of the Civil and Political Rights Covenant, American Convention and European Convention allow governments to prohibit certain statements which denigrate women and thus aim to destroy the rights of women. The reasoning would be analogous to that made by the European Commission on Human Rights in interpreting a limitations clause in the European Convention, Article 17, to allow governments to prohibit statements that denigrate racial and ethnic groups, on the ground that such statements aim to destroy the rights of those groups.<sup>51</sup>

Yet another issue is what sanction is appropriate under international law for extremist expression, an issue long ignored in the debates.<sup>52</sup> Even though inter-

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47. Civil and Rights Covenant, *supra* note 3, art. 20(2); American Convention, *supra* note 3, art. 13(5); CERD Convention, *supra* note 5, art. 4.

48. "We the people of the United Nations determined . . . to reaffirm faith . . . in the equal rights of men and women . . ." *Preamble* to U.N. Charter, *supra* note 21.

49. Article 2 of the Universal Declaration, *supra* note 3, states that everyone is "entitled to all the rights" in the Universal Declaration "without distinction of any kind, such as . . . sex . . ." Virtually identical language appears in Article 2(1) of the Civil and Political Rights Covenant, *supra* note 3, and Article 2(2) of the Economic, Social and Cultural Rights Covenant, *supra* note 23. Similar language appears in Article 1 of the American Convention, *supra* note 3, and Article 14 of the European Convention, *supra* note 3. In fact, in the latter Convention, sex is listed *first* among the prohibited grounds of discrimination.

The initial draft of the European Convention did not mention sex as a prohibited ground of discrimination. The original Article I(j) referred to "[f]reedom from discrimination on account of religion, race, national origin or political other opinion." 1 COLLECTED EDITION OF THE *TRAVAUX PRÉPARATOIRES* 54 (1975). Mr. Lannug (Denmark) strongly urged that the European Convention guarantee the fundamental rights of every individual, whether man or woman, *id.* at 52-54, and the wording was changed accordingly.

50. U.N. Doc. E/CN.4/365 (1950).

51. *See, e.g.,* Glimmerveen and Hagenbeek v. Netherlands, [1980] 23 Y.B. Eur. Conv. on H.R. 366 (discussed *infra* text accompanying notes 407-14).

52. Dean Bollinger has pointed out the same phenomenon with respect to this question in domestic law. "The connection between free speech and punishment is one of the most striking omissions in our appreciation of the potential meaning of the free speech experience." Lee Bollinger, *The Tolerant Society: A Response to Critics*, 90 COLUMB. L. REV. 979, 985 (1990). He notes

national law allows restrictions on hate speech, it does not specify what sanction may be imposed. Imprisonment for hate speech may well violate the principle of proportionality.<sup>53</sup>

This article explores the history of the prohibition of hate speech in international human rights law and practice, and analyzes the theories that emerge from that history.<sup>54</sup> The sections on drafting history are based on research of the *travaux préparatoires* themselves, which paint a picture somewhat different from that drawn by most summaries of the *travaux* written to date.<sup>55</sup> Because international law permits governments to prohibit hate speech, the article concludes with a comparison of the international law rationales with those advanced by critical race theorists in support of hate speech restrictions. It is hoped that this research and analysis will add to the multicultural dimensions of the hate speech debate in the United States.

## II.

### THE UNIVERSAL DECLARATION OF HUMAN RIGHTS<sup>56</sup>

Although the Universal Declaration of Human Rights does not expressly prohibit advocacy of racial or religious hatred, the right to freedom of expression is subject to the restrictions found in the general limiting clause, Article

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that "Holmes' outrage in his dissent in *Abrams v. United States* was partly directed at the punishment that had been imposed on the defendants, which he found disproportionate." *Id.* (citing 250 U.S. 616 (1919)).

53. For the views of the two U.N. Special Rapporteurs on Freedom of Expression on this issue, see *infra* text accompanying notes 556-59.

54. This article does not examine in detail U.S. free speech jurisprudence, which has been ably and amply discussed in numerous articles. For a list of some 38 such articles (to which one could add many more since publication of this source), see Massey, *supra* note 39. One of the best articles of recent vintage is Lawrence Douglas, Review Essay: *The Force of Words: Fish, Matsuda, Mackinnon, and the Theory of Discursive Violence*, 29 *Law & Soc. Rev.* 169 (1995).

55. The records of the U.N. Commission on Human Rights debates during drafting of the Civil and Political Rights Covenant, for example, reveal a picture somewhat different from that which emerges from the summaries in Marc Bossuyt's very useful volume, *GUIDE TO THE "TRAVAUX PRÉPARATOIRES" OF THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS* (1987) [hereinafter *GUIDE TO THE "TRAVAUX PRÉPARATOIRES"*]. And one learns from the *travaux* of Article 4 of the Racial Discrimination Convention that the United States actually voted for adoption of that provision. See *infra* note 299.

56. U.N. General Assembly Res. 217 A(III), Dec. 10, 1948, U.N. Doc. A/810, at 71 (1948). This document is one of three instruments that constituted the original International Bill of Human Rights. Initially, there was to have been a single document. Early in the drafting process, however, a proposal was made to have a declaration of general principles, to be followed by a treaty with implementation measures and more detailed provisions on specific rights. For discussion of this approach, see, e.g., U.N. Doc. E/CN.4/21 (1 July 1947). The documents ultimately concluded were the Universal Declaration, *supra* note 3, which sets forth general principles and was adopted as a resolution by the U.N. General Assembly, and two treaties which are binding on states that ratify them: the Civil and Political Rights Covenant, *supra* note 3, and the International Covenant on Economic, Social and Cultural Rights Covenant, *supra* note 23. Together, these three documents constituted the original International Bill of Human Rights. Two additional documents have since been added: the First Optional Protocol, G.A. Res. 2200 (XXI), 21 U.N. GAOR, Supp. No. 16, at 59, U.N. Doc. A/6316 (1966), which provides for the right of individuals to submit individual communications alleging a violation of their rights, and the Second Optional Protocol, G.A. Res. 44/128, U.N. GAOR, Supp. No. 49, at 206, U.N. Doc. A/44/49 (1989), which aims to abolish the death penalty.

29,<sup>57</sup> as well as in Article 7, which prohibits incitement to discrimination.<sup>58</sup> The history of those provisions indicates that most of the drafters understood them to allow restrictions on the advocacy of hatred.

From the very first drafts of the Declaration submitted to the Commission on Human Rights, one sees concern expressed over the potential abuse of the right to free speech and of other rights.<sup>59</sup> The draft freedom of expression provision submitted by the United Kingdom, for example, allowed restrictions on “publications aimed at the suppression of human rights and fundamental free-

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57. Article 29 provides, *inter alia*, that the exercise of the rights and freedoms in the Declaration may be subject to “such limitations as are determined by law solely for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society.”

58. “All are entitled to equal protection against . . . any incitement to [ ] discrimination” in violation of the Declaration. Universal Declaration, *supra* note 3, art. 7. Advocacy which incites not only discrimination but also hatred is addressed in the Civil and Political Rights Covenant, *supra* note 3. That treaty goes so far as to require states parties to prohibit by law “[a]ny advocacy of national, racial, or religious hatred that constitutes incitement to discrimination, hostility or violence.” See *infra* note 230 and accompanying text.

59. The Commission on Human Rights was established by the U.N. Economic and Social Council (ECOSOC) pursuant to Article 68 of the U.N. Charter, *supra* note 21, which provides that ECOSOC “shall set up commissions . . . for the promotion of human rights.” The first draft outline of what was then called the International Bill of Rights was prepared for the Commission on Human Rights by the Division of Human Rights of the Secretariat of the United Nations. The very first two articles of that draft did not enunciate rights, but instead spoke of duties and limitations on rights. See U.N. Commission on Human Rights, First Session, U.N. Doc. E/CN.4/SR.10 (28 January 1947) Annex A, at 9. In addition to the draft prepared by the Secretariat, the Drafting Committee of the U.N. Commission on Human Rights had before it the text of a letter from the United Kingdom representative to the Commission on Human Rights transmitting a draft as well. See U.N. Doc. E/CN.4/21 (1 July 1947) Annex B, at 25 *et seq.*

The Secretariat’s draft outline of the Universal Declaration began by stating that the preamble would enunciate four principles, the second of which was “that man does not have rights only; he owes duties to the society of which he forms a part.” Draft Outline of International Bill of Rights (prepared by the Division of Human Rights), U.N. Commission on Human Rights, Drafting Committee, U.N. Doc. E/CN.4/AC.1/3 (4 June 1947) at 2. Article 1 of that draft, after stating that everyone owes a duty of loyalty to the state and the United Nations, stated that everyone “must accept his just share of responsibility for the performance of such social duties and his share of such common sacrifices as may contribute to the common good.” *Id.* at 2.

Article 2 of the draft Declaration enunciated a principle which would be echoed in several subsequent human rights instruments: “In the exercise of his rights everyone is limited by the rights of others and by the just requirements of the state and of the United Nations.” *Id.* Only then did the draft International Bill of Rights enunciate specific rights. Article 3 declared the right to life, Article 4 the prohibition against torture, Article 5 the right to personal liberty, and so on. *Id.*

For an article-by-article compilation of observations made by members of the Commission on Human Rights to each proposed article, as well as for copies of the national constitutions submitted by member states of the United Nations for consideration during the drafting of the Universal Declaration, see U.N. Commission on Human Rights, Drafting Committee, International Bill of Rights, Documented Outline, Part I — Texts, U.N. Doc. E/CN.4/AC.1/3/Add.1 (2 June 1947).

For the “United States suggestions for articles to be incorporated in an International Bill of Human Rights,” see Annex C, *id.* at 41 *et seq.*

It is the French proposal, Annex D, *id.* at 49 *et seq.*, that bears the closest resemblance to the final language adopted as the Universal Declaration. That draft began in Article 1 with a declaration that all possess equal dignity and rights. The freedom of expression provision in that draft contained a limitation regarding abuse of that right “by defamation of character or failure to present information and news in a true and impartial manner.” *Id.* at 57.

doms.”<sup>60</sup> The accompanying Comment expressed some concern as to its wording because the broad language might lead to greater restrictions than necessary or desirable.<sup>61</sup> The Comment proceeded, however, to state the case for allowing such a restriction:

[I]t would be inconsistent for a Bill of Rights whose whole object is to establish human rights and fundamental freedoms to prevent any Government, if it wished to do so, from taking steps against publications whose whole object was to destroy the rights and freedoms which it is the purpose of the Bill to establish.<sup>62</sup>

The Comment ended by noting that “in any case . . . no Government is *obliged* by the Bill to make use of the powers of limitation which are provided in paragraph 3.”<sup>63</sup>

The original draft Universal Declaration provision on expression was drawn from the U.N. Secretariat and other drafts, as well as from consideration of freedom of expression provisions in national constitutions.<sup>64</sup> That initial draft Universal Declaration provision read as follows:

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60. U.N. Doc. E/CN.4/21, 1 July 1947, Annex B, at 35 (Article 14(3); the clause appears in square brackets). Another clause in the limitations provision allowed restrictions on “publications intended or likely to incite persons to alter by violence the system of Government, or to promote disorder or crime.” The accompanying Comment declared that the clause should be interpreted “as strictly confined to such publications as advocate the use of violence.” *Id.* at 36. No such qualification, however, appeared in the Comment to the clause on publications aimed at suppressing others’ human rights.

61. *Id.* at 36, para. (b).

62. *Id.* Giving the concrete example of what the most immediate underlying concern was here, the Comment then stated that, “[i]n the last analysis, perhaps, the best definition of a nazi or fascist regime is that it is a regime which does not recognize the dignity and worth of a human person and permit individuals to enjoy human rights and fundamental freedoms.” *Id.*

Other states also submitted limitations clauses in their proposals for the Universal Declaration. The “Statement of Essential Human Rights” presented for consideration by the delegation of Panama in April 1946 contained a general limitations clause stating that everyone’s rights are limited by the rights of others. U.N. Doc. E/HR/3 (26 April 1946) at 16. The accompanying Comment to that draft article states that it “recognizes the general relativity of rights,” in that rights can be abused by exercising them in such a way as to deprive others of their rights. *Id.* “[F]reedom of religion,” for example, “does not permit practices such as human sacrifice, nor in countries where the prevailing standards profoundly disapprove, of practices such as polygamy.” *Id.*

In addition, the Panamanian Statement declares that the “organization of parties seeking to establish a dictatorship is not consistent with freedom of assembly or association because it would tend to destroy the rights of others.” *Id.* Under this reasoning, then, the speech of members of such parties could be permissibly restricted as well.

63. U.N. Doc. E/CN.4/21, Annex B, at 36 para. (c) (emphasis added). This is in marked contrast to Article 20(2) in the International Covenant on Civil and Political Rights, which *requires* states to prohibit the advocacy of hatred. See *infra* notes 119-31 and accompanying text.

64. For a compilation of drafts or proposals submitted by governments to the Commission on Human Rights on freedom of expression, as well as a compilation of provisions in national constitutions submitted by governments with respect to this freedom, see U.N. Commission on Human Rights, Drafting Committee, International Bill of Rights, Documented Outline, U.N. Doc. E/CN.4/AC.1/3/Add.1 (2 June 1947) at 122-36.

Of the provisions of 46 national constitutions excerpted which relate to freedom of speech or expression, there is wide variety in the degree to which that freedom is protected. Most of the constitutions not only provide for the right to freedom of expression, but also expressly limit that freedom in general, and sometimes specific, clauses. For example, Article 141 of the Constitution of Brazil stated, after indicating that publications were not to be dependent upon government permission, “[h]owever, propaganda for war, or violent processes to subvert the political and social order, or prejudices of race or of class shall not be tolerated.” U.N. Doc. E/CN.4/AC.1/3/Add.1 (2 June 1947) at 124. The Constitution of Colombia stated in Article 42 that the press would be free, “but

Subject only to the laws governing slander and libel, there shall be freedom of speech and of expression by *any means whatsoever*, and there shall be reasonable access to all channels of communication. Censorship shall not be permitted.<sup>65</sup>

The words “by any means whatsoever” were later deleted by the Commission on Human Rights after the representative of the Coordinating Committee of Jewish Organizations addressed the Commission, stating that in no case should the freedom of expression imply freedom to incite hatred and violence aimed at groups on the basis of race or religion.<sup>66</sup> The deletion of the clause strongly suggests that the Commission believed that the right to freedom of expression does not include the right to incite racial or religious hatred.

#### A. *The Equal Protection Clause as Limiting Freedom of Expression*

Although the Universal Declaration does not contain an anti-hate speech clause, its equal protection provision arguably allows restrictions on hate speech.<sup>67</sup> Article 7 proclaims the right to equality before the law and to the equal protection of the law. In its second sentence, Article 7 indicates one means by which equality is to be safeguarded: “All are entitled to equal protection against . . . any incitement to [ ] discrimination” in violation of the Declaration. As the drafting history indicates, this clause was adopted with the understanding that it protected against propaganda of national, racial and religious hostility and hatred, as well as the understanding that although Article 19

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responsible . . . when it may attack personal honour, the social order, or public tranquility.” A number of constitutions provided that there was freedom of speech except where measures were necessary to protect the social order. See *id.* at 123-36. The Constitution of Nicaragua provided in Article 30 that the law may enact measures “against war propaganda and violent means of subverting the political and social order.” *Id.* at 131. Ironically, the Constitution of the USSR provided, at the time, that “The citizens of the USSR are guaranteed by law: (a) Freedom of speech; (b) Freedom of the press; (c) Freedom of assembly, including the holding of mass meetings; (d) Freedom of street processions and demonstration.” *Id.* at 134-35.

65. *Id.* at 122 (emphasis added). The Inter-American Juridical Committee, through Chile, had submitted a lengthy provision on freedom of speech and expression for the Commission’s consideration in drafting the Universal Declaration (for what would become Article 19, declaring the right to freedom of expression, and setting forth the permissible limitations). The Inter-American Juridical Committee proposed the following limitations provision:

The only limitations which the State may impose upon this freedom are those prescribed by general law looking to the protection of the public peace against slanderous or libelous defamation of others, and against indecent language or publications, and language or publications directly provocative of violence among the people.

U.N. Doc. E/CN.4/2 (8 Jan. 1947) at 3 (emphasis added). For the text of Article 19 as adopted, see *infra* note 113.

66. ALBERT VERDOODT, *NAISSANCE ET SIGNIFICATION DE LA DECLARATION UNIVERSELLE DES DROITS DE L’HOMME* 189 (1964).

67. For arguments in the U.S. context for applying equal protection laws in the hate speech debate, see, e.g., Akhil R. Amar, *The Case of the Missing Amendments: R.A.V. v. City of St. Paul*, 106 HARV. L. REV. 124, 151-61 (1992); Charles R. Lawrence III, *If He Hollers Let Him Go: Regulating Racist Speech on Campus*, 1990 DUKE L.J. 431. On the proposition that civil rights law, along with other issues in U.S. constitutional law, “could benefit from a comparative and internationalist perspective,” see David Weissbrodt, *Globalization of Constitutional Law and Civil Rights*, 43 J. LEGAL EDUC. 261 (1993).

protected freedom of expression, it did not protect expression that incites discrimination.<sup>68</sup>

When the draft Declaration was being considered by the Sub-Commission on Prevention of Discrimination and Protection of Minorities,<sup>69</sup> the French expert put forward a broadly-worded proposal that would simply have required states to punish infringements of the principle of non-discrimination.<sup>70</sup> The Australian and Chinese experts then submitted a text amending a proposal by the Soviet expert, so that it read:

Any advocacy of national, racial and religious hostility and any action establishing a privilege or a discrimination based on distinctions of race, nationality or religion shall be prohibited by the law of the State.<sup>71</sup>

This text narrowly failed by a vote of five in favor and five against, with one abstention.<sup>72</sup> The Sub-Commission did, however, adopt by a vote of 10 in favor and one abstention, the recommendation that the Commission include, "in the appropriate places, clauses condemning incitement to violence against religious groups, nations, races, or minorities."<sup>73</sup> Thus, the Sub-Commission initially recommended clauses condemning incitement to violence, not incitement to discrimination per se. It did not, however, limit its focus to incitement to violence against individuals, but included violence directed against groups as well.<sup>74</sup>

When the draft Declaration came before the Commission on Human Rights, the Soviet representative proposed that the equal protection provision be amended by adding a prohibition on advocacy of racial or religious hatred.<sup>75</sup>

Any 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

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68. See VERDOODT, *supra* note 66, at 116.

69. The draft Declaration was considered first by the Sub-Commission, which then passed its recommendations on to the Commission on Human Rights.

70. The French expert proposed that the nondiscrimination provision include a clause "making it compulsory for the various national constitutions and laws to include in their relevant statutes provisions for the punishment of infringements of the principles of nondiscrimination and for redress of such infringements." Commission on Human Rights, Sub-Commission on Prevention of Discrimination and the Protection of Minorities, Report Submitted to the Commission on Human Rights, (1st Sess.), U.N. Doc. E/CN.4/52 (6 Dec. 1947) at 5.

71. *Id.* at 6.

72. *Id.*

73. U.N. Commission on Human Rights, Second Session, U.N. Doc. E/CN.4/SR.31 (8 Dec. 1947) at 3. Adoption of the proposal is consonant with the mission of the Sub-Commission, whose name indicates its dual role — that of not only protecting minorities but also preventing discrimination.

74. Eleanor Roosevelt was later to argue with respect to a related article that the Universal Declaration was concerned only with the rights of individuals, not of groups. See *infra* text accompanying note 98.

75. The equal protection provision to which the Soviet representative proposed his amendment provided:

All people are equal before the law and shall enjoy equal rights in the economic, cultural, social and political life, irrespective of their race, sex, language, religion, property status, national or social origin.

U.N. Commission on Human Rights, Sub-Commission on Prevention of Discrimination and the Protection of Minorities, U.N. Doc. E/CN.4/Sub.2/21 (26 Nov. 1947).



discrimination based on distinctions of race, nationality or religion, constitute a crime and shall be punishable under the law of the State.<sup>76</sup>

This proposal directly linked advocacy of racial or religious hostility to the problem of discrimination. The Chair of the Commission on Human Rights, Eleanor Roosevelt, declared that the U.S. would oppose the Soviet proposal. Stating that such a law could not be applied in practice, she cited the failure of the prohibition law in the United States as an example.<sup>77</sup> The Soviet representative countered that if no such provision were adopted, practices such as "lynching of negroes would continue."<sup>78</sup>

The ensuing debate did not reflect divisions of opinion along strictly Cold War lines. General Romulo of the Philippines, for example, stated that he "agreed with the Soviet Union proposal in principle," though he did not think it should be included in the Declaration.<sup>79</sup> The Belgian representative did not oppose the Soviet amendment, and even proposed adding to it the words "and against any incitement to such discrimination."<sup>80</sup>

At one point debate centered on whether to include "political or other opinion" in the equal protection clause. The Soviet representative maintained that it was appropriate to omit that phrase, for "[t]here were political opinions which tolerated not only the advocacy of racial or national hatred, but also the actions arising therefrom. Equal rights could not be granted to those who professed such opinions."<sup>81</sup> The Chilean representative opposed the USSR amendment "since it put all power in the hands of the State, and, in his opinion, the State constituted the chief threat to the rights of the individual."<sup>82</sup> He asked the Soviet representative whether he "would approve of an individual being persecuted for his political opinions."<sup>83</sup> Mr. Bogomolov responded that this question "bore no relation" to the matter at hand, that is, "whether propaganda and actions based on national or racial hatred should or should not be permitted."<sup>84</sup>

It was at this point that the Chinese representative suggested amending the Soviet proposal to require states to prohibit advocacy of national, racial or religious hostility "designed to provoke violence."<sup>85</sup> It was agreed that discussion of this proposal would be postponed and taken up again during drafting of the Convention (rather than Declaration), whereupon a roll call vote was taken on the Soviet proposal. It failed by a vote of ten to four, with three abstentions.<sup>86</sup>

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76. *Id.*

77. U.N. Commission on Human Rights, U.N. Doc. E/CN.4/SR.34 (12 Dec. 1947) at 10 (referring to the failed attempt to suppress the use of alcohol).

78. *Id.* at 11.

79. *Id.* at 10-11.

80. U.N. Doc. E/CN.4/SR/35 (12 Dec. 1947). The Belgian representative also stated that it was inappropriate to put provisions regarding implementation in a document that was simply to serve as a declaration and not a binding covenant. *Id.*

81. U.N. Commission on Human Rights, U.N. Doc. E/CN.4/SR.35 (12 Dec. 1947) at 4.

82. *Id.* at 10.

83. *Id.*

84. *Id.*

85. *Id.*

86. U.N. Doc. E/CN.4/SR.35 (12 Dec. 1947) at 5.

Even though the Soviet proposal failed, the Declaration's prohibition on incitement to discrimination<sup>87</sup> may be interpreted as allowing restrictions on hate speech, if such speech is deemed to advocate discrimination. The statement presented by the International Refugee Organization (IRO)'s<sup>88</sup> Executive Secretariat to the Commission appears to have influenced the Commission in this respect. During the Commission's discussion of the equal protection clause, the IRO urged that equality before the law should be safeguarded not only by positive rights, but also by incorporating into civil and criminal law "adequate safeguards against discrimination, incitement to, and advocacy of, discrimination against individuals or groups of individuals."<sup>89</sup> The IRO Executive Secretariat explained that

incitement to discrimination is frequently directed against national, religious and racial groups. Civil proceedings and criminal prosecutions against instigators of discrimination, or even violence, against such groups have sometimes failed in the past because the law provided only for the protection of individuals, but not of groups.<sup>90</sup>

A few days later, the Commission on Human Rights adopted a working draft containing a clause stating that "[a]ll are . . . entitled to equal protection of the law against any arbitrary discrimination, or against any incitement to such discrimination, in violation of this Declaration."<sup>91</sup>

As for drafting a freedom of expression provision, the Commission on Human Rights's Working Group on the Declaration chose to postpone discussion of freedom of expression until after the International Conference on Freedom of Information and of the Press, which was to be held in March 1948.<sup>92</sup>

87. The second sentence of Article 7 of the Universal Declaration reads: "All are entitled to equal protection against any discrimination in violation of this Declaration *and against any incitement to such discrimination.*" (Emphasis added).

88. Specifically, it was the Executive Secretariat of the Preparatory Commission for the International Refugee Organization which proposed the language. The International Refugee Organization was the precursor to today's United Nations High Commissioner for Refugees. The Preparatory Commission of the IRO, along with other international human rights bodies, had been invited by the U.N. Commission on Human Rights to submit suggestions as to what rights should be included in the Universal Declaration, and to comment on earlier drafts that had been circulated.

89. U.N. Doc. E/CN.4/41/Rev.1 (13 Dec. 1947) at 2. Explaining the IRO's interest in providing input into the drafting process on this issue, he stated that:

[n]o group of human individuals can be more interested in an International Bill of Human Rights than the large number of persons who are the concern of the International Refugee Organization — the refugees and displaced persons. The position of these persons is due, to a considerable extent, to the flagrant violation of their human rights by Nationalist-Socialist Germany, Japan and their Fascist Allies.

*Id.* at 1.

90. U.N. Commission on Human Rights, U.N. Doc. E/CN.4/41/rev.1 (13 Dec. 1947) at 2.

91. Draft International Declaration on Human Rights, Commission on Human Rights, U.N. Doc. E/CN.4/77/ANNEX A (16 Dec. 1947) at 2. In that draft, no text was proposed covering freedom of opinion. Instead, a parenthetical statement appeared indicating that the Commission had decided not to elaborate on that principle until it had the views of the Sub-Commission on Freedom of Information and of the Press, and of the International Conference on Freedom of Information. See *infra* note 121.

92. Report of the Working Group on the Declaration on Human Rights, Commission on Human Rights, U.N. Doc. E/CN.4/57 (10 Dec. 1947) at 11. By 1948, the United Nations Conference on Freedom of Information submitted to the U.N. Commission on Human Rights a text for the Commission to consider during its deliberations on the freedom of speech clauses of the Universal

The Commission did, however, adopt a resolution recommending that the two bodies which were at that time considering the issue of freedom of information and the press<sup>93</sup> “consider the possibility of excluding from this freedom publications and other media of public expression which aim or tend to inflict injury, or incite prejudice or hatred, against persons or groups because of their race, language, religion, or national origin.”<sup>94</sup>

### B. Debate in the Third Committee

After the Commission on Human Rights completed its work on the draft Declaration, the document went to the Third Committee of the United Nations General Assembly, which is charged with addressing social, humanitarian and cultural questions. During the Third Committee’s deliberations, the U.S.S.R. introduced an amendment to the freedom of expression provision to prohibit “war-mongering and fascist speech,”<sup>95</sup> on the ground that “the propagation of such ideas [had] been responsible for the horrors that the world had recently known.”<sup>96</sup> He asserted that:

It [is] of no use to argue that ideas should only be opposed by other ideas; ideas had not stopped Hitler making war. . . . The mistake of not considering any measures for punishment might once again cost the world millions of lives.<sup>97</sup>

Eleanor Roosevelt responded that such an amendment was inappropriate in the Universal Declaration. It was clear from the U.S.S.R. amendment, she said, “that the aim was to guarantee the rights of certain groups, and not the rights of individuals, with which alone the Declaration was concerned.”<sup>98</sup> The U.S.S.R.

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Declaration and International Covenant. After first stating the basic proposition that everyone has the right to freedom of thought and expression without interference by governmental action, the text then declared that the right to freedom of expression carries with it certain duties and is therefore subject to restrictions “clearly defined by law, but only with regard to” a lengthy list of restrictions. The drafting committee forwarded along with that text a list of 25 additional possible limitations, the length of which dwarfs the initial clause declaring the right in the first place. For the entire list, see BOSSUYT, *supra* note 55, at 374-76. A few years later, the U.S. representative to the Commission on Human Rights commented that “efforts made by delegations in 1949 to formulate all the possible limitations [on freedom of the press] had transformed the Convention on Freedom of Information and of the Press into a convention on restrictions on the freedom of the press.” U.N. Commission on Human Rights, U.N. Doc.E/CN.4/SR.320 (18 June 1952) at 7.

93. The Sub-Commission on Freedom of Information and of the Press, and the International Conference on Freedom of Information.

94. Draft Report of the Commission on Human Rights Submitted to the Economic and Social Council, U.N. Commission on Human Rights, U.N. Doc. E/CN.4/77 (16 December 1947) at 12-13. For the full text of the draft resolution, see U.N. Commission on Human Rights, Report of the Working Party of an International Convention on Human Rights, U.N. Doc. A/CN.4/56 (11 Dec. 1947) at 15. That resolution also proposed that the Commission urge those two bodies to consider two General Assembly resolutions on this question, one on “measures to be taken against propaganda and the inciters of a new war,” U.N. Doc. A/C.1/228, cited in *id.* at 14, and the other on “slandorous information,” U.N. Doc. A/C.3/180, cited in *id.* at 15.

95. U.N. General Assembly Official Records, 3d Comm., 180th plen. mtg. (9 Dec. 1948) at 855.

96. *Id.*

97. *Id.*

98. *Id.* at 861.

amendment to prohibit war-mongering and fascist speech was defeated by a vote of 41 to 6, with 9 abstentions.<sup>99</sup>

### C. Prohibiting Use of These Rights to Destroy Others' Rights

Defeat of the USSR amendment did not mean, however, that delegates believed freedom of expression should carry no restrictions. As the drafting history reveals, the Declaration's limitations clauses, Articles 29<sup>100</sup> and 30,<sup>101</sup> may be understood to allow restrictions on hate speech.

Article 2 of the draft Universal Declaration stated that the exercise of one's rights is limited by the rights of others.<sup>102</sup> To demonstrate the sources of that concept, the draft presented the text of similar provisions from a number of national constitutions submitted by various states.<sup>103</sup> Notably, France submitted Article 4 of the 1789 Declaration of the Rights of Man and of the Citizen, which expresses the classical liberal theory:

Liberty consists in the power of doing whatever does not injure another. Accordingly, the exercise of the natural rights of every man has no other limits than those which are necessary to secure to every other man the free exercise of the same rights; and these limits are determinable only by the law.<sup>104</sup>

This concept is reflected in the clause proposed by Charles Malik, the Lebanese representative, during the drafting of the Universal Declaration:

Nothing in this Declaration shall be considered to recognise the right of any person to engage in any activity aimed at the destruction of any of the rights and freedoms prescribed therein.<sup>105</sup>

In introducing this proposal, Mr. Malik explained that people who were opposed to the Declaration or were working to undermine the rights in the Declaration should not be protected by those rights. The proposal was adopted by eight votes in favor, with seven abstentions.<sup>106</sup>

Although the drafters were unwilling to include a specific limitation in the freedom of expression provision itself, one proposed draft of that provision con-

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99. *Id.* at 930-31.

100. Article 29 provides, *inter alia*, that the exercise of the rights and freedoms in the Declaration may be subject to "such limitations as are determined by law solely for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society."

101. Article 30 provides:

Nothing in this Declaration may be interpreted as implying for any State, group or person any right to engage in any activity or to perform any act aimed at the destruction of any of the rights and freedoms set forth herein.

102. U.N. Doc. E/CN.4/AC.1/3/Add.1 (2 June 1947).

103. *Id.* This U.N. document gives excerpts from many national constitutions relating to the various rights and limitations on rights being discussed.

104. Quoted in *id.* at 13. The French Declaration also declares in Article 11: "The unrestrained communication of thought or opinions being one of the most precious rights of man, every citizen may speak, write and publish freely provided he be responsible for the abuse of this liberty in the cases determined by law."

105. U.N. Doc. E/CN.4/SR.41 (16 Dec. 1947) at 7. This concept appears as Article 17 in the European Convention, *supra* note 3, and has served to justify anti-hate speech restrictions in Europe. See *infra* note 394 and accompanying text.

106. *Id.* at 8.

tained a general restriction regarding abuse of that freedom.<sup>107</sup> That language was deleted at the suggestion of the United States, which pointed out that another article in the Declaration (Article 29) already contained provisions that would restrain the freedom within legitimate limits.<sup>108</sup> Freedom of expression was thus considered subject to Article 29, as well as to Article 30, which announces that nothing in the Universal Declaration may be interpreted to imply any right to engage in activity aimed at the destruction of the rights and freedoms set forth in the Declaration.<sup>109</sup>

During discussion of Article 19 in the Third Committee of the General Assembly, the French and Soviet delegates attempted to reintroduce the specific restrictive clauses.<sup>110</sup> The clauses were rejected by the majority, which viewed the general limitations clause (Article 29) as sufficient.<sup>111</sup> When Article 19 was discussed in the U.N. General Assembly, the Soviets once again sought to reintroduce more detailed restrictive amendments, which were rejected without discussion at the request of Mrs. Roosevelt.<sup>112</sup> The final text of Article 19 was adopted by a vote of 44 to 7, with 2 abstentions.<sup>113</sup>

The Universal Declaration as a whole was adopted without dissent, although eight governments abstained and two were absent.<sup>114</sup> One significant reason for the lack of dissent was that the Universal Declaration was a declaration rather than a binding instrument.<sup>115</sup> In addition, a number of the rights were stated in fairly general terms, and there were no implementation procedures.<sup>116</sup> The drafters of the Universal Declaration realized that a binding, more specific document with implementation procedures would be needed if human rights were to be protected by more than just words. When the Universal Decla-

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107. VERDOODT, *supra* note 66, at 188.

108. *Id.*

109. *Id.* at 189; Universal Declaration, *supra* note 3, art. 30.

110. VERDOODT, *supra* note 66, at 189-90.

111. *Id.* at 190.

112. *Id.*

113. *Id.* Article 19 reads:

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.

Civil and Political Rights Covenant, *supra* note 3, art. 19.

114. U.N. General Assembly Official Record 5, 3d Comm., 180th plen. mtg. (9 Dec. 1948) at 933. Abstaining were the six communist countries then members of the United Nations (Byelorussian SSR, Czechoslovakia, Poland, Ukrainian SSR, USSR, and Yugoslavia), South Africa, and Saudi Arabia (which objected to Articles 16 (freedom to marry) and 18 (right to change one's religion)). Absent were Yemen and Honduras.

115. *Id.*

116. *Id.* at 934.

ration was adopted, the U.N. Commission on Human Rights had already begun drafting the documents to fill these needs: the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights.

### III.

#### INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS

Article 19 of the Civil and Political Rights Covenant both protects and limits freedom of expression. In addition to declaring that “[e]veryone shall have the right to freedom of expression,” Article 19 states that the exercise of that right “carries with it special duties and responsibilities.”<sup>117</sup> The right is subject to certain restrictions, including those “necessary . . . for respect of the rights or the reputations of others,” and those necessary “[f]or the protection of national security or of public order (*ordre public*).”<sup>118</sup>

While Article 19 includes general standards relating to restrictions on freedom of expression, Article 20 contains a specific prohibition on two types of expression. It proscribes war propaganda, as well as the advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence.<sup>119</sup> The drafting history shows that this article was the subject of considerable debate. I will describe the deliberations in the U.N. Commission on Human Rights of the United Nations in some detail so as to give the full flavor of the thoughts and concerns of the various delegations.<sup>120</sup> As is evident from the records of Commission meetings, many delegates appreciated the complexity of the issue and the points of view expressed by various sides.

#### A. *Earliest Drafts of Article 19 of the Covenant*

As early as 1947, the Commission on Human Rights considered “the possibility of excluding from” the right to freedom of expression “publications and other media of public expression which aim or tend to inflict injury, or incite prejudice or hatred, against persons or groups because of their race, language, religion, or national origin.”<sup>121</sup> The language in the initial working draft of the Covenant, however, was limited to incitement to violence:

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117. Civil and Political Rights Covenant, *supra* note 3, art. 19.

118. *Id.*

119. *Id.* art. 20.

120. I will refer to “Article 20” even if in the drafting history the representatives refer to it as “Article 26,” simply for purposes of clarity; the placement of this and other articles was changed somewhat during the drafting process.

121. U.N. Doc. E/CN.4/77 (16 Dec. 1947) at 12-13. The quoted language appeared in a resolution adopted by the Commission urging the Sub-Commission on Freedom of Information and of the Press, as well as the International Conference on Freedom of Information, to consider these points during their deliberations; the resolution was adopted upon recommendation of the Working Party on an International Convention on Human Rights. See Commission on Human Rights, U.N. Doc. E/CN.4/56 (11 December 1947) at 15; see also *supra* note 91 and accompanying text.

Initially, two versions of a freedom of expression article came before the working party appointed by the Commission on Human Rights to develop a human rights convention or conventions. The version submitted by the Drafting Committee began with clauses declaring the right to express

Any advocacy of national, racial or religious hostility that constitutes an incitement to violence shall be prohibited by the law of the State.<sup>122</sup>

The early history of that provision reveals that many of the drafters were concerned not only about advocacy of hatred that would incite imminent violence, but also about the causal connection they saw between such advocacy and the problem of discrimination.<sup>123</sup> A number of delegates also saw a connection between advocacy of discrimination and the war from which the world had so recently emerged. Explaining what prompted his delegation's proposal to prohibit advocacy of racial or religious hostility, for example, the USSR representative stated:

Millions had perished because the propaganda of racial and national superiority, hatred and contempt, had not been stopped in time. Yet five years had hardly elapsed since the end of the war, and there were already signs of a revival of similar tendencies in various countries of the world.<sup>124</sup>

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ideas and to receive and disseminate information. These provisions were followed by a limitations clause stating that the freedoms of speech and information were subject to a number of restrictions, including restrictions on "publications aimed at the suppression of human rights and fundamental freedoms," and "expressions or publications which libel or slander the reputations of other persons." Report of the Working Party on an International Convention on Human Rights, Commission on Human Rights, U.N. Doc. E/CN.4/56 (11 December 1947) at 10.

The United States submitted its own draft, which contained no restrictions; it simply declared the rights to freedom of information, speech and expression. *Id.* The Report of the Working Party noted, however, that the United States' Draft Convention did contain a general limitation clause which would apply to all articles, including the one on freedom of expression, which read as follows: "The full exercise of these rights requires recognition of the rights of others and protection by law of the freedom, general welfare and security of all." *Id.* at 11.

The representative of the United Kingdom believed that such a general limitation would render the Convention "innocuous" because it would be open to abuse by states. Draft International Covenant on Human Rights, Commission on Human Rights, U.N. Doc. E/CN.4/77/ANNEX B (16 Dec. 1947) (commentary of U.K.) at 12.

A separate limitations clause was proposed by Mr. Malik, the Lebanese representative. It stated that nothing in the Convention gave anyone the right to engage in activity aimed at destroying other rights. That clause, having already been adopted by the Commission as part of the Universal Declaration of Human Rights, was then adopted as part of the Covenant as well. U.N. Doc. E/CN.4/SR.42. The discussions of this limitations clause indicate that it, too, was seen as allowing restrictions on hate propaganda. *See supra* notes 92-94 and accompanying text.

122. Draft International Covenant on Human Rights, Commission on Human Rights, U.N. Doc. E/CN.4/77/ANNEX B (16 December 1947) at 12. The first proposal to prohibit advocacy of racial or religious hostility, introduced by the Soviet Union, did not mention violence. *See* U.N. Doc. E/CN.4/Sub.2/21 (26 Nov. 1947). That proposal was rejected by a vote of 10 to 4, with 3 abstentions, U.N. Doc. E/CN.4/SR.35 (12 Dec. 1947) at 5. In the meantime, the Chinese representative had proposed a text prohibiting advocacy that was "designed to provoke violence," but he agreed to postpone consideration of that language. *Id.* at 4. Article 20 as ultimately adopted prohibits advocacy of hatred "that constitutes incitement" not only to violence, but also to "discrimination" or "hostility."

123. The first version of the clause was introduced by the Soviet Union as part of the article on non-discrimination, during the drafting of the Universal Declaration of Human Rights. *See* U.N. Doc. E/CN.4/Sub.2/21 (26 Nov. 1947). Upon suggestion of the Australian representative, consideration of that clause was postponed because he felt that it was out of place in the discrimination provision, and might more appropriately be dealt with in a separate article. U.N. Doc. E/CN.4/SR.35 (12 Dec. 1947) at 11. The Chinese representative, who had proffered an amendment, accepted this proposal, and then asked that the text of his amendment be inserted as a separate article in the draft Covenant, immediately after the article on equal protection, since it related to one aspect of discrimination. The amendment was then adopted by a vote of 7 to 2 with 7 abstentions. *Id.* at 12.

124. U.N. Commission on Human Rights, U.N. Doc. E/CN.4/SR.123 (14 June 1949) at 4.

The U.S. response to this remark could not have set out more starkly the contrast between the opposing views. A U.S. Supreme Court decision had been handed down just one month earlier, the U.S. representative noted, in which someone accused of creating dissension between political and religious groups was freed on the ground that "the principle of democracy was better served by allowing individuals to create disputes and dissension than by suppressing their freedom of speech."<sup>125</sup>

Few others supported the U.S. view at this stage. René Cassin of France not only supported the USSR proposal to prohibit hate propaganda,<sup>126</sup> but even proposed inserting the words "and hatred" after the word "violence," so that the proposed article would require a prohibition of "any advocacy of national, racial, or religious hostility that constitutes an incitement to violence and hatred."<sup>127</sup>

### B. Protection Against Private Actors

The wording of the French proposal indicates that it was to reach not only government abuse, but private abuse as well. The U.S. noted that its own proposal declaring the right to freedom of expression "was deliberately framed to make it clear that the freedom to be guaranteed was against *governmental* interference. Extension to the field of *private* infringements on freedom of information would create complications and give rise to many unpredictable situations."<sup>128</sup>

The French representative then responded. "Every freedom has two aspects," he said, "that of the protection of the individual against the State and that of the protection of the freedom itself by the enforcement of the individual's respect for it."<sup>129</sup> Since Article 2 requires states parties "to respect and ensure to all individuals . . . the rights defined in this Covenant," both governmental as well as private interference with those rights were prohibited.<sup>130</sup>

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125. *Id.* at 5. This case is most likely *Terminiello v. Chicago*, 337 U.S. 1 (1949). The Soviet representative quickly responded that the dissenting opinion in the Supreme Court case "amounted to an objection to allowing freedom for the dissemination of Fascist views." *Id.*

126. The English translation of the word "propagande" was, simply, "propaganda." The U.K. representative, among others, proposed that the word "advocacy" be used instead, as it was the "proper legal term," and the word "propaganda" was both "vague and derogatory." U.N. Commission on Human Rights, U.N. Doc. E/CN.4/SR.174 (8 May 1950) at 13.

127. *Id.* at 6.

128. U.N. Commission on Human Rights, U.N. Doc. E/CN.4/SR.160 (27 Apr. 1950) at 10. The Danish representative responded that the Commission must not only prevent infringement of freedom of information by the government, but also by groups outside the government. *Id.* at 12.

129. *Id.* at 13.

130. *Id.* In response, Eleanor Roosevelt said that throughout the history of the drafting of the Freedom of Information Convention and the Civil and Political Rights Covenant, the intent was always to limit governmental interference, and that therefore that idea should be expressed in Article 19. *Id.* at 14. Several delegates expressed their disagreement with this view. For example, the Australian representative stated that the "duties and responsibilities" clause was "absolutely necessary." U.N. Commission on Human Rights, U.N. Doc. E/CN.4/SR.163 (2 May 1950) at 3. The Lebanese representative, Mr. Azkoul, went so far as to say that "private interference from groups of individuals was *more* to be feared than governmental interference." *Id.* at 11 (emphasis added). For an



Articles 2 and 20(2) are not the only provisions of the Civil and Political Rights Covenant which require states to take action to protect people from violation of their human rights by private persons; other articles do so as well.<sup>131</sup> Article 6 of the Covenant, after declaring that everyone has the inherent right to life, states: "This right shall be protected by law." Although the U.S. expressed the belief that the Article should only protect against improper acts by a government,<sup>132</sup> it was commonly accepted by other Commission members that the Covenant should require governments to protect human life against abuse not only by public authorities but also by private persons.<sup>133</sup>

Article 17 is another of the articles requiring governments to take action to protect individuals against violation of their rights by private persons. Article 17 provides that "no one shall be subjected to . . . unlawful attacks on his honour and reputation." Paragraph 2 of that Article provides: "Everyone has the right to the protection of the law against such interference or attacks."<sup>134</sup> It is interesting that the members of the Commission did not view Article 2 of the Civil and Political Rights Covenant as providing sufficient protection to individuals of this right.<sup>135</sup> This very point was addressed by the French member, who asserted that Article 17(2) would "not be superfluous, but would round off the article."<sup>136</sup> Article 2, he explained, requires states to enact legislation to give effect to the rights in the Covenant; the addition of Article 17(2) "would also recognize the right of individuals to the protection of the law against any violations of that right."<sup>137</sup>

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excellent analysis of the obligation of governments under international law to protect victims from non-state actors, see generally ANDREW CLAPHAM, *HUMAN RIGHTS IN THE PRIVATE SPHERE* (1993).

131. A number of writers have pointed to only two provisions of human rights treaties which are not explicitly self-executing. See, e.g., Jochen A. Frowein, *The European and the American Conventions on Human Rights — A Comparison*, 1 *HUM. RTS. L. J.* 44 (1980). Frowein writes that Article 13(5) of the American Convention and Article 20(2) of the Civil and Political Rights Covenant are "distinctive" in that they are explicitly not self-executing, in that they create an obligation for the legislature, rather than being directly applicable within the national system of those countries having a system where direct application of treaty law in the national system exists. *Id.* at 59. This view overlooks Article 6 of the Civil and Political Rights Covenant, as well as Article 2 of both covenants.

132. U.N. Commission on Human Rights, U.N. Doc. E/CN.4/SR.90 (20 May 1949) at 9.

133. See, e.g., U.N. Commission on Human Rights, 5th Sess. (1949), 6th Sess. (1950), and 8th Sess. (1952), remarks by Great Britain, Ireland, France, Denmark, Chile, Lebanon and Uruguay, cited in BOSSUYT, *supra* note 55, at 120.

134. During the drafting of this clause, the Pakistani representative stated that "[t]here was no doubt that [it] covered both private persons and governments or public authorities." U.N. Commission on Human Rights, U.N. Doc. E/CN.4/SR.376 (16 Oct. 1953) at 4.

135. Article 2 requires each state party to the Covenant to "ensure to all individuals within its territory . . . the rights recognized in the present Covenant."

136. U.N. Commission on Human Rights, U.N. Doc. E/CN.4/SR.376 (16 Oct. 1953) at 8.

137. *Id.* The U.S., which had proposed alternative language simply providing for "appropriate remedies" for unlawful interference with or attacks on the rights in paragraph 1, withdrew that proposal and joined the others in adopting the final language as it appears, resulting in a vote of 13 to 0, with 3 abstentions. *Id.* at 10.

C. "Violence" Only, or "Hatred" as Well?

A major issue debated by the Commission on Human Rights was whether to condemn only "incitement to violence" against racial, national or religious minorities, or "incitement to hatred" as well. In the view of the Polish delegate, simply condemning incitement to violence did not go to "the root of the evil," but "merely tackled its consequences, and . . . would only serve to hide the real nature of the problem."<sup>138</sup> He proposed that the article go further, for the danger of not doing so had been demonstrated.<sup>139</sup> Nationalist propaganda in Nazi Germany, he said, "by the constant repetition of the theory of racial domination had led not only to the curtailment of human rights, but to the destruction of entire peoples."<sup>140</sup> He therefore proposed prohibiting advocacy of national or racial "exclusiveness, hatred and contempt or religious hostility," though he qualified that language by adding: "particularly of such a nature as to constitute an incitement to violence."<sup>141</sup>

The Chilean representative believed that the Polish proposal did not go far enough; he proposed that the draft also condemn incitement to hatred,<sup>142</sup> for "some forms of propaganda," even if not a direct incitement to violence, "were so insidious as to constitute a very real danger in the long run,"<sup>143</sup> for hatred "was at the root of violence."<sup>144</sup> "The Commission must not await the effects of an evil before seeking to remedy it. It must take preventive action and attack the evil at its roots."<sup>145</sup> He simply could not support a provision which prohibited only incitement to violence, for that would leave "the door open to all other forms of intolerance," and "render no service to the cause of tolerance."<sup>146</sup>

Explaining why he had proposed an amendment to Article 19 which was relevant to another article prohibiting incitement to discrimination, he pointed out the main difference between the two articles. He noted that Article 19, after setting forth the right to freedom of expression, then contained a paragraph stating that right *could be* subject to certain restrictions, i.e. it allowed states to determine whether to impose certain restrictions. On the other hand, Article 20 did not leave the matter to the discretion of individual states, but *required* that states restrict certain expression.<sup>147</sup>

Speaking in support of the Chilean amendment, the Uruguayan representative said that the reference to incitement to hatred "would fill a gap in the text,

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138. U.N. Commission on Human Rights, U.N. Doc. E/CN.4/SR.377 (16 Oct. 1953) at 4.

139. *Id.*

140. *Id.*

141. U.N. Doc. E/CN.4/L.269 (1953). No detailed discussion took place of the meaning of the words "incitement" and "advocacy."

142. *Id.*

143. *Id.* at 5. His proposal, he believed, was "directly linked with the principles of tolerance and peace set forth in the [U.N.] Charter." *Id.* at 5. He went so far as to say that to condemn only advocacy that constituted incitement to violence was "not only inadequate, but even . . . dangerous." U.N. Commission on Human Rights, U.N. Doc. E/CN.4/SR.378 (19 Oct. 1953) at 11.

144. U.N. Commission on Human Rights, U.N. Doc. E/CN.4/SR.378 (19 Oct. 1953) at 11.

145. *Id.* at 11.

146. U.N. Commission on Human Rights, U.N. Doc. E/CN.4/SR.377 (19 Oct. 1953) at 14.

147. U.N. Doc. E/CN.4/SR.377 (19 Oct. 1953) para. 23.

since it was obvious that the indulgence of hatred must inevitably lead to violence."<sup>148</sup>

#### D. "And" or "Or"?

It was also not until deliberations in the Third Committee in 1961 that serious discussion took place on a proposal that the phrase "hatred or violence" be used instead of "hatred and violence."<sup>149</sup> In proposing that "or" be used, the Yugoslavian representative explained that although it was important to prohibit advocacy of violence, "it was just as important to suppress manifestations of hatred which, even without leading to violence, constituted a degradation of human dignity and a violation of human rights."<sup>150</sup>

The Polish representative spoke in favor of this suggestion. She said there were three principal forms of hostility: hatred, discrimination and violence. Propaganda aimed at arousing hatred should be forbidden, she said. And discrimination, she noted, "did not necessarily manifest itself in acts of violence;" laws requiring racial segregation on public transportation, for example, did not involve violence. However, she said, discrimination stood "halfway between hatred and violence," and was the "most wide-spread form of national, racial or religious hostility." It was therefore necessary to include "discrimination" in Article 20.<sup>151</sup>

The Soviet representative spoke on this issue as well, stating that "[d]iscrimination, racial hatred and any form of racialism did not necessarily lead to violence; but they had all been very rightly condemned by the Nürnberg Tribunal in the name of the community of nations."<sup>152</sup>

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148. U.N. Commission on Human Rights, U.N. Doc. E/CN.4/SR.379 (19 Oct. 1953) at 7-8. The Polish amendment was then defeated in two separate votes. The first clause was rejected by a vote of nine to three, with five abstentions, and the second clause was rejected 11 votes to three, with three abstentions. U.N. Doc. E/CN.4/SR.379 (1953).

149. U.N. General Assembly, 16th Sess., Third Committee, U.N. Doc. A/C.3/SR.1079 (20 Oct. 1961) para. 9. In 1950, language had been proposed in the Commission on Human Rights prohibiting the advocacy of "hatred or violence," but it never came to a vote. That proposal, introduced by the Philippine member of the Commission, was the only one to mention gender among the prohibited bases for stirring up hatred:

Every act which tends to stir up hatred or violence against any person or group of persons by reason of race, colour, sex, language, religion, political, economic or other opinion, national or social origin, property, educational attainment, birth or other status, shall be prohibited by the law of the State.

U.N. Doc. E/CN.4/365 (1950).

It was also in 1961 that the clause prohibiting propaganda for war was first introduced. Never proposed or even discussed in the Commission on Human Rights, that provision was added in the Third Committee of the UNGA in large part in reaction to the looming threat of nuclear war. See, e.g., U.N. General Assembly, 16th Sess., Third Committee, U.N. Doc. A/C.3/SR.1084 (26 Oct. 1961) para. 28.

150. U.N. General Assembly, Third Committee, U.N. Doc. A/C.3/SR.1079 (20 Oct. 1961) para. 9.

151. U.N. General Assembly, 16th Sess., Third Committee, U.N. Doc. E/C.3/SR.108 (23 October 1961) para. 33.

152. *Id.* para. 78.

*E. Potential for Abuse*

Debate over the incitement to hatred proposals often centered on whether they would provide too much opportunity for government abuse. The French and USSR incitement to hatred proposals were “extremely dangerous,” Eleanor Roosevelt argued, “since any criticism of public or religious authorities might all too easily be described as incitement to hatred and consequently prohibited.”<sup>153</sup> Pointing out the difficulty of distinguishing between “hatred” and “ill-feeling and mere dislike,” she warned against using “such vague expressions as national hostility and religious hostility which appeared in the French text,” since such terms would encourage governments to punish all criticism under the guise of protecting against religious or national hostility.<sup>154</sup>

Giving a specific example of such a danger, Mrs. Roosevelt spoke of the problem that arose from a similar provision contained in several peace treaties concluded after World War II. She noted that during the General Assembly debate in 1949 on the human rights problems in Hungary, Bulgaria and Romania, the Polish representative had argued that the acts taken by those three governments were entirely justified under the peace treaties, in particular Article 4 of the treaties relating to the suppression of Fascism or hostility to democracy or the United Nations.<sup>155</sup> What Mrs. Roosevelt did not point out was that a critical role had been played in crafting those treaties by the two countries now opposed to prohibiting racist or fascist propaganda.<sup>156</sup> As Egon Schwelb has pointed out, “[i]n the Peace Treaty of 1947 the Allied Powers, including the U.K. and the U.S.A., imposed on Hungary the obligation not to permit Fascist-type organisations as well as other organisations conducting propaganda, including revisionist propaganda, hostile to the United Nations.”<sup>157</sup> Similar provisions appeared in the peace treaties with Bulgaria, Finland, Italy and Romania, as well as in the 1955 State Treaty with Austria.<sup>158</sup> Austria was also placed under the obligation to prevent “the revival of Nazi organizations and all Nazi propaganda.”<sup>159</sup>

Mrs. Roosevelt nevertheless cautioned against including in the Covenant “any provision likely to be exploited by totalitarian States for the purpose of rendering the other articles null and void.”<sup>160</sup> She saw the peace treaties with

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153. U.N. Commission on Human Rights, U.N. Doc.E/CN.4/SR.174 (8 May 1950) at 6.

154. *Id.* at 6.

155. *Id.*

156. For example, the representative of the United Kingdom expressed concern over prohibiting advocacy of “hostility,” and asserted that the French proposal would suppress the writings of Voltaire. U.N. Commission on Human Rights, U.N. Doc. E/CN.4/SR.174 (8 May 1950) at 13. “[T]he works of Voltaire had been intended to incite to religious hatred — and indeed they were still on the Index of the Roman Catholic Church.” U.N. Commission on Human Rights, U.N. Doc. E/CN.4/SR.379 (19 Oct. 1953) at 6.

157. Egon Schwelb, *The International Convention on the Elimination of All Forms of Racial Discrimination*, 15 INT’L AND COMP. L.Q. 996, 1022 (1966) (citing Peace Treaty with Hungary of Feb. 10, 1947, art. 4).

158. *Id.*

159. *Id.* (citing State Treaty of May 15, 1955, arts. 4 and 10).

160. U.N. Commission on Human Rights, U.N. Doc. E/CN.4/SR.174 (8 May 1950) at 7.

Hungary, Bulgaria and Romania as doing just that, for although they required those countries to safeguard basic human rights for everyone in those countries, the clause that permitted suppression of Fascism and hostile propaganda was a "loophole" for them to ignore their obligations.<sup>161</sup>

The U.K. representative concurred in this view. "[U]nscrupulous governments like nothing better than a moral justification for their actions," he said, and a provision such as the one proposed would provide that justification.<sup>162</sup> "Hitler had started out on a moral platform, posing as the champion of a Germany oppressed through the Treaty of Versailles."<sup>163</sup>

Others were concerned not about potential abuse of the restriction on the right to free speech, but about the danger from the abuse of that right. The Polish representative expressed concern that freedom of expression as articulated in Article 19 might "boomerang against those seeking to proclaim it" because it might be abused and "thus contribute decisively to the elimination of all freedoms and all rights."<sup>164</sup> It was therefore necessary to include a provision to protect against such abuses, including a provision "against the use of that freedom by certain people to incite to war or to preach racial hatred."<sup>165</sup>

The representative from the Congo (Leopoldville) also expressed concern about the potential for abuse. He noted that it was sometimes difficult to determine when there was incitement to hatred, and "care must be taken not to include in a text of that nature expressions which were so liable to give rise to doubt or abuse."<sup>166</sup>

However, a representative of the World Jewish Congress, invited to speak to the Commission, argued against the notion that the right to freedom of expression should be free from restrictions because restrictions might open the way to abuse.<sup>167</sup> It was necessary to include a specific prohibition on hate propaganda in the draft covenant on civil and political rights, he said, because abuses of freedom of expression relating to national, racial or religious hatred were insufficiently covered by other provisions.<sup>168</sup> He believed that judges should have no difficulty applying such an article:

[A]s a member of the minority which had suffered more than any other from the absence of provisions such as those under discussion and a third of whose members had suffered the supreme sacrifice during the Second World War, he would recall that for many years the words "Down with the Jews" had appeared in the Nazi publication, the "Stürmer", in letters over an inch high, and houses in Germany had been plastered with hundreds of thousands of posters calling for the death of the Jews or other minorities. It would be difficult to deny that such

161. *Id.*

162. U.N. Commission on Human Rights, U.N. Doc. E/CN.4/SR.379 (19 Oct. 1953) at 7.

163. *Id.*

164. U.N. General Assembly, Third Comm., U.N. Doc. A/C.3/SR.1073 (13 Oct. 1961) para. 28.

165. U.N. General Assembly, Third Comm., U.N. Doc. A/C.3/SR.1073 (13 Oct. 1961) para. 28.

166. U.N. General Assembly, Third Comm., U.N. Doc. A/C.3/SR.1081 (23 Oct. 1961) para. 18.

167. U.N. Commission on Human Rights, U.N. Doc. E/CN.4/SR.378 (19 Oct. 1953) at 4.

168. *Id.* Specifically, he found inadequate in this regard the limitations clause of the article on the right to freedom of expression and the article designed to prevent abuse of the rights in the Covenant (art. 5). He added that the Convention on Genocide also did not address the question of incitement of hatred on national, religious or racial grounds. *Id.*

propaganda incited hatred or violence, and it would be doing the independent and enlightened judges of the democratic nations an injustice to suppose that they would have any difficulty in applying an article prohibiting it.<sup>169</sup>

Keeping the focus on a causal link between the power of such words and the Holocaust that followed, he added that “[t]hose who had suffered most from racial and religious hatred would fail to understand how it was that the Commission on Human Rights could not find the means to prohibit explicitly the actions which engendered it.”<sup>170</sup>

The Swedish representative expressed doubt that a provision prohibiting incitement to hatred would in fact prevent the “fanatical persecution” which the world had witnessed. Instead, she believed that “[t]he effective prophylaxis lay in free discussion, information and education.”<sup>171</sup> She referred to a recent case in Sweden in which advocacy of national hostility amounted to incitement to violence, where the government resisted pressure to take more repressive measures and instead chose to address this problem by preserving the right to freedom of expression and information.<sup>172</sup>

Mr. Malik, the representative of Lebanon, was particularly concerned that terms such as national hostility and religious hostility could be interpreted in a variety of ways. He thought that even the phrase “incitement to violence” would be “very difficult to define.”<sup>173</sup>

No definitional problem existed in the view of the Yugoslav representative. It was clear, he said, that the ideas to which that phrase referred “had been the

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169. *Id.*

170. *Id.* The matter was then discussed at length by Commission members from the USSR, Pakistan, Egypt, Sweden and Chile. The Egyptian expressed concern that the draft article might lead to imprisonment of individuals involved in national movements for liberation; he believed that incitement to violence should be allowed if necessary “for the protection or realization of the rights enunciated in the draft covenants.” U.N. Commission on Human Rights, U.N. Doc. E/CN.4/SR.378 (19 October 1953).

The right to rebel appeared as early as the initial draft of the Universal Declaration of Human Rights. The Commission on Human Rights suggested that the following language be considered in connection with drafting the Declaration’s preamble: “When a government, group or individual seriously or systematically tramples the fundamental human rights and freedoms, individuals and peoples have the right to resist oppression and tyranny.” Draft International Declaration on Human Rights, U.N. Commission on Human Rights, Draft Annex A, U.N. Doc. E/CN.4/77/ANNEX A (16 Dec. 1947) at 11. The initial draft of the Declaration itself contained an Article providing for right to rebel: “Everyone has the right, either individually or with others, to resist oppression and tyranny.” *Id.* at 254.

In effect, the right to rebel does appear in the Preamble of the Universal Declaration: “[I]t is essential, if man is not to be compelled to have recourse, as a last resort, to rebellion against tyranny and oppression, that human rights should be protected by the rule of law.”

Only two provisions from national laws were provided to the Commission containing a similar provision. The Constitution of El Salvador referred to “[t]he right of insurrection,” in a provision which also articulates a limit on that right. *Id.* at 254. The French Declaration of the Rights of Man and of the Citizen provides in Article 2: “The purpose of all civil association is the preservation of the natural and imprescriptible rights of man. These rights are liberty, property, security, and resistance to oppression.”

171. U.N. Commission on Human Rights, U.N. Doc. E/CN.4/SR.378 (19 Oct. 1953) at 10.

172. *Id.* at 10. She concluded by stating that she would abstain in voting on the proposed article if it included the prohibition on incitement to “hatred and” violence. *Id.*

173. U.N. Commission on Human Rights, U.N. Doc. E/CN.4/SR.379 (19 Oct. 1953) at 7.

cause of the death of two million Yugoslavs. . . . [The Yugoslav] people knew what was meant by incitement to hatred."<sup>174</sup>

The Chilean representative, addressing the criticism that the word "hatred" would be difficult to define, noted that countries commonly use in their legislation words such as "honour" and "reputation" without complaining that those terms were so difficult to define that they should not be included in legislation.<sup>175</sup> He did, however, express concern over the use of the term "religious" hostility, in particular with respect to those religions "based on the dogma of revelation [which] believed they had an absolute and unquestionable monopoly of the truth; their propaganda was accordingly unfavourable or positively hostile towards other religions."<sup>176</sup> Thus, he asserted, the proposal might result in precluding all religious discussion.<sup>177</sup>

René Cassin of France, however, suggested that his resolution drew a middle course between two extremes: that of the USSR proposal, which would "silence free men," and that of the U.S., which "wished to permit full freedom of expression for the purpose of incitement to hatred and violence."<sup>178</sup>

#### F. *Challenging the U.S. Position*

Several representatives challenged the position taken by the United States. Referring to the U.S. position as "absolutist," the Egyptian delegate commented that although he understood that position, it was time for that country to change its views because it had "renounced isolationism in order to become an international power and its traditional conception of freedom of the press should be adjusted accordingly, since it must take the requirements of international society into account."<sup>179</sup>

Another challenge to the U.S. position came from the Ukrainian representative. Referring to a Mississippi state law then in force which made speech favoring racial equality a crime,<sup>180</sup> he asserted that "perhaps the United States delegation was opposed to prohibiting propaganda of racial hatred because it shared that view."<sup>181</sup>

174. *Id.* at 9. The hostilities that have erupted again in the former Yugoslavia reveal the virulence of such hatred.

175. U.N. Commission on Human Rights, U.N. Doc. E/CN.4/SR.377 (19 Oct. 1953) at 13-14.

176. U.N. Commission on Human Rights, U.N. Doc. E/CN.4/SR.379 (19 Oct. 1953) at 13.

177. *Id.*

178. U.N. Commission on Human Rights, U.N. Doc. E/CN.4/SR.174 (8 May 1950) at 9.

179. U.N. Commission on Human Rights, U.N. Doc. E/CN.4/SR.320 (18 June 1952) at 13-14.

180. The Mississippi law to which the delegate was apparently referring provided:

Any person, firm or corporation who shall be guilty of printing, publishing or circulating printed, typewritten or written matter urging or presenting for public acceptance or general information, arguments or suggestions in favor of social equality or of intermarriage between whites and negroes, shall be guilty of a misdemeanor and subject to a fine . . . or imprisonment . . . or both fine and imprisonment.

Miss. CODE ANN. § 2339 (1942) ("races—social equality, marriages between—advocacy punished").

181. U.N. Commission on Human Rights, U.N. Doc. E/CN.4/SR.321 (17 June 1952) at 4.

In response, the U.S. representative simply said that that example of a state law was "misleading," though he gave no explanation why that was so. He suggested that a "more pertinent example" was that of another state law recently upheld by the U.S. Supreme Court which made it unlawful to publish any matter that "exposed any group to hatred and contempt on the grounds of race or color."<sup>182</sup> However, although he said such legislation was "highly desirable" in the domestic arena, he added that it was inappropriate in an international instrument.<sup>183</sup>

Yet another challenge came from the Polish representative, who, after pointing out that the U.S. was party to two conventions prohibiting the dissemination of obscene publications, said he could not see how the U.S. could consider such publications "more dangerous than war propaganda, the incitement of hatred among the peoples, racial discrimination and the dissemination of slanderous rumors."<sup>184</sup>

The votes on various anti-hate provisions reflect a see-saw of influence, alternating between support for including an anti-hate clause and support for the U.S. position. From 1947 through 1953, anti-hate provisions were added to the draft Covenant, then deleted upon motion by the United States, then added again, then deleted, and finally added for good.<sup>185</sup>

### G. *The Power of Propaganda / Legislating Morality*

Much discussion revolved around the use of propaganda and the concerns of a number of representatives over the power of propaganda in manipulating views.<sup>186</sup> The Chilean representative, for example, spoke at length in the Third

182. *Id.* at 7. The speaker was no doubt referring to the case decided just weeks earlier, *Beauharnais v. Illinois*, 343 U.S. 250 (1952). The case is generally considered today to have been chiseled down so much by subsequent Supreme court decisions that it is no longer valid law. See, e.g., *Collin v. Smith*, 578 F.2d 1197, 1204 (7th Cir. 1978). See also Jeffrey Shaman, *The Theory of Low-Value Speech*, 48 S.M.U. L. REV. 297, 314-15 (1995) (analyzing why "[a]lthough *Beauharnais* has never been expressly overruled, it is of extremely dubious validity by contemporary standards").

For a historically fascinating Note prompted by the Illinois Supreme Court's decision in *Beauharnais* and published shortly before the Supreme Court decided the case, see Note, *Group Libel Laws: Abortive Efforts to Combat Hate Propaganda*, 61 YALE L.J. 252 (1952) (describing, *inter alia*, the work of hate propagandists in the U.S. and their incitement of racist and anti-Semitic hostility). It is of no small import that *Beauharnais* was decided in the wake of fascist propaganda during World War II and the U.S. "race riots" described in the Note.

The article also takes note of the "psychic harm suffered by members of systematically defamed groups." *Id.* at 254. To critical race theorists, recognition of this harm should be a fundamental part of analyzing the law. See Mari Matsuda, *Public Response to Racist Speech*, 87 MICH. L. REV. 2320, 2335-41 (1989); Patricia Williams, *Spirit-Murdering the Messenger: The Discourse of Fingerprinting as the Law's Response to Racism*, 42 MIAMI L. REV. 127, 129 (1987).

183. U.N. Commission on Human Rights, U.N. Doc. E/CN.4/SR.321 (17 June 1952) at 7. The U.S. representative did not elaborate on why he thought that anti-hate speech laws might be desirable in the domestic arena but not the international.

184. *Id.* at 5.

185. For a summary of this history, see BOSSUYT, *supra* note 55, at 403-06.

186. See, e.g., U.N. General Assembly, 16th Sess., Third Committee, U.N. Doc. A/C.3/SR.1078 (19 Oct. 1961) paras. 7-16. The use of the word "propaganda" has more than a semantic significance. Apparently in the Brazilian amendment, the English version used the word "advocacy," the French version used "propagande," and the Spanish version used the word "propaganda." *Id.* para.



Committee in 1961 about the use of organized propaganda to shape public opinion. It is clear that the Chilean representative would find today's theory of the marketplace of ideas unconvincing. Referring to propaganda campaigns before World War II, he said that "skillfully directed propaganda could successfully nullify the effects or falsify the premises of education."<sup>187</sup> Moreover, the "powerful media" played a considerable role in forming opinion, which when used as a tool of propaganda, could easily incite national, racial or religious hatred.<sup>188</sup> He spoke of his own personal experience in this regard, living as a young person in a country "poisoned by a hatred" that made people ready to commit violence, as a result of a propaganda which "transformed the moral outlook of the man in the street and sometimes that of cultivated people."<sup>189</sup> He thus argued that "the principle of *laissez-faire* was indefensible;" one could certainly counter hate propaganda by urging mutual respect, he said, but that was not enough; national and international law must also prohibit incitement to hatred.<sup>190</sup>

The U.K. representative countered that "the power of democracy to combat propaganda lay in the last resort in the ability of its citizens to arrive at reasoned decisions in the face of conflicting appeals."<sup>191</sup> In response, the Chilean representative explained two different concepts of the role of legislation in protecting individual freedom. It was not useful to view it as a distinction between advocating individualism or advocating state intervention. Instead, the two in fact merged, in that even though democracy depended on individuals, "the defence of democracy could not be left with the individual . . . Intervention by the state was essential if the democratic way of life was to survive."<sup>192</sup>

Although the Australian delegate fully supported the aims of the Chilean proposal, he believed that legislation was not the best means for achieving that aim. "[P]eople could not be legislated into morality."<sup>193</sup> "[T]he *practice* of tolerance could be achieved through means other than legislation,"<sup>194</sup> he said. Considering the danger of censorship inherent in the draft proposal, "the remedy might be worse than the evil it sought to remove."<sup>195</sup>

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5. The Brazilian representative suggested that in the English text the word "propaganda" be used. *Id.*

187. U.N. Commission on Human Rights, U.N. Doc. E/CN.4/SR.378 (19 Oct. 1953) at 11.

188. *Id.* at 11-12.

189. *Id.* at 12.

190. *Id.* Noting that the Commission on Human Rights had recently adopted a provision protecting against defamation of character, he added: "The libelling of a whole group or nation was an even more serious matter than the defamation of an individual." *Id.* at 13.

191. *Id.* at 9. One could argue, of course, that the citizens of Germany, Austria, and other countries hardly arrived at reasoned decisions in the 1930s and 1940s, to the detriment of millions of their fellow human beings.

192. *Id.* at 13.

193. *Id.* at 7. To this the Soviet representative responded that "[t]he next logical step would be to deny the usefulness of legislation as a means of ensuring law and order in society." U.N. Commission on Human Rights, U.N. Doc. E/CN.4/SR.377 (16 Oct. 1953) at 10.

194. U.N. Commission on Human Rights, U.N. Doc. E/CN.4/SR.377 (16 Oct. 1953) at 7 (emphasis in original).

195. *Id.* One has to question whether this in fact has happened. It seems that in a number of countries which have hate speech legislation, it has not been abused. See generally STRIKING A

The Polish representative believed that penal law could teach; it was not only a means of punishment, but "it comprised many elements of an educative character."<sup>196</sup> Just as the discrimination laws in South Africa promoted racist sentiments of one part of the population against another, so too "it was possible for the right sentiments to be fostered and wrong sentiments to be eradicated by the action of law."<sup>197</sup>

The French delegate agreed with what he referred to as the "brilliant exposition" of the Chilean in describing "that vicious phenomenon of the modern world, propaganda, [which was a] mind-conditioning and spiritual rape of the masses."<sup>198</sup> The French representative did not dismiss out of hand difficulties in using legislation to "legislate morality." In a speech giving general support to the Polish and Chilean amendments, he acknowledged that "to transform the state of mind of a nation was a laborious task . . . since what was required was a revolution not merely in legislation but also in national ways of thought."<sup>199</sup>

But "[w]hy should his own country," queried the U.K. representative, "which was quite able to deal in its own way with the propaganda to which the Chilean representative had referred, be compelled to introduce into its law the conception proposed by Chile, a conception foreign to its whole tradition?"<sup>200</sup>

René Cassin noticed that those pushing for an anti-hate propaganda clause were for the most part those who had been most subjected to such hatred.<sup>201</sup> He

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BALANCE, *supra* note 4. It is true, however, that abuses have occurred in some countries which have taken advantage of such laws to suppress political opponents. *See id.*

196. U.N. Commission on Human Rights, U.N. Doc. E/CN.4/SR.378 (19 Oct. 1953) at 9.

197. *Id.* at 9-10. In the end, South Africa abstained from the vote on both paragraph 2 of Article 20 and Article 20 as a whole. *See infra* at notes 231-32.

198. *Id.* at 12.

199. *Id.* One is reminded of Attaturk's attempt to turn Turks from Islam in the 1920s by outlawing the wearing of the fez, and encouraging the wearing of caps with brims. The fez, which has no brim, could easily be worn while praying, whereas the cap with which Attaturk soon became identified had a brim, which would interfere with touching the head to the prayer rug during prayer. This attempt to symbolically change what was happening inside the head by what was worn on it, needless to say, failed.

200. *Id.* at 7. The U.K. representative posited that governments could pass whatever law they liked, but the Covenant should not impose a *requirement* to enact legislation "of a repressive character." Since different countries are in different states of stability, and have different cultures with which to deal with a variety of problems in society, perhaps it would have been wise to have followed the U.K. suggestion.

In a heated exchange between the representatives of the United Kingdom and the USSR, Mr. Hoare of the U.K. gave as an example of the respect for freedom of expression the fact that Hitler's *Mein Kampf* had not been banned in the U.K. This prompted the Soviet representative to say that he was "shocked" that it had not been banned, to which Mr. Hoare responded that it was clear that the Soviet Union representative had no idea what was meant by freedom of speech, because of the Soviet representative's "inability to understand how the British people could have successfully fought Hitler unaided for a considerable and highly critical period of the war and at the same time allowed *Mein Kampf* to circulate throughout the country." He added that "the United Kingdom would maintain and fight for its conception of liberty as resolutely as it had fought against Hitler." U.N. Commission on Human Rights, U.N. Doc. E/CN.4/379 (19 Oct. 1953) at 12-13.

201. In addition to statements by members of the Commission on Human Rights, the Commission heard similar concerns expressed by others invited to share their views. In late 1953, a representative of the World Jewish Congress, invited to speak to the Commission on Human Rights, said it was "essential to include an article in the Covenant prohibiting hate propaganda." U.N. Commission on Human Rights, U.N. Doc. E/CN.4/SR.378 (19 Oct. 1953) at 5. He characterized the absolut-

did question the wisdom of turning into a universal principle something that only some countries supported in view of their own national experience. “[I]t would be difficult to extend to the international sphere conceptions that had their birth in national experience.”<sup>202</sup> Similarly, the Yugoslav representative said that “[i]t was probably necessary to have been a victim of such propaganda, as the people of Yugoslavia had been, to appreciate the importance” of the hate speech article, but in his opinion, such a provision “should figure in all relevant national instruments.”<sup>203</sup>

The Commission then voted on the several anti-hatred proposals before it and adopted the Chilean amendment adding “incitement to hatred” to the clause.<sup>204</sup>

#### H. *In the Third Committee of the U.N. General Assembly*

The draft Covenant on Civil and Political Rights reached the Third Committee of the U.N. General Assembly in 1961. Many of the same arguments for and against the incitement provision were raised in the Committee as had been raised in the Commission.<sup>205</sup> However, whereas Cold War concerns were evident during the Commission on Human Rights deliberations,<sup>206</sup> the discussions

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ists as viewing the right to freedom of expression as “sacred.” *Id.* He argued that an article prohibiting hate propaganda should be included in part because Article 5, designed to prevent abuse of the rights referred to in the Covenant, was inadequate, as evidenced by the hesitancy by some Commission members over whether even to include a hate propaganda article. *Id.*

202. *Id.* at 10.

203. *Id.* at 12.

204. The Polish amendment came to a vote first. It would have substituted the words “national or racial exclusiveness, hatred and contempt or religious hostility” for the words “national, racial or religious hostility.” That proposal was rejected by a vote of 9-3, with 5 abstentions. U.N. Comm’n on Human Rights, U.N. Doc. E/CN.4/SR.379 (19 Oct. 1953) at 13. Then a vote was taken on the Chilean proposal to add a prohibition on incitement to hatred to the prohibition on incitement to violence. It was adopted by a vote of 8-5, with 4 abstentions. (No country-by-country breakdown is given in the Summary Record.)

Finally, a vote on the entire article as amended was taken; it was adopted as amended by the Chilean proposal, by 11 votes to 3, with 3 abstentions. *Voting in favor* were: Pakistan, Philippines, Poland, Ukrainian Soviet Socialist Republic, USSR, Uruguay, Yugoslavia, Chile, Egypt, France, India. *Voting against*: United Kingdom, USA, Australia. *Abstaining*: Sweden, Belgium, China. *Id.* at 13-14.

Directly after the vote, the representatives of the USA, Australia, and the U.K. explained why they had voted against the article, basically reiterating earlier arguments. However, Sir Rahman of Pakistan explained that he had voted in favor of the article because he understood the word “and” to mean “incitement to both hatred and violence conjunctively.” It appears therefore that he saw a requirement that violence result before the article could be invoked. The representative of China explained that he abstained because he believed the Chilean amendment would have given too much authority to governments. *Id.* at 14. It appears, therefore, that not only were the concerns of those abstained similar to those who voted against the article, but in addition, one person who voted in favor of the article agreed with those who rejected the article, that is, that incitement to violence should be required before a government may punish expression.

205. See, e.g., U.N. Docs. A/C.3/SR.1078 - SR.1084 (1961).

206. The presence of the Cold War was evident throughout the deliberations of the Commission on Human Rights in drafting the Covenant, as witness the running debate between various representatives of the USSR and Eleanor Roosevelt, Chair of the Commission and representative of the United States. At times, the heated debate diverged from discussion of substantive articles to accusations about the two governments’ respective political systems. For an example of a particularly testy exchange, see U.N. Commission on Human Rights, U.N. Doc. E/CN.4/SR.322 (17 June 1952)

in the Third Committee of the U.N. General Assembly reveal the emergence of other global issues. The Soviet Union departed from references to World War II and shifted its focus to colonialism, the racism evident in the non-self-governing and trust territories, and, of course, South Africa.<sup>207</sup>

During Third Committee deliberations over the draft Covenant, additional attempts were made to add to Article 19 certain restrictions relating to incitement to national, racial or religious hatred. India, Brazil and the U.S.S.R. all proposed amending Article 19 to include in the limitations clause restrictions on incitement to hatred that were somewhat broader than that of the Chilean amendment adopted by the Commission on Human Rights. India, for example, proposed restrictions in respect of incitement to national, racial or religious hatred, as well as attacks on founders of religions.<sup>208</sup> Brazil proposed allowing

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at 4-6, where the U.S. and the USSR went off the agenda at great length. Eventually, the representative of Chile spoke, noting that "the Commission had shown great forbearance in agreeing to hear statements of a political nature which were not related to the item. It should now continue its work." *Id.* at 6. The representative of Belgium announced that he "associated himself with the Chilean Representative's remarks." When the representative of the USSR maintained that his remarks were "directly connected with the question before the Commission," the Chilean representative stated that "on behalf of his country and of the small Powers, he wished to protest against the waste of the Commission's time by the great Powers." *Id.* Undaunted, the representative of the USSR continued in some detail to try to explain how his political comments related directly to the question at hand. Finally, the representative of Greece intervened, expressing hope that Commission members "would in future refrain from introducing into the discussion questions which were obviously extraneous." *Id.* at 7.

207. See, e.g., U.N. General Assembly, 16th Sess., Third Committee U.N. Doc. A/C.3/SR.1078 (19 October 1961) paras. 15-18. In addition, in discussing draft Article 19 of the Civil and Political Rights Covenant, the representative of Jordan referred to the abuse of freedom of expression by many United States newspapers, which in his view, "regarded freedom as identical with irresponsibility." U.N. General Assembly, 16th Sess., Third Committee (A/C.3/SR.1074, 16 October 1961) para. 1. He said that "Jordan had suffered greatly from the activities of Zionist pressure groups in the United States through the medium of such newspapers," adding that "malicious information should be expressly prohibited in Article 19, since the Press ought to be guided by objectivity, justice and truth, and not by the interests of pressure groups."

The Jordanian representative also expressed opposition to the U.S. amendment which would have required that any restrictions on freedom of speech be consistent with the other rights recognized in the Covenant; he said that such a provision would allow no restrictions at all, "because limitations were always inconsistent with the original text." *Id.* para. 3. The Bulgarian representative then expressed the view that the press in the United States was not free at all, but was instead "controlled by financial monopolies which censored it and defined its policies, while such bodies as the Committee on Un-American Activities of the House of Representatives at the U.S. Congress instilled fear and prevented expressions of criticism." *Id.*

At one point, the Canadian representative observed that there was more concern with the abuse of freedom of information than with the need to ensure the right to freedom of expression. *Id.* at para. 31. As the Uruguayan delegate saw it, on one side of the debate were those who believed that Article 19 should define and guarantee fundamental rights; on the other side were "those who wished to convert it into a list of restrictions designed to protect the State from the threat of human freedom." U.N. General Assembly, 16th Sess., Third Committee U.N. Doc. A/C.3/SR.1075 (17 October 1961) para. 2. He acknowledged that all rights have certain limitations, but remarked that Article 19 had been singled out and subjected to many vague and general restrictions that might well "lead to the negation of that very right." *Id.* para. 3. The Turkish and Swedish delegates expressed the classic view that "to let truth compete with falsehood [was better] than to restrain the exercise of freedom of expression." *Id.* para. 13.

208. U.N. General Assembly, 16th Sess., Third Committee, Draft International Covenants on Human Rights, India amendment, U.N. Doc. A/C.3/L.919 (10 Oct. 1961). The Venezuelan representative questioned whether it was feasible to compile a list of all religions and their founders.

restrictions necessary “for preventing any manifestations of racial, religious or class prejudices.”<sup>209</sup> The U.S.S.R. proposed an amendment to add to Article 19(3) restrictions necessary “for the prevention of war propaganda, incitement to enmity among nations, racial discrimination, and the dissemination of slanderous rumours.”<sup>210</sup>

### I. *Relation Between Articles 19 and 20*

What relation Article 20 bore to Article 19 was the subject of some disagreement. It was not until the Third Committee’s deliberations on Article 19 that the Chilean representative proposed moving the article prohibiting incitement to war and hatred so that it would appear directly after Article 19 (it had been Article 26 in the draft Covenant), “so that the underlying connexion between the two principles involved would be more clearly seen.”<sup>211</sup> Interestingly, when the Austrian representative spoke in favor of clauses prohibiting war propaganda and incitement to hatred, he added that such provisions “did not . . . have any direct connexion with the right to freedom of expression.”<sup>212</sup> The representative from Ghana pointed out that a significant difference between Articles 19 and 20 was that the former set forth individual rights, whereas the latter defined “collective rights.”<sup>213</sup> In contrast, the Irish representative questioned the appropriateness of including Article 20 in the Civil and Political Rights Covenant at all, since that document was to set forth rights, and Article 20 “did not in fact deal with individual or group rights.”<sup>214</sup> According to the Philippine representative, however, Article 20 “in fact sanctioned the right to life and the right to live in peace with one’s neighbours.”<sup>215</sup>

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U.N. General Assembly, 16th Sess., Third Committee U.N. Doc. A/C.3/SR.1071 (12 October 1961) para. 13. The Indian delegation explained that it inserted “attacks on founders of religion” because that language appeared in the draft Convention on Freedom of Information, which had been adopted by the Third Committee. UNGA, 16th Sess., Third Committee, U.N. Doc. A/C.3/SR.1072 (12 Oct. 1961) para. 2.

209. U.N. General Assembly, 16th Sess., Third Committee, Draft International Covenants on Human Rights, Brazil amendment, U.N. Doc. A/C.3/L.920 (11 Oct. 1961).

210. U.N. General Assembly, 16th Sess., Third Committee, Draft International Covenants on Human Rights, USSR amendment, U.N. Doc. A/C.3/L.921 (11 Oct. 1961).

211. *Id.* para. 22.

212. U.N. General Assembly, 16th Sess., Third Committee, U.N. Doc. A/C.3/SR.1074 (16 Oct. 1961) para. 40. *But cf.* Irwin Cotler, *Hate Literature*, in JUSTICE BEYOND ORWELL, *supra* note 41, at 117 (identifying the two rights: “freedom of expression” and “freedom from expression”).

213. U.N. General Assembly, 16th Sess., Third Committee, U.N. Doc. A/C.3/SR.1078 (19 Oct. 1961) para. 53.

214. U.N. General Assembly, 16th Sess., Third Committee, U.N. Doc. E/C.3/SR.1081 (23 October 1961) para. 70.

215. U.N. General Assembly, 16th Sess., Third Committee, U.N. Doc. A/C.3/SR.1081 (23 Oct. 1961) para. 23. Expressing a related view, the representative from the United Arab Republic stated that Articles 19 and 20 were “not contradictory,” but were in fact “complementary and both were designed to promote international peace and understanding.” U.N. General Assembly, 16th Sess., Third Committee, U.N. Doc. A/C.3/SR.1073 (13 Oct. 1961) para. 25.

The Soviet delegate framed the difference of opinion regarding Article 20 as “a question of choosing between freedom to spread war propaganda [and hatred] and the prohibition of it.”<sup>216</sup>

### *J. Means and Ends*

Throughout the debate in the Commission on Human Rights and in the Third Committee of the U.N. General Assembly, neither side seemed to respond much to the concerns of the other. Their disagreement reflects the split in conceptions of hierarchy in the goals of free speech and non-discrimination. Opponents of Article 20 raised the spectre of the potential for abuse and the difficulty of defining “incitement,” “hostility,” and “hatred,” whereas the proponents of Article 20 continually spoke of the need to end racial hatred and discrimination and the human suffering that results from such hatred and discrimination. The opponents rarely expressed concern over rampant racism; the proponents seemed to do better at addressing the concerns of the opponents, in agreeing that some of the terms were difficult, but they pointed out at the same time that the Covenant contained other terms to which those countries had not objected which were potentially difficult to define as well.

In one of the rare comments during the lengthy deliberations on Article 20 in which someone did address the means-goals issue, the Japanese delegate stated that all were in agreement that advocacy of national, racial or religious hatred should be eliminated, but that the main question was over the method of implementation. Prohibiting hatred “might be the shortest way [but] the shortest and most incisive way was not always the best. While the article might achieve its own specific objectives, it was very likely that at the same time it would destroy freedom of expression and information. . . . Restrictions on those freedoms represented a far greater threat to lasting world peace than did propaganda for war and hostility.”<sup>217</sup>

### *K. The “Sixteen Power” Amendment*

After several days of deliberations in the Third Committee, sixteen countries joined together to propose a text which one delegate suggested represented a compromise between those who thought that “hatred” could not be defined and that existing proposals posed too great a threat to freedom of expression, and those who felt that prohibiting incitement to violence alone was insufficient.<sup>218</sup>

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216. U.N. General Assembly, 16th Sess., Third Committee, A/C.3/SR.1083 (25 Oct. 1961) para. 51.

217. U.N. General Assembly, 16th Sess., Third Committee, U.N. Doc. A/C.3/SR.1082 (25 Oct. 1961) paras. 23 and 25.

218. U.N. General Assembly, 16th Sess., Third Committee, U.N. Doc. A/C.3/SR.1081 (23 Oct. 1961) para. 11 (statement of Yugoslavian representative). The sixteen co-sponsors of the amendment were: Brazil, Cambodia, Congo (Leopoldville), Ghana, Guinea, Indonesia, Iraq, Lebanon, Mali, Morocco, Philippines, Poland, Saudi Arabia, Thailand, United Arab Republic and Yugoslavia. U.N. General Assembly, 16th Sess., Third Committee, U.N. Doc. A/C.3/L.933 (24 Oct. 1961). Support for this amendment came from many quarters, prompting the Congolese representative to remark that since 1953, “many new countries had been able to make themselves heard in the United

The text of what was referred to as the "sixteen-Power amendment" is that which was ultimately adopted as Article 20(2). The Yugoslav representative, explaining his delegation's support for the proposal, stated that the term "hatred" was indeed defined in that proposal, "by the addition of the words 'that constitutes incitement to discrimination, hostility or violence.'"<sup>219</sup> Despite this assertion, some delegations, including those of Japan and Cyprus, continued to express concern that the text might lead to abuse of the right to the freedom of expression.

#### L. *New Concerns and Old*

Responding to the sixteen-Power amendment, the French delegate expressed surprise that the amendment reversed the order of the terms "hatred" and "hostility" in a way that weakened the meaning of the original article. Since "hatred" was stronger than "hostility," he said, it made little sense for the text to speak of prohibiting advocacy of hatred that constitutes incitement to hostility; "hatred always resulted in hostility," he noted.<sup>220</sup> He indicated that his delegation would be unable to support the sixteen-Power amendment, but not because of opposition to the principle that advocacy of hatred should be prohibited; it was rather the particular phrasing that he was unable to support.<sup>221</sup>

In addition to raising new concerns because of the wording of this proposal, the ensuing discussion revisited many of the concerns expressed about earlier proposals. The Uruguayan delegate spoke at length against Article 20. In addition to addressing definitional problems, he questioned "whether it was not altogether too ambitious to attempt to prohibit by means of a legal instrument ills which were inherent in human nature."<sup>222</sup> It was more important to guarantee freedom of expression so that various views could be expressed, and so that people could examine those views "in order to discover the truth, which human intelligence would always ferret out, despite all attempts to hide or distort."<sup>223</sup> The Belgian delegate explained that she would oppose the amendment because it "lent itself to a far-reaching and arbitrary interpretation and, if adopted, it might well lead to a negation of the freedoms set forth in Article 19."<sup>224</sup>

These views ran directly counter to the views of other delegates, who expressed great concern at the manipulation of public opinion through propaganda. The Saudi representative said that the Uruguayan representative's "confidence in human intelligence was perhaps a little excessive."<sup>225</sup> He then went on to

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Nations." U.N. General Assembly, 16th Sess., Third Committee, U.N. Doc. A/C.3/SR.1083 (25 Oct. 1961) para. 44.

219. U.N. General Assembly, 16th Sess., Third Committee, U.N. Doc. A/C.3/SR.1082 (25 Oct. 1961) para. 12.

220. U.N. General Assembly, 16th Sess., Third Committee, U.N. Doc. A/C.3/SR.1083 (25 Oct. 1961) para. 9.

221. *Id.* para. 13. France abstained in the vote on paragraph 2 of Article 20, as well as on the Article as whole. *Id.* paras. 58-59.

222. *Id.* para. 23.

223. *Id.* para. 24.

224. *Id.* para. 27.

225. *Id.* para. 36.

describe the manipulation of public opinion by "the big press agencies" and added that "only the privileged class engaged in non-manual professions was able to resist such propaganda."<sup>226</sup> Others, he said, would be incapable of "arriving at a genuinely informed opinion."<sup>227</sup>

In a remark indicating that not all people have equal access to the marketplace to voice their views, the Venezuelan delegate expressed deep concern that "some people were powerless to make their views known."<sup>228</sup> He seemed dubious that all would be able to make their views heard "on an equal footing with the most powerful interest groups."<sup>229</sup>

### M. The Votes

Finally, Article 20 came to a vote. After voting to include paragraph 1 prohibiting propaganda for war, members of the Third Committee voted first on the phrase "to discrimination, hostility or" in the sixteen-Power amendment.<sup>230</sup> The phrase was adopted with 43 votes in favor, 21 against, and 19 abstentions.<sup>231</sup>

226. *Id.*

227. *Id.*

228. U.N. General Assembly, 16th Sess., Third Committee, U.N. Doc. A/C.3/SR.1083 (25 Oct. 1961) para. 42.

229. *Id.*

230. The full text of the amendment read:

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

U.N. Doc. A/C.3/L.933 (24 Oct. 1961).

231.

#### IN FAVOR:

Afghanistan	Ethiopia	Nigeria
Albania	Ghana	Poland
Brazil	Guinea	Romania
Bulgaria	Haiti	Saudi Arabia
Burma	Hungary	Sudan
Byelorussian S.S.R.	India	Togo
Cambodia	Indonesia	Ukranian S.S.R.
Cameroon	Iraq	U.S.S.R.
Central African Republic	Liberia	United Arab Republic
Ceylon	Libya	Upper Volta
Chad	Mali	Venezuela
Congo (Brazzaville)	Mexico	Yemen
Congo (Leopoldville)	Morocco	Yugoslavia
Cuba	Nicaragua	
Czechoslovakia	Niger	

#### AGAINST:

Belgium	France	Norway
Canada	Greece	Peru
Chile	Iceland	Sweden
Colombia	Ireland	Turkey
Denmark	Israel	U.K.
Federation of Malaya	Japan	U.S.A.
Finland	Lebanon	Uruguay



Paragraph 2 as a whole was then put to the vote, and was adopted with fifty votes in favor, eighteen votes against, and fifteen abstentions.<sup>232</sup> Some countries that had been very active in the Commission on Human Rights in promoting an anti-hatred provision abstained from the vote on the sixteen-Power Amendment, most notably Chile and France. Israel and Lebanon, which had voted against including the phrase “to discrimination, hostility or” nonetheless voted in favor of paragraph 2 as a whole. Seven countries which had abstained from the vote on adding that language also joined in voting in favor of paragraph 2 as a whole.<sup>233</sup> The article as a whole was adopted by a roll call vote of 52 to 19, with 12 abstentions.<sup>234</sup>

**ABSTAINING:**

Argentina	Iran	Portugal
Australia	Italy	South Africa
Austria	Netherlands	Spain
China	New Zealand	Thailand
Cypruss	Pakistan	Tunisia
Dominican Republic	Panama	
Ecuador	Philippines	

U.N. General Assembly, 16th Sess., Third Committee, U.N. Doc. A/C.3/SR.1083 (25 Oct. 1961) para. 57.

232. *Id.* para. 58:

**IN FAVOR:**

Afghanistan	Ghana	Pakistan
Albania	Guinea	Philippines
Brazil	Haiti	Poland
Bulgaria	Hungary	Romania
Burma	India	Saudi Arabia
Byelorussian S.S.R.	Indonesia	Sudan
Cambodia	Iraq	Thailand
Cameroon	Israel	Togo
Central African Republic	Lebanon	Tunisia
Ceylon	Liberia	Ukrainian S.S.R.
Chad	Libya	U.S.S.R.
Congo (Brazzaville)	Mali	United Arab Republic
Congo (Leopoldville)	Mexico	Upper Volta
Cuba	Morocco	Venezuela
Czechoslovakia	Nicaragua	Yemen
Dominican Republic	Niger	Yugoslavia
Ethiopia	Nigeria	

**AGAINST:**

Belgium	Finland	Norway
Canada	Iceland	Sweden
Colombia	Ireland	Turkey
Denmark	Japan	U.K.
Ecuador	Netherlands	U.S.A.
Federation of Malaya	New Zealand	Uruguay

**ABSTAINING:**

Argentina	Cypruss	Panama
Australia	France	Peru
Austria	Greece	Portugal
Chile	Iran	South Africa
China	Italy	Spain

233. Dominican Republic, Israel, Lebanon, Pakistan, Philippines, Thailand and Tunisia.

234. U.N. Doc. A/C.3/SR.1083 (25 Oct. 1961) para. 59. Explaining the votes cast by Denmark, Finland, Iceland, Sweden and Norway, the Norwegian delegate first expressed concern that Article

Although Peru had abstained from the vote on paragraph 2, it voted in favor of Article 20 as a whole, as did Chile, which had been one of the leading proponents of including a provision in the Civil and Political Rights Covenant requiring that national, racial and religious hatred be prohibited. Thus, although Chile was not completely satisfied with the final wording, it nonetheless believed it important to have some provision in the Civil and Political Rights Covenant explicitly prohibiting what it viewed as an abuse of the right to free expression.

In a comment forecasting what has in fact happened in some countries, the Norwegian representative indicated concern that the phrase "advocacy of national hatred that constitutes incitement to hostility" would be so easily misconstrued that it might well be used to victimize those whom it was intended to protect.<sup>235</sup>

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19 was already subject to too many restrictions in its paragraph 3, and that Article 20 went too far in placing further restrictions. He said that in addition, Article 20 did not belong in the Civil and Political Rights Covenant since it did not proclaim a human right. On this latter point, see *supra* notes 212-15 and accompanying text.

U.N. General Assembly, Third Committee, vote on Civil and Political Rights Covenant Article 20:

**IN FAVOR (52)**

Afghanistan	Ethiopia	Pakistan
Albania	Ghana	Peru
Brazil	Guinea	Philippines
Bulgaria	Haiti	Poland
Burma	Hungary	Romania
Byel. S.S.R.	India	Saudi Arabia
Cambodia	Indonesia	Sudan
Cameroon	Iraq	Thailand
Central Afr. R.	Israel	Togo
Ceylon	Lebanon	Tunisia
Chad	Liberia	Ukr. S.S.R.
Chile	Libya	U.S.S.R.
Congo (Brazzaville)	Mali	Upper Volta (Burkina Faso)
Congo (Zaire)	Mexico	Venezuela
Cuba	Morocco	Yemen
Czechoslovakia	Nicaragua	Yugoslavia
Dominican Republic	Niger	
Egypt (U.A.R.)	Nigeria	

**AGAINST (19)**

Australia	Ireland	Sweden
Belgium	Italy	Turkey
Canada	Japan	United Kingdom
Denmark	Malaysia	U.S.A.
Ecuador	Netherlands	Uruguay
Finland	New Zealand	
Iceland	Norway	

**ABSTAINING (12)**

Argentina	Cyprus	Panama
Austria	France	Portugal
China	Greece	South Africa
Colombia	Iran	Spain

<sup>235</sup> U.N. General Assembly, 16th Sess., Third Committee, U.N. Doc. A/C.3/SR.1084 (26 Oct. 1961) para. 5.

The Australian delegate, explaining that she would have voted for the Article originally proposed by the Commission on Human Rights, stated that she had voted against it “for purely technical and legal reasons.”<sup>236</sup> She had abstained in the vote on paragraph 2 in part because the term “hostility” could mean unfriendliness or even contrariness, and thus could even mean “a mere difference of view.”<sup>237</sup> The delegate from New Zealand, as well, indicated support for an earlier version of the article, but some discomfort with the final wording of the sixteen-Power Amendment, and therefore had voted against it.<sup>238</sup>

The British delegate, explaining the various reasons why her delegation had voted against Article 20, remarked that “[t]he term ‘incitement to hostility’ was even broader than ‘incitement to hatred’ and was entirely out of place in a legal document.”<sup>239</sup>

The Romanian delegate’s reason for voting in favor of the article was also the main reason many delegations voted in favor: they viewed incitement to hatred or discrimination as being directed against freedom of expression. The Romanian delegate thought it important that Article 20(2) “provided for positive legal sanctions to deal with any manifestations directed against peace, human dignity, equality of rights or freedom of opinion.”<sup>240</sup>

#### *N. Reason for Relativism on This Issue?*

The delegate from Ceylon remarked that “whereas in some countries enjoying political stability and material wealth that right [freedom of expression] could be exercised without restraint, some restrictions on it might be necessary in countries still in the process of political and economic development.”<sup>241</sup> This echoes the question posed by the U.K. representative who had asked why his own country should be compelled to introduce into its law a specific measure for dealing with hate propaganda, when it “was quite able to deal in its own way with [such] propaganda.”<sup>242</sup>

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236. *Id.* para. 9.

237. *Id.* para. 10.

238. *Id.* para. 11. The Italian delegate expressed similar views. She added that Article 20 did not belong in the Civil and Political Rights Covenant because the purpose of the Covenant “was to safeguard human rights, and not to legislate against crime.” *Id.* para. 14. The Canadian delegate also said she would have voted for the original text of the article but had reservations about using the term “hatred,” *id.* para. 16, and the Ecuadorian delegate voted against paragraph 2 because the definition of “national hatred” had been unclear, *id.* para. 20. He did not express concern over any other portion of paragraph 2, but focused the remainder of his concerns on the war propaganda clause, paragraph 1.

239. *Id.* para. 23. The Turkish delegate also voted against Article 20(2). His explanation for the vote is fraught with irony. Observing that “racial, religious and national discrimination had never existed in his country,” he claimed that he had voted against the amendment “solely by the fear that a tendentious application of that text might detract from the rights embodied in Article 19 of the draft Covenant.” *Id.* para. 32. This statement is consistent with the Turkish government’s history of denying its genocide of over one million Armenians.

240. *Id.* para. 25.

241. *Id.* para. 15.

242. U.N. Commission on Human Rights, U.N. Doc. E/CN.4/SR.378 (19 Oct. 1953) at 7.

O. *Using Rights to Destroy Others' Rights*

Another potential basis in the Covenant for restricting hate speech is Article 5, which allows restrictions on expression designed to limit the rights of others. The Universal Declaration of Human Rights states in Article 29 that one may not use the rights set forth in that document to destroy others' rights. A limitations clause virtually identical to that article was proposed by Mr. Malik of Lebanon during the drafting of the Covenant. In discussing this clause, which became Article 5 of the Civil and Political Rights Covenant, Mrs. Roosevelt argued that the article was "vague and unnecessary,"<sup>243</sup> and open to abuse.<sup>244</sup> Furthermore, she said, "it [would be] difficult to determine" just what acts might tend to destroy the rights of others.<sup>245</sup>

Urging support for the proposal, Mr. Malik spoke of the need to prevent Fascists from using rights to suppress others' rights; he specifically urged the U.S. to consider that it was preferable "to err on the side of redundancy rather than of omission."<sup>246</sup> In typically eloquent fashion, René Cassin noted that "[the] edifice of liberty which was erected in the Covenant must not be capable of being used against liberty itself."<sup>247</sup> Thus, Article 5 of the Civil and Political Rights Covenant may be seen as an additional basis for allowing restrictions on hate speech.<sup>248</sup>

P. *Reservations Entered upon Ratification*

Of the more than 90 governments that had ratified the Civil and Political Rights Covenant by the end of 1991, only Malta had entered a reservation to Article 20(2).<sup>249</sup> In 1992 the United States became the second party to enter such a reservation when it ratified the Covenant.<sup>250</sup> Three countries did enter a reservation to paragraph 1 of Article 20, which prohibits war propaganda, on the ground that it might inhibit freedom of expression, but entered no reservation to paragraph 2.<sup>251</sup> Belgium and Luxembourg, after entering a reservation to para-

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243. U.N. Commission on Human Rights, U.N. Doc. E/CN.4/SR.123 (10 June 1947) at 7.

244. U.N. Commission on Human Rights, U.N. Doc. E/CN.4/SR.181 (16 May 1950) para. 17.

245. *Id.* para. 29.

246. U.N. Doc. E/CN.4/SR.123 (10 June 1949) at 8.

247. *Id.* Remarkably, the USSR representative agreed with the U.S., and expressed the view that the article was "vague and possibly unnecessary." *Id.* at 9. However, he said, the problem could be solved simply by changing the wording "rights and freedoms defined herein" to "rights and freedoms set forth in the Declaration," and that with such a change, he would support the article. *Id.*

248. This approach has been the basis for the decisions by European Commission on Human Rights in hate speech cases. See *infra* at notes 388-391 and accompanying text.

249. "The Government of Malta interprets article 20 consistently with the rights conferred by articles 19 and 21 of the Covenant, but reserves the right not to introduce any legislation for the purpose of implementing article 20." U.N. Doc. CCPR/C/2/Rev.2 (12 May 1989, as updated in May 1992).

250. The reservation reads:

Article 20 does not authorize or require legislation or other action by the United States that would restrict the right of free speech and association protected by the constitution and laws of the United States.

102 Cong. Rec. S4781 (Apr. 2, 1992).

251. Denmark, Finland, Iceland. United Nations, HUMAN RIGHTS: STATUS OF INTERNATIONAL INSTRUMENTS 33, 34, 38 (1987).

graph 1, stated that Article 20 as a whole would be implemented "taking into account" the rights to freedom of thought, religion, opinion, etc. expressed in other articles of the Convention.<sup>252</sup> Other countries declared that they already had legislation implementing Article 20.<sup>253</sup>

*Q. Human Rights Committee — Review of Government Reports*

In addition to listing civil and political rights, the Civil and Political Rights Covenant established a committee of human rights experts to oversee implementation of the Covenant.<sup>254</sup> That body, the Human Rights Committee, reviews reports submitted by states parties on measures they have taken to implement the Covenant.<sup>255</sup> The Committee also issues its own reports, as well as any "general comments" it sees fit to transmit.<sup>256</sup> The General Comments are considered to be authoritative interpretations of the provisions of the Covenant.<sup>257</sup> Comments by individual members of the Committee are not authoritative but nonetheless may reflect a trend. The statements issued by the Human Rights Committee on Article 20(2), both in questioning governments about their reports and in a General Comment on that Article, indicate that the Human Rights Committee takes very seriously the obligation under Article 20 to outlaw advocacy of racial, religious and ethnic hatred.

In 1983 the Human Rights Committee issued a General Comment on Article 20(2), noting that a number of reports submitted by states parties did not provide sufficient information as to the implementation of Article 20 of the Cov-

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252. *Id.* at 40. Some writers have interpreted this language as constituting a reservation — for example, Sandra Coliver, in letter on file with the author — but such a view does not explain why those governments did not simply include a reference to paragraph 2 along with paragraph 1 in its initial statement that the government "declares that it does not consider itself obligated to adopt legislation in the field covered by article 20, paragraph 1 . . . ."

253. New Zealand stated that it "reserves the right not to introduce further legislation with regard to article 20" because it had already "legislated in the areas of the advocacy of national and racial hatred and the exciting of hostility or ill will against any group of persons." *Id.* at 43. Australia and the United Kingdom, after declaring that they interpret article 20 consistently with the rights of freedom of expression, assembly and association, declared that they had already legislated "in the matters of practical concern in the interests of public order (*ordre public*), and therefore reserved the right not to introduce further legislation. *Id.* at 20 and 48. Arguably, the Australian and U.K. declarations could be interpreted to constitute reservations, if one interprets the reference to *ordre public* as addressing situations involving violence only. The term in French, however, has a much broader meaning, which is why it is always included in a parenthetical after the direct English translation, "public order." Even the narrowest definition of the French term encompasses all that is necessary to ensure safety, morality, and the proper functioning of public services. See J.E.S. FAWCETT, *THE APPLICATION OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS* 330-33 (1987). See also Karl Josef Partsch, *Freedom of Conscience and Expression, and Political Freedoms*, in LOUIS HENKIN, *THE INTERNATIONAL BILL OF RIGHTS: THE COVENANT ON CIVIL AND POLITICAL RIGHTS* 209, 221, 224-25 (1981). Inasmuch as both Australia and the United Kingdom have hate speech restrictions, it does not seem appropriate to interpret as a reservation their statement that they need not introduce additional legislation to give effect to article 20.

254. Civil and Political Rights Covenant, *supra* note 3, art. 28(1).

255. *Id.* art. 40.

256. *Id.* art. 40.

257. FRANK NEWMAN & DAVID WEISSBRODT, *INTERNATIONAL HUMAN RIGHTS: LAW, POLICY AND PROCESS* 314 (1990).

enant.<sup>258</sup> The Committee stated that in its opinion, the prohibitions required under Article 20 “are fully compatible with the right of freedom of expression as contained in Article 19, the exercise of which carries with it special duties and responsibilities.”<sup>259</sup> The Committee went on to say that for Article 20 to become fully effective, states must enact laws “making it clear that . . . advocacy as described [in Article 20 is] contrary to public policy and providing for an appropriate sanction in case of violation.”<sup>260</sup> The Committee then urged states parties which had not yet done so to take the measures necessary to fulfill their obligations under Article 20.<sup>261</sup>

The Human Rights Committee has also urged individual countries to enact laws pursuant to Article 20, during its review of those countries’ periodic reports. For example, in the section of the 1983 Human Rights Committee Report dealing with Australia, some members wondered why no prohibition was made under Article 20 of propaganda for war and advocacy of racial hatred, when such a prohibition was mandatory and such prohibition might be necessary for the protection of the rights enunciated in Articles 19, 20 and 22.<sup>262</sup>

In examining the report of Austria that same year, the Committee pointed out that “the relevant Austrian legislation did not really correspond to [Article 20] especially with regard to . . . incitement to commit hostile acts.”<sup>263</sup> Committee members asked “whether action had been taken to prevent activities or tendencies which were in violation of Articles 5 and 20 of the Covenant, . . . and how many persons had been punished through the Prohibition Act, mentioned in the report, in the past three years and to what extent it was applied.”<sup>264</sup>

Similarly, Committee members asked France, in reviewing its report, “whether any provisions existed in France prohibiting national or religious hatred and how ‘anarchist propaganda,’ provided for in a law issued in 1894, but still in force, would be interpreted at the present time.”<sup>265</sup>

In a remark indicating the reasoning behind Article 20(2), a Committee member commented on the inadequacy of measures reported by Germany (FRG), stating:

Propaganda fomenting national hatred and the organization of fifth columns had paved the way for German imperialism in the Second World War and the suppression of national hatred, including the prohibition of Nazi propaganda and SS-type organizations, was therefore extremely important.<sup>266</sup>

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258. Report of the Human Rights Committee, U.N. GAOR, 38th Sess., Supp. No. 40, Annex VI, U.N. Doc. A/38/40 (1983) at 109-10.

259. *Id.* at 110.

260. *Id.*

261. *Id.*

262. Report of the Human Rights Committee, U.N. GAOR, 38th Sess., U.N. Doc. A/38/40, Supp. No. 40 A (1983) at 31.

263. *Id.* at 43.

264. *Id.*

265. *Id.*

266. Human Rights Committee, *Consideration of Reports Submitted by States Parties Under Article 40 of the Covenant* — Initial Reports of States Parties Due in 1977, U.N. Doc. CCPR/C/SR.94 para. 4.

Another Committee member noted, in reviewing the report from Sri Lanka, that that country made no mention of the prohibition of racial hatred as required in Article 20. He maintained that such prohibition by law "would be a most effective means of combatting the terrorism now racking Sri Lanka."<sup>267</sup>

Interestingly, when the Committee issued its comments on the report of the United States, it did not specifically address the U.S. reservation to Article 20, though it did express regret over the extent of the reservations, declarations and understandings entered by the U.S.<sup>268</sup>

#### R. Human Rights Committee — Complaints by Individuals

In addition to reviewing reports submitted by states parties, the Human Rights Committee is authorized by states which have ratified the First Optional Protocol to the Civil and Political Rights Covenant to receive communications from individuals who claim that their rights have been violated, provided they have exhausted all available domestic remedies.<sup>269</sup> In 1981, the Committee dealt with a communication from a Canadian who had been disseminating anti-semitic statements over a telephone line.<sup>270</sup>

The communication was submitted by John Ross Taylor, a Canadian citizen, and by the political party he led.<sup>271</sup> They claimed that the Canadian government had infringed their right to hold and maintain their opinions without interference under Article 19(1) of the International Covenant on Civil and Political Rights and their right to freedom of expression under Article 19(2) of the Covenant.<sup>272</sup> Taylor and the party had attempted to promote their ideas through the use of tape-recorded messages which the public could hear by dialing a telephone number.<sup>273</sup> The messages warned callers "of the dangers of international finance and international Jewry leading the world into wars, unemployment, inflation and the collapse of world values and principles."<sup>274</sup>

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267. Report of the Human Rights Committee, U.N. GAOR, 39th Sess., U.N. Doc. A/39/40, Supp. No. A (1984) at 23.

268. Human Rights Committee, *Consideration of Reports Submitted by States Parties Under Article 40 of the Covenant*, Comments of the Human Rights Committee, *United States of America*, U.N. Doc. CCPR/C/79/Add 50 (adopted 6 Apr. 1995) para. 14. The Committee did express specific, and sometimes lengthy, concerns about the following matters: use of the death penalty, ill-treatment by the police, due process for asylum-seekers, conditions of detention in both state and federal prisons, laws which punish sexual relations between adult consenting partners of the same sex, the election rather than the appointment of judges, the adverse effect of financial costs on the right to be a candidate at elections, threats to aboriginal rights, and the effect of poverty on the ability to enjoy rights in the Covenant on the basis of equality. See *id.* paras. 16-26.

269. Optional Protocol to the International Covenant on Civil and Political Rights, G.A. Res 2200 (XXI), U.N. GAOR, Supp. No. 16, at 59, U.N. Doc. A/6316 (1966) (entered into force Mar. 23, 1976).

270. Human Rights Committee, *Advocacy of Racial Hatred and Admissibility of a Communication: Case of Taylor v. Canada* [communication No. R. 24/104 (1981)], 4 Hum. Rts. L.J. 193 (1983).

271. *Id.*

272. *Id.*

273. *Id.*

274. *Id.*

The Canadian government curtailed the telephone service of the party and Taylor under a provision of the Canadian Human Rights Act which declares it a discriminatory practice to communicate telephonically "any matter that is likely to expose a person or persons to hatred or contempt by reason of the fact that the person or those persons are identifiable on the basis of a prohibited ground of discrimination."<sup>275</sup> Among the "prohibited grounds of discrimination" is discrimination based on "race, national or ethnic origin."<sup>276</sup>

Although the Committee declared the communication inadmissible under exhaustion of remedies grounds, the Committee did state:

[T]he opinions which Mr. Taylor seeks to disseminate through the telephone system clearly constitute the advocacy of racial or religious hatred which Canada has an obligation under article 20(2) of the Covenant to prohibit. In the Committee's opinion, therefore, the communication is, in respect of this claim, incompatible with the provisions of the Covenant, within the meaning of article 3 of the Optional Protocol.<sup>277</sup>

In 1984, the Human Rights Committee dealt with a communication concerning an Italian imprisoned for reorganizing a dissolved fascist party. The Committee declared the communication inadmissible on the ground that his activity was not protected under the Covenant by virtue of Article 5, which states, in language almost identical to Article 30 of the Universal Declaration of Human Rights, that:

Nothing in the present Covenant may be interpreted as implying for any State, group or person any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms recognized herein or at their limitation to a greater extent than is provided for in the present Covenant.<sup>278</sup>

The prisoner, "a right-wing political militant and publicist," according to the Committee summary, claimed that he had been condemned to prison solely for his ideas and that he had been deprived of the right to profess his political beliefs. The Committee rejected this claim, stating that the acts for which he was convicted (reorganizing a dissolved fascist party) were "removed from the protection of the Covenant by Article 5" and were "justifiably prohibited by Italian law having regard to the limitations and restrictions applicable to the rights in question under the provisions of Articles 18(3),<sup>279</sup> 19(3),<sup>280</sup> 22(2)<sup>281</sup>

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275. Human Rights Committee, *Advocacy of Racial Hatred and Admissibility of a Communication: Case of Taylor v. Canada [communication No. R. 24/104 (1981)]*, 4 HUMAN RIGHTS L.J. 194 (1983).

276. *Id.*

277. *Id.*

278. See Universal Declaration, *supra* note 3, art. 5.

279. "Freedom to manifest one's religion or beliefs may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others." (Emphasis added.)

280. This restriction on freedom of expression is quoted *supra* note 113.

281. Restrictions on freedom of association are allowed if "necessary in a democratic society in the interests of national security or public safety, public order (*ordre public*), the protection of public health or morals or the protection of the rights and freedoms of others." (Emphasis added.)



and 25<sup>282</sup> of the Covenant.” The communication was thus declared inadmissible as incompatible with the provisions of the Covenant.

#### IV.

##### CONVENTION ON THE ELIMINATION OF RACIAL DISCRIMINATION

###### *“Prevention Rather than Cure”*

The International Convention on the Elimination of All Forms of Racial Discrimination,<sup>283</sup> seeks to abolish racial discrimination<sup>284</sup> through two methods: prohibiting incitement to racial hatred, and promoting education. The former method, set forth in Article 4 of the Convention, goes further than Article 20 of the Civil and Political Rights Covenant. As characterized by the committee established to oversee implementation of the Convention, Article 4 “aims at prevention rather than cure,”<sup>285</sup> in part by using the penalty of law to deter activities aimed at promoting or inciting racism or racial discrimination.<sup>286</sup> It requires that states prohibit not only advocacy of hatred, but also “all dissemination of ideas based on racial superiority or hatred,” and the provision of “any assistance to racist activities, including financing thereof.” In addition, organizations “which promote and incite racial discrimination” are to be declared illegal and prohibited by law, and participation in such organizations or activities is to be made punishable as well.<sup>287</sup> Another difference between the Covenant and the CERD Convention is that the latter requires that incitement be made an offense, whereas Article 20 of the Covenant only requires that incitement be punishable by law, which could be met by a civil or administrative remedy in addition to criminal sanction.

Article 4 represents a compromise between those who wanted to prohibit the dissemination of ideas based on racial superiority or hatred, and those who were concerned that such a prohibition would impair freedom of expression or assembly.<sup>288</sup> The original draft of Article 4, as proposed by the Sub-Commis-

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282. Declaring that everyone has the right to participate in public affairs, elections and public service “without *unreasonable* restrictions.” (Emphasis added.)

283. CERD Convention, *supra* note 3.

284. *Id.* “Discrimination” is defined as:

any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life.

CERD Convention, *supra* note 283, art. 1(1).

285. *Positive Measures Designed to Eradicate all Incitement to, or Acts of, Racial Discrimination, Implementation of the International Convention on the Elimination of All Forms of Racial Discrimination, Article 4*, U.N. Doc. CERD/2 (1985) at 37, para. 221 [hereinafter CERD Report on Article 4].

286. *Id.* The Committee noted that the Convention aimed at “prevention rather than cure” by means of education, “particularly in Article 7, through teaching, information, education and acculturation, to combat prejudices which lead to racial discrimination and to promote understanding, tolerance and friendship among nations and racial or ethnic groups. *But it is also recognized that penal legislation is educative as well as punitive.*” (Emphasis added.)

287. CERD, *supra* note 3, art. 4(b).

288. CERD Report on Article 4, *supra* note 285, at 1, para. 2.

sion<sup>289</sup> and adopted by the U.N. Commission on Human Rights,<sup>290</sup> provided for the punishment by law of "all incitement to racial discrimination resulting in or likely to cause acts of violence."

When this language came before the U.N. General Assembly, an amendment was proposed that would require states to prohibit dissemination of ideas as well.<sup>291</sup> Among the states that objected were the United Kingdom and Colombia. The U.K. announced that it would not accept punishment for expression of ideas or incitement to discrimination unless there was incitement to violence.<sup>292</sup> Colombia stated that the resulting article 4 would be "a throwback to the past, since punishing ideas, whatever they may be, is to aid and abet tyranny, and leads to the abuse of power."<sup>293</sup> "As far as we are concerned," the Colombian representative stated, "and as far as democracy is concerned, ideas should be fought with ideas and reasons; theories must be refuted by arguments and not by the scaffold, prison, exile, confiscation or fines."<sup>294</sup>

Nigeria proposed a compromised text, prohibiting "acts of violence or incitement to such acts against any race or group of persons," as well as "all dissemination of ideas based on superiority or hatred, incitement to racial discrimination." To address the concerns regarding freedom of expression and association, however, the Nigerian proposal also included what has become known as the "due regard" clause. By virtue of that clause, parties to the Convention undertake to adopt measures to eradicate incitement to or acts of racial discrimination "with due regard to the principles embodied in the Universal Declaration of Human Rights and expressly set forth in Article 5 of this Convention."

A French representative proposed that the clause speak of "due regard" to Civil and Political Rights Covenant Articles 19 and 20 only.<sup>295</sup> The U.S. made a similar suggestion, proposing the specific reference of "due regard" to freedom of expression and of association.<sup>296</sup>

Significantly, the delegates ultimately agreed to accept the Nigerian proposal of "due regard" to the Universal Declaration as a whole.<sup>297</sup> This language incorporates all the rights in the Universal Declaration into a balancing test.

289. Report of the Sub-Commission on Prevention of Discrimination and Protection of Minorities, 16th Sess., para. 119, U.N. Doc. E/CN.4/873, also cited as U.N. Doc. E/CN.4/Sub.2/241 (1964). *Id.* n.3.

290. Report of Commission on Human Rights, UNESCOR, 37th Sess., Supp. No. 8, U.N. Doc. E/3873, also cited as U.N. Doc. E/CN.4/874, ch. XI, draft resol. I, annex (1964), cited in CERD Report on Article 4, *supra* note 285, at 1, n.3.

291. NATAN LERNER, *THE U.N. CONVENTION ON THE ELIMINATION OF ALL FORMS OF RACIAL DISCRIMINATION* 46 (1980); U.N. GAOR, 20th Sess., 1406th Plenary mtg., U.N. Doc. A/PV.1406 (1965) at 6.

292. U.N. GAOR 3d Comm., 1361st mtg., paras. 3 and 4, cited in CERD Report on Article 4, *supra* note 285, at 1 n.1.

293. U.N. GAOR, 20th Sess., 1406th Plenary mtg., U.N. Doc. A/PV.1406 (1965) at 42-43, cited in LERNER, *supra* note 291, at 47.

294. *Id.*

295. Egon Schwelb, *The International Convention on the Elimination of All Forms of Racial Discrimination*, 15 INT'L & COMP. L.Q. 996, 1025 n.140 (1966).

296. *Id.*

297. *Id.*

Arguably, then, freedom of expression is not given greater weight; it is one among many rights to be given "due regard" in fashioning legislation pursuant to Article 4. The United States representative, however, interpreted the due regard clause as "not imposing on a State party the obligation to take any action impairing the right to freedom of speech and freedom of association."<sup>298</sup> The United States joined other delegations in voting in favor of Article 4, which was adopted by a vote of 76 to one, with 14 abstentions.<sup>299</sup>

#### A. *Committee on the Elimination of Racial Discrimination*

In a major report on implementation of Article 4 published by the U.N. in 1986,<sup>300</sup> the committee of experts established by the Convention to oversee its implementation declared that states parties "cannot construe the 'due regard' clause as canceling or justifying a departure from the mandatory obligations set forth in Articles 4(a) and (b). Otherwise, there would have been no purpose in their inclusion."<sup>301</sup>

The Committee has characterized as "the extreme position" the view that implementation of Article 4 might impair or jeopardize freedom of opinion and expression.<sup>302</sup> In indicating that a balance must be struck between the obligations under Article 4 and the freedoms of expression and association, it noted that those freedoms are not absolute.<sup>303</sup> "Liberty is not licence," the Committee declared.<sup>304</sup> Sensing the need to elaborate on this concept, the Committee went on to describe existing limits on liberty, first invoking the words of former U.N. Secretary General Dag Hammarskjöld:

There is not now and never has been any such thing as unlimited liberty . . . Each man's freedom is limited by that of his neighbours . . . The very existence of a society . . . imposes certain limitations of the freedom of action of all its members, no matter how loose or disorderly the society or communities may be. Limitations . . . on the liberty of individuals are thus inevitable.<sup>305</sup>

Limits on rights, the Committee then noted, included Article 29(2) of the Universal Declaration of Human Rights, which permits rights and freedoms to be lifted "for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society."<sup>306</sup> It further pointed out

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298. U.N. GAOR 3d Comm., 20th Sess., 1318th mtg., para. 59, U.N. Doc. A/C.3/SR.1318 (1965), cited in CERD Report on Article 4, *supra* note 285, para. 4.

299. Draft International Convention on the Elimination of All Forms of Racial Discrimination, U.N. GAOR 3d Comm., 20th Sess., Agenda Item 58, para. 74, U.N. Doc. A/6181 (1965).

300. In addition to recommendations and conclusions on Article 4 of the Convention, the report contains the text of and Committee commentary on national legislation submitted by governments as fulfilling their obligations under that Article. CERD Report on Article 4, *supra* note 285.

301. Committee on the Elimination of Racial Discrimination, 18th Sess., 399th mtg., U.N. Doc. CERD/C/SR.399 (1978) at 152, para. 2.

302. CERD Report on Article 4, *supra* note 285, at 37.

303. *Id.*

304. *Id.*

305. *Id.* at 37-38 (statement originally made at the annual convention of the American Bar Association in Philadelphia, 1955).

306. *Id.* at 38.

the restrictions on freedoms permitted under Article 30 of the Universal Declaration and the limitation on freedom of expression contained in Article 19(3) of the Civil and Political Rights Covenant.<sup>307</sup>

In a remark seemingly aimed at such countries as the United States and the United Kingdom, the Committee noted that “[e]ven in societies most zealous of safeguarding the right of free speech, there are laws against defamation and sedition.”<sup>308</sup> It opined that laws against incitement to racial discrimination or hatred “are certainly no less necessary to protect public order or the rights of others.”<sup>309</sup>

Apparently not all on the Committee were in agreement on the next point, for the report states that the “majority” of the Committee was “convinced that the same applies without distinction to the dissemination of *ideas* based on racial superiority.”<sup>310</sup>

### B. *Civil or Criminal Sanction?*

The phrase “offense punishable by law” has been interpreted by the Committee to mean a criminal offense, in part because the long delays that might accompany a civil suit would not provide the punitive effect necessary to protect the community effectively from racial discrimination.<sup>311</sup> Not all states parties, however, have agreed with this interpretation. Belgium, for example, has noted that Article 4(a) does not explicitly require that the prohibited activities be made “criminal” offenses, but simply refers to “offenses punishable by law,” which can include civil law.<sup>312</sup> Other states have pointed to the utility of civil liability in certain cases such as those involving unintentional discriminatory acts, which under their penal law preclude punitive measures.<sup>313</sup>

Not all CERD Committee members agree that imprisonment is an appropriate sanction for violations of legislation enacted under Article 4(a), although most Committee members are of that view.<sup>314</sup>

### C. *The “Due Regard” Clause — Limitation on a Limitation*

The “due regard” clause of Article 4 of the CERD Convention imposes a limit on what is generally regarded as a limitation on freedom of expression. Because the focus of Article 4 is on protection from racial discrimination, the format of Article 4 has been interpreted to give greater weight to the right to

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307. *Id.* For a discussion of Universal Declaration art. 30, see *supra* text accompanying notes 102-09.

308. *Id.*

309. *Id.*

310. *Id.* (emphasis added).

311. See Preliminary Report prepared by Mr. Danilo Türk and Mr. Louis Joinet, Special Rapporteurs, *The Right to Freedom of Opinion and Expression: Current Problems of Its Realization and Measures Necessary for Its Strengthening and Promotion*, U.N. Doc. E/CN.4/Sub.2/1990/11 (18 July 1990) (citing at nn. 72 and 73: CERD Decision 3 (vii) of 4 May 1973, and 35 U.N. GAOR Supp. (No. 18), at 94-95 para. 391, U.N. Doc. A/35/18 (1980)).

312. See *id.* note 74, and sources cited therein.

313. See *id.* note 87.

314. *Id.*

freedom from racial discrimination than to the freedoms protected under the “due regard” clause.<sup>315</sup> Committee members, when faced with a conflict between the right to freedom from racial discrimination and the right to freedom of expression, tend to give greater weight to the former. In interpreting the “due regard” clause, CERD Committee members have explained that it must be read in view of the Universal Declaration as a whole.<sup>316</sup> Although Article 19 of the Universal Declaration protects freedom of expression, numerous other articles emphasize other rights and protections which, if weighed on an equal basis with freedom of expression, combine to form a strong argument that when the rights to freedom of expression and freedom from discrimination compete, freedom from discrimination should be given greater weight.<sup>317</sup>

Committee members have explicitly adopted this view. Noting that the Convention had been drafted after “bitter experience of racist acts which had led to great suffering,” members stated: “Freedom of association could no longer be equated with the principle of non-discrimination, *the very hub of the Convention*. Limitation of the right of association restricted freedom only to the extent needed to promote harmony within society. The solution lay essentially in a judicious differentiation between a right and its punishable abuse.”<sup>318</sup>

Furthermore, Article 4 requires governments to control private acts of discrimination, and it reaches both intentional and unintentional discrimination. The latter point is evident both from the definition of “discrimination” with its reference to “purpose or effect,” as well as from the United Nations training courses on the preparation of national legislation to combat racism and racial discrimination. The 1987 lecture dealing with the Convention on Racial Discrimination noted that it was “agreed that the Convention should be applicable to racial discrimination in whatever context it might occur, whether in the *public or private sector*, and whether or not such discrimination was intentional.”<sup>319</sup>

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315. Drew Mahalic & Joan Gambee Mahalic, *The Limitation Provisions of the International Convention on the Elimination of All Forms of Racial Discrimination*, 9 HUM. RTS. Q. 74, 89 (1987).

316. CERD, 9th Sess., 189th mtg., U.N. Doc. CERD/C/SR.189 (1974) at 65.

317. See, e.g. Universal Declaration, *supra* note 3, art. 1 (all people are equal in dignity and rights); *id.* art. 2 (right to be free from racial discrimination); *id.* art. 5 (protection against degrading treatment); *id.* art. 7 (protection against discrimination or incitement to discrimination); *id.* art. 8 (right to effective remedy for violation of fundamental rights); *id.* art. 28 (calling for an international order in which the rights and freedoms set forth in the Declaration can be fully realized); *id.* art. 29(2) (the exercise of rights and freedoms is subject to limitations for the purpose of, *inter alia*, respect for the rights and freedoms of others and for the collective good of society); *id.* art. 30 (no individual or group may invoke a right in the Universal Declaration for any activities aimed at the destruction of the rights and freedoms in that Declaration). For a discussion of this balance and the outcome, see Mahalic & Mahalic, *supra* note 315, at 90-93.

318. Report of the Committee on the Elimination of Racial Discrimination, U.N. GAOR, 42nd Sess., Supp. No. 18, at 69, U.N. Doc. A/42/18 (1987) (emphasis added). Of course, one always has to return to the argument of civil libertarians that placing few restrictions on freedom of expression is the most effective way of ensuring freedom from racial discrimination. Thus, discussions of whether greater weight should be given to freedom of expression or freedom from discrimination become circular arguments; the goal desired by both sides is the same, and it is simply in the means of achieving the goal where deep divisions lie.

319. U.N. Doc. E/1988/10 (8 April 1988) “Introducing Issues of Policy and Interpretation,” para. 10 (emphasis added). The training session went on to discuss obligations under Articles 2, 3, 6

Not all Committee members agree that little danger lurks in Article 4. Some have pointed out that “repressive measures might be counterproductive: An organization driven underground might be much more dangerous than one which was allowed to act openly.”<sup>320</sup> The Committee acknowledges that methods other than prohibition by law could deal effectively with racist organizations and ideas.<sup>321</sup> Committee members have observed, for example, that the Prime Minister of the Netherlands “preferred to deal with organizations which profligate racist ideas primarily by using the political strength and openness of a democracy to initiate public debate and express criticism and perhaps only then to have recourse to the law.”<sup>322</sup> The Committee noted the importance of this “kind of political guidance” in shaping the attitudes and positions which the public adopted.<sup>323</sup> The Committee then expressed hope that that action by the Prime Minister would be expanded into a wider program aimed at “bringing about desired changes in majority attitudes.”<sup>324</sup>

#### D. State Implementation of Article 4

Many states have enacted laws in conformance with Article 4 that would doubtless offend the U.S. sense of what constitutes “due regard” to free expression.<sup>325</sup> Cases enforcing those laws further illustrate a view different from that

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and 7, and discussed drafting techniques, among other things. However, Article 4 was not specifically addressed.

For the United Nations report on “Global Compilation of National Legislation Against Racial Discrimination,” see U.N. Doc. A/43/637 (27 Sept. 1988) (containing information submitted by 44 states). In an overview of the legislation and constitutional provisions submitted, the report notes that some states prohibit associations that promote racial discrimination, including Spain and Panama. Other states, including Bulgaria, France and Iran, have laws providing for punishment of individuals who “either form or participate in the activities of associations such as these.” *Id.* para. 26.

320. *Id.* at 69.

321. The Committee monitors implementation of *all* of the Convention, not just the article on which this paper has focused. Thus, the Committee also gives attention to measures taken to implement Article 7 of CERD, which urges educative measures to eradicate discrimination.

322. *Id.*

323. *Id.* at 69-70.

324. *Id.*

325. The periodic reports submitted by states parties to the CERD Convention are a good source of texts of national hate speech laws. The CERD Report on Article 4, *supra* note 285, provides the text of hate speech laws from almost two dozen countries.

Australia has reported to the CERD Committee on both federal and state legislation, pointing out, for example, that Western Australia passed an amendment to its penal code which criminalized possession or publication of material intended to incite racial hatred or harass a racial group. Consideration of Reports Submitted by States Parties Pursuant to Article 9 of the Convention, CERD, 40th Sess., U.N. Doc. CERD/194/Add.2 (1991) at 40 (adding that Victoria, Queensland and Tasmania were all considering proposing anti-incitement legislation). See also, e.g., Report of Argentina to CERD, describing law imposing a prison term of one month to three years for “anyone who participates in organizations or produces propaganda based on ideas or theories of the superiority of a race or a group of persons of a specific religion, ethnic origin or colour, which have as their objective the justification or encouragement of religious or racial discrimination.” *Consideration of Reports Submitted by States Parties under Article 9 of the Convention*, CERD, 37th Sess., U.N. Doc. CERD/C/172/Add.18 (1989) at 12. The same penalty also applies to “[a]nyone who in any way encourages or incites to persecution or hatred against a person or group of persons on grounds of race, reli-

found in U.S. jurisprudence.<sup>326</sup> However, Article 4 has had a “profound impact” on the degree of compliance with that article.<sup>327</sup> States parties have generally given greater weight to the freedom of expression in enacting legislation to implement Article 4 than they have to fulfilling every requirement of that Article.<sup>328</sup>

In its first General Recommendation, the Committee on the Elimination of Racial Discrimination noted that the reports submitted by a number of states parties did not address implementation of Article 4(a) and (b) of the Convention and urged that states parties supplement their legislation with provisions meeting the requirements of that Article.<sup>329</sup> Thirteen years later, the CERD Committee issued another General Recommendation relating to the implementation of Article 4 of the Convention<sup>330</sup> in which it noted that a number of states had yet to implement the legislation required under Article 4 of the Convention, and urged parties to do so and report that they had done so to the CERD Committee.

In explaining their failure to fully implement Article 4 (a) or (b), states have generally given one of four reasons.<sup>331</sup> One is that they need not enact legislation outlawing racist organizations as required under paragraph (b), be-

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gion, nationality or political ideas.” *Id.* Furthermore, the names of political parties may not contain “words displaying racial, class or religious antagonisms or tending to provoke them.” *Id.* at 13.

326. Periodic reports submitted by states parties under the CERD Convention inform the Committee not only of laws on the books, but also of cases prosecuted under those laws. *See, e.g., Report of Sweden to CERD in 1985 on Measures Giving Effect to Article 4*, CERD, 33d Sess., U.N. Doc. CERD/C/131/Add.2/Rev.1 (1986) at 15-16. Sweden listed cases brought against individuals for expressing contempt against ethnic or racial groups. For example, it describes the following cases considered by the courts in 1983 and 1984:

- (a) a person was fined for putting a sign on a front door which expressed contempt for a certain ethnic group;
- (b) the editor of two radio programs was sentenced to two months’ imprisonment for airing “certain pejorative expressions regarding members of a racial group” on the radio programs; the court of appeal upheld the conviction;
- (c) someone charged with anti-semitic statements in printed publications was sentenced to ten months’ imprisonment, on the ground that the publications expressed strong contempt for a certain ethnic group; the conviction was upheld on appeal;
- (d) a shopkeeper was fined for putting a sign on the front door saying “Gypsies not welcome,” with the court finding that the sign expressed contempt;
- (e) a person was sentenced to four months’ imprisonment “for statements expressing contempt for ethnic groups in local radio programmes;” conviction upheld on appeal;
- (f) the editor of a local radio program was sentenced to a 60-day fine [sic] for a statement on the program in which someone who called on the telephone expressed contempt for North Africans; conviction upheld on appeal;
- (g) someone accused of distributing an anti-semitic publication was not prosecuted before the statute of limitations ran.

327. Mahalic & Mahalic, *supra* note 315, at 97.

328. *Id.* at 93. For a discussion of hate speech cases in Scandinavian courts, *see* Henning Jakhelln, *Freedom of Speech and the Prohibition of Racial Discrimination*, 26 SCANDINAVIAN STUDIES IN L. 95 (1982).

329. *General Recommendation I, Report of the Committee on the Elimination of Racial Discrimination*, U.N. GAOR, 27th Sess., Supp. No. 18,, U.N. Doc. A/8718 (1972) at 20-22.

330. *General Recommendation VII, Report of the Committee on the Elimination of Racial Discrimination*, U.N. GAOR, 40th Sess., Supp. No. 18, U.N. Doc. A/40118 (1985) at 131.

331. This is in cases where the state has not entered a reservation to Article 4.

cause there are no organizations in that country that promote or incite racial discrimination.<sup>332</sup> The Committee typically responds by pointing out that such offenses as described in Article 4 should be declared punishable by law nonetheless, inasmuch as the provisions of Article 4 were “preventive in nature.”<sup>333</sup> Committee members also caution that “the possibility that organizations might promote or incite racial discrimination [cannot] not be ruled out, particularly in a multi-racial society.”<sup>334</sup> Simply outlawing organizations dedicated to terrorism or the violent overthrow of the government has also been declared insufficient; all organizations which promote or incite racial discrimination are to be declared illegal.<sup>335</sup>

A second reason states have offered for not implementing Article 4 (a) or (b) is that there is no racial discrimination in their country.<sup>336</sup> In reviewing a periodic report submitted by Tonga, for example, the chair of the Committee noted that it was insufficient to state that no racial discrimination existed and that there was thus no need to take measures required under Article 4, because “the measures in question sought not only to punish certain acts but also to prevent them.”<sup>337</sup> Seychelles also reported no legislation implementing Article 4 because there was no racial discrimination there. Committee members pointed

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332. Sweden has flatly stated that it does not consider it necessary to prohibit organizations aimed at carrying out acts prohibited under the Convention. *Report of the Committee on the Elimination of Racial Discrimination*, U.N. GAOR, 42nd Sess., Supp. No. 18, U.N. Doc. A/42/18 (1987) at 76-79. See also *Review of Barbados' Periodic Report, Report of the Committee on the Elimination of Racial Discrimination*, U.N. GAOR, 42nd Sess., Supp. No. 18, U.N. Doc. A/42/18 (1987) at 32-34.

Canada's legislation, which does punish certain racist speech, was deemed insufficient by Committee members because it did not meet the requirements of Article 4(b) dealing with racist organizations. *Id.* at 84. The representative of Canada, who himself referred to the “inadequacy of Canada's hate propaganda laws,” *id.* at 88, regarded the views of the Committee as sufficiently important that he said they would be explained to a Canadian court in the near future in justifying section 1 of Canada's Charter, which restricted freedom of expression. *Id.*

333. *Report of the Committee on the Elimination of Racial Discrimination*, U.N. GAOR, 42nd Sess., Supp. No. 18, U.N. Doc. A/42/18 (1987) at 69.

334. *Id.* at 32 (reviewing periodic report of Barbados, which had said there were no racist organizations there, hence no legislation prohibiting such organizations).

335. See *id.* at 136 (response of CERD Committee members to report of United Kingdom, declaring British law insufficient for this reason). Thirty states parties require that the dissemination of ideas or incitement to discrimination create violence, stir up hatred or disturb the public order before a penalty may be imposed. Mahalic & Mahalic, *supra* note 315, at 96 and nn. 90-91. Many members of the CERD Committee have indicated that the degree of harm, such as whether violence is likely to occur as a result of the dissemination of ideas or incitement to discrimination, should not be used in determining guilt. *Id.* The degree or severity of the harm may, however, be considered in setting the severity of the punishment. *Id.*

336. See, e.g., *Review of Tonga's Periodic Report*, Summary Records of the 831st to 862nd meetings, CERD, 37th Sess., U.N. Doc. CERD/C/SR.831-862 (1990) at 81-82 and *Review of Seychelles' Periodic Report, Report of the Committee on the Elimination of Racial Discrimination*, GAOR, 43d Sess., Supp. No. 18, U.N. Doc. A/43/18 (1988) at 23-24.

337. Summary Records of the 831st to 862nd meetings, CERD, 37th Sess., U.N. Doc. CERD/C/SR.831-862 (1990) at 81-82. Tonga is party to the Convention but not a member of the United Nations, because of the high cost that membership entails. *Id.*

Review of the periodic report of Tonga highlights one of the challenges for bodies charged with monitoring implementation of treaty provisions, for, in the 1989 CERD Report, the Committee noted that Tonga apparently has no Penal Code. The Committee thus inquired, in reviewing Tonga's report, what the applicable legal system was, and what measures were to be taken under that system



out states parties' duty to enact legislation nonetheless, because "even if there were no racial discrimination in a country at a given time, no one could predict that unfortunate events would not alter that situation in the future."<sup>338</sup>

A third reason given for not implementing legislation under Article 4 is that the treaty provisions are already part of domestic law, "by virtue of ratification."<sup>339</sup> The Committee has emphasized time and again, however, that Article 4 is not self-executing, and thus requires implementing legislation.<sup>340</sup> Furthermore, simply enunciating principles supported by Article 4 is insufficient. Those principles must be "matched by penal sanctions, as required under Article 4(b)."<sup>341</sup>

Moreover, enacting legislation alone is not enough. States parties also have a duty to make known the remedies provided pursuant to the Convention. Expressing surprise that, given "the present tide of xenophobia affecting the industrialized countries of Europe," only two cases involving racial discrimination had been reported by Denmark,<sup>342</sup> members inquired whether this might be because those who might suffer most from discrimination, particularly new immigrants, were ill-informed about the remedies that existed.<sup>343</sup>

It is also clear that Article 4 is aimed not only at government discrimination but at private behavior. For example, Committee members reviewing China's periodic report noted that the government had taken measures to combat Han chauvinism, but inquired whether China had enacted any legislation to punish people who discriminated against minority nationalities.<sup>344</sup>

Finally, some states have not fully implemented Article 4 because they balk at punishing the financing of racist organizations, as required under Article 4(a).<sup>345</sup> Committee members take that aspect of Article 4 as seriously as the

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to comply with Article 4. It was in this context that the Committee chair said it was insufficient to state that no legislation was necessary because no racial discrimination existed.

338. *Report of the Committee on the Elimination of Racial Discrimination*, U.N. GAOR, 43rd Sess., Supp. No. 18, U.N. Doc. A/43/18 (1988) at 23-24.

339. Representative of Cuba, responding to Committee members. She stated that Article 4 could be invoked in court because once a treaty had been published in the official gazette, it acquired the force of domestic law. She did add, however, that a provision of the penal code prohibited encouraging the incitement of others to discriminate against another person. *Report of the Committee on the Elimination of Racial Discrimination*, U.N. GAOR, 42d Sess., Supp. No. 18, U.N. Doc. A/42/18 (1987) at 45.

340. *See, e.g.*, CERD Report on Article 4, *supra* note 285, at 39, para. 242.

341. *Report of the Committee on the Elimination of Racial Discrimination*, U.N. GAOR, 42nd Sess., Supp. No. 18, U.N. Doc. A/42/18 (1987) at 125.

342. *Id.* at 57.

343. *Id.*

344. *Id.* at 73.

345. Other states report having implemented that section of the Article. Australia, for example, reported to the CERD Committee that its Racial Discrimination Act of 1975 makes it unlawful to incite or assist or promote racial discrimination, by financial assistance or otherwise. *Consideration of Reports Submitted by States Parties Pursuant to Article 9 of the Convention*, CERD, U.N. Doc. CERD/194/Add.2 (1991) at 37.

others, and urge states that have not done so, to enact laws giving full effect to that requirement.<sup>346</sup>

Though a number of states have enacted legislation punishing the dissemination of ideas based on racial superiority or hatred, the very first punishable category listed in Article 4(a),<sup>347</sup> others have not. The CERD Committee has reported that “[t]he majority of Committee is convinced” that such legislation must be enacted,<sup>348</sup> implying that the Committee is not in agreement on this issue.

An area of disagreement between a significant number of states parties and the Committee is whether intent must be a constituent element of a crime in any legislation implementing Article 4. Approximately thirty states parties to the CERD Convention do require that the defendant intend to achieve the prohibited aim before guilt may be found.<sup>349</sup> This contravenes the view expressed by the CERD Committee in its Report on Article 4, which states that it is “clear that the mere act of dissemination is penalized, despite lack of intention to commit an offence and irrespective of the consequences of the dissemination, whether they be grave or insignificant.”<sup>350</sup> Committee members have pointed out that Article 4(a) addresses racial discrimination *per se*, and nowhere mentions intent.<sup>351</sup>

As to the question whether civil sanctions would suffice in implementing Article 4, the Committee has stated that “the imposition of civil liability falls short of the requirement of Article 4 to declare certain acts or activities ‘as an offence punishable by law.’”<sup>352</sup> As for criminal sanctions, some states report that they enhance the sentence if the crime is considered aggravated by racial or religious hatred.<sup>353</sup>

346. See, e.g., *Review of Argentina’s Periodic Report, Report of the Committee on the Elimination of Racial Discrimination*, U.N. GAOR, 42nd Sess., Supp. No. 18, U.N. Doc. A/42/18 (1987) at 98, and that of Cameroon, *id.* at 153.

347. Portugal has reported to the CERD Committee that its criminal code provides penalties for disseminating “ideas inciting to racial discrimination and for encourag[ing] of racist activities through the promotion of those ideas through participation and organizations that uphold them or through support, financial or otherwise, for racist activities.” *Consideration of Reports Submitted by States Parties under Article 9 of the Convention*, CERD, U.N. Doc. CERD/C/179/Add.2 (1990) at 9-10. Portugal’s Constitution “upholds the principal of equality and non-discrimination, and prohibits associations that embrace a Fascist ideology, i.e. that adopt, promote or disseminate values such as colonialism or racism.” *Id.* at 9.

348. CERD Report on Article 4, *supra* note 285, at 38.

349. Mahalic & Mahalic, *supra* note 315, at 96 and nn. 84 and 85. See, e.g., *Review of Algeria’s Periodic Report, Report of the Committee on the Elimination of Racial Discrimination*, U.N. GAOR, 42nd Sess., Supp. No. 18, U.N. Doc. A/42/18 (1987) at 80 (indicating that “defamation of persons belonging to an ethnic or an ideological group or to a specific religion was punishable when it was intended to incite hatred”). *Id.* (emphasis added).

350. CERD Report on Article 4, *supra* note 285, at 18.

351. Mahalic & Mahalic, *supra* note 315, at 96. Additional support for this view comes from the definition of “discrimination” in Article 1(1) of the Convention, which refers to any distinction or exclusion which has the “purpose or effect” of nullifying or impairing equal enjoyment of human rights. See full definition, quoted *supra* note 284.

352. CERD Report on Article 4, *supra* note 285, at 39.

353. See, e.g., *Consideration of Reports Submitted by States Parties under Article 9 of the Convention, Fourth Periodic Reports of States Parties due in 1989, Portugal*, CERD, 38th Sess., U.N. Doc. CERD/C/179/Add.2 (1990) at 10; *Consideration of Reports Submitted by States Parties under Article 9 of the Convention, Tenth Periodic Reports of States Parties due in 1988, Argentina*,

*E. State Court Application of Article 4*

Even when a state's implementing language seems to be fairly broad, national courts have not applied Article 4 to prohibit every statement derogatory of certain racial or ethnic groups. The Supreme Court of Norway, for example, in *Re Morgenavisen*<sup>354</sup> overturned the convictions of a writer of a letter to the editor and of the newspaper that published the letter for breach of a penal code provision prohibiting publication of matter likely to expose a group of persons to hatred, persecution or contempt, which was enacted to implement the CERD Convention. The letter cast aspersions on immigrant workers in Norway, including Pakistanis, Turks and Arabs. The Supreme Court described the letter as "a somewhat disjointed mixture of exaggerated and at times meaningless statements and allegations against refugees, immigrant workers, in particular Pakistanis, and those [the writer called] extremists."<sup>355</sup> The lower court had focused on the letter's allegations of criminality among immigrant workers, but the Supreme Court, while acknowledging that "the letter may be likely to have a negative effect on the attitude of certain readers to the immigrant workers in question," nonetheless held that the letter did not "threaten" or "insult" any person or group of persons on the grounds of race, national or ethnic origin. The penal code provision, the Court said, "cannot be interpreted to give protection against every statement which may have a negative effect on attitudes to the persons covered by the provision."<sup>356</sup> The Court emphasized the "considerable" effects that an expression must have before it falls within the penal code provision. Specifically addressing the CERD Convention, the Court said that the Convention "is clearly based on situations which are different from the above case."<sup>357</sup> The CERD Convention and the penal code provision, the Court said, must be read in light of the constitutional protection of freedom of speech, and should the two conflict, greater weight should be given to freedom of speech.<sup>358</sup> The Court then proceeded to express the classic civil libertarian argument that suppression of prejudiced and biased opinion will result in such statements going underground and thus flourishing and causing greater harm than if "they are expressed in public and can be answered."<sup>359</sup> So long as there is freedom of speech, "all groups must find themselves subject to such attacks, even if they are basically biased or use misleading information."<sup>360</sup> Thus, the Court concluded, the effects of speech must be "strong" and "widespread" before it will find that "the limit of what is lawful is transgressed."<sup>361</sup>

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CERD, 37th Sess., U.N. Doc. CERD/C/172/Add.18 (1989) at 12 (indicating that homicide committed on account of racial or religious hatred results in imprisonment for life).

354. [1979] E.C.C. 139 (23 Sept. 1978) available in LEXIS.

355. *Id.* at \*5.

356. *Id.* at \*6.

357. *Id.*

358. *Id.*

359. *Id.*

360. *Id.* at \*7.

361. *Id.*

In a strongly worded dissent, one justice said he would uphold the convictions, because “the description of the Pakistanis is so gross and biased, and the appeal to human prejudices against foreigners so strong, that the minority has the right in my opinion to the protection of the law. I cannot see that legitimate considerations or freedom of expression will suffer” if the convictions are upheld.<sup>362</sup> Criticizing the sentence-by-sentence analysis by the majority, the dissenting justice wrote that “a philological or logical analysis of the individual sentences” is an inappropriate method of assessing the impact of such a letter. Pointing out that most people will read the letter quickly without subjecting it to critical analysis, he said that the meaning conveyed by the letter as a whole becomes even stronger, and that the “extreme exaggeration and unreasonable generalisations together express a strong emotional appeal which is likely to expose Pakistanis to hatred and contempt.”<sup>363</sup>

#### F. Reservations to Article 4

With 146 states parties as of 1996,<sup>364</sup> the Convention on the Elimination of All Forms of Racial Discrimination is the second most widely ratified of all human rights treaties.<sup>365</sup> Five of the countries acceded or ratified with an “understanding” emphasizing the importance of freedom of expression and assembly and stating that legislation may be adopted pursuant to Article 4 only insofar as it gives due regard to the principles embodied in the Universal Declaration.<sup>366</sup> Five other countries ratified subject to a reservation that their ratification did not imply the acceptance of obligations going beyond the limits of what was permitted in their respective constitutions.<sup>367</sup> In its report on Article 4, the Committee on the Elimination of Racial Discrimination said it remained to be seen whether any state’s constitutional provisions might inhibit the enactment of legislation implementing Article 4. The Committee also said:

It is clear, however, that the constitutional guarantees of freedom of speech and freedom of association may not be invoked as a bar to such legislation, in view of the categorical provisions of Article 29(2) of the Universal Declaration of Human Rights, and Article 19(3) and Article 21 of the International Covenant on Civil and Political Rights.<sup>368</sup>

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362. *Id.* at \*8. (Blom, J., separate opinion, voting to dismiss appeal).

363. *Id.*

364. U.N. Doc. RD/844 (27 Feb. 1996).

365. The most widely ratified as of end 1994 was the Convention on the Rights of the Child, G.A. res. 44/25, annex, 44 U.N. GAOR Supp. (No. 49) at 167, U.N. Doc. A/44/49 (1989), *entered into force* Sept. 2, 1990, with 159 states parties. U.N. Doc. RD/844 (27 Feb. 1996).

366. Austria, Belgium, France, Italy, Papua New Guinea. United Nations, HUMAN RIGHTS: STATUS OF INTERNATIONAL INSTRUMENTS, 100, 101, 105-06, 108-09 AND 112 (1987). The United States ratified the Convention in 1994 with the following reservation:

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

367. Bahamas, Barbados, Guyana, Jamaica, Nepal. *Id.* at 100, 101, 106, 107 and 111-12.

368. CERD Report on Article 4, *supra* note 285 at 36, para. 209.

The Committee takes the opportunity, when reviewing the periodic reports of states that have reserved to Article 4, to urge governments to withdraw the reservation.<sup>369</sup>

At least one country, instead of entering a reservation, has taken the view that a reservation was unnecessary because of the leeway provided in Article 2 of the Convention. Sweden has explained that it did not reserve to Article 4(b), even though it had no intention of prohibiting racist organizations as required by that section, because "each State Party has a margin of appreciation when determining the technical and legal methods for the implementation of the provisions in the Convention."<sup>370</sup> Sweden saw this margin of appreciation in Article 2(1)(d) of the Convention, which requires each State Party to bring an end to racial discrimination "by all appropriate means, including legislation as required by circumstances." In the view of the Swedish government, circumstances did not require legislation outlawing racist organizations.<sup>371</sup>

### G. What Redress Is Available Under Article 4?

If a state party to the Convention fails to comply with the requirements of Article 4, what redress can be obtained by a citizen? The article requires the enactment of legislation; it does not declare a substantive right.<sup>372</sup> The Committee has noted, however, that Article 4 requires the state party "actively to prosecute cases of alleged racial discrimination."<sup>373</sup> States do enjoy some discretion in determining whether to prosecute a case or not. "[T]he freedom to prosecute criminal offenses — commonly known as the expediency principle — is governed by considerations of public policy."<sup>374</sup> The Racial Discrimination Convention "cannot be interpreted as challenging the raison d'être of the [expediency] principle."<sup>375</sup> The Committee applied this reading of the expedi-

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369. See, e.g., CERD Review of Periodic Report of Nepal (in which Committee members expressed their disappointment that Nepal had entered a reservation to Article 4, and urged it to withdraw the reservation). *Review of Nepal's Periodic Report, Report of the Committee on the Elimination of Racial Discrimination*, U.N. GAOR, 42nd Sess., Supp. No. 18, U.N. Doc. A/42/18 (1987) at 107-09.

370. Consideration of Reports Submitted by States Parties under Article 9 of the Convention, Seventh Periodic Reports of States Parties due in 1985, *Sweden*, CERD, 37th Sess., U.N. Doc. CERD/C/131/Add.2/Rev.1 (1986) at 12.

371. *Id.* The Committee, however, takes a very different view. It insists that governments enact legislation to implement every subsection of Article 4, even when a government expresses the view that such legislation is unnecessary. See *supra* note 332.

Note that Sweden does not object to other parts of Article 4, and in fact, enacted legislation prior to ratification of the Racial Discrimination Convention on "agitation against an ethnic group" and on "unlawful discrimination." See *id.* at 12.

372. For an argument that such a provision does establish a substantive right, see *supra* text accompanying notes 291-99.

373. Communication No. 1/1984, *Yilmaz-Dogan v. The Netherlands* (Op. adopted on 10 Aug. 1988), in Annex IV of Report of CERD, U.N. GAOR, 43d Sess., Supp. No. 18, U.N. Doc. A/43/18 (1988) at 64. For an update of this case, see *L.K. v. Netherlands* (Op. adopted on 16 Mar. 1993), in Annex IV of Report of CERD, U.N. GAOR, 48th Sess., U.N. Doc. A/48/18 (1993).

374. *L.K. v. Netherlands* (Op. adopted on 16 Mar. 1993), in Annex IV of Report of CERD, U.N. GAOR, 48th Sess., at 135, quoting *Yilmaz-Dogan v. The Netherlands*, *supra* note 373, at 64.

375. *Id.*

ency principle in reviewing a communication<sup>376</sup> submitted by a Turkish national living in the Netherlands whose employment was terminated because she became pregnant.<sup>377</sup> The Committee examined whether the application by the Netherlands of the expediency principle in that case had been subjected to judicial review. Finding that it had, the Committee determined that “this mechanism of judicial review is compatible with Article 4 of the Convention.”<sup>378</sup> It thus found no violation of Article 4, although it did find a violation of Article 5.<sup>379</sup>

#### H. *The Case of Salman Rushdie: Insufficient “Regard”?*

In considering the French periodic report in 1989, several members of the Committee expressed the view that France should not have permitted publication or distribution of the controversial book by Salman Rushdie, *THE SATANIC VERSES*. Mr. Aboul-Nasr noted that Article 4(a) and (b) of the Convention outlaw activities inciting racial discrimination and hatred, and, “in his view, the book had already incited hatred in the form of demonstrations and counter-demonstrations as well as events involving mosques.”<sup>380</sup> Contrasting the French approach with that in the United Kingdom, where the Prime Minister had stated that the U.K. government did not endorse the book, although it allowed its publication in accordance with the principle of free expression, Mr. Aboul-Nasr stated that the publication in France by authorization of the French Ministry of Culture “might be interpreted as implying support for the book.”<sup>381</sup> He inquired

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376. “Communication” is the term used for cases, petitions or complaints submitted to the Committee pursuant to Article 14 of the Convention, alleging that a state party has violated one or more of the petitioner’s rights set forth in the Convention.

377. Yilmaz-Dogan v. The Netherlands, *supra* note 372. Although Netherlands law prohibits termination of employment contracts during the pregnancy of the employee, employers are permitted to submit a special request to terminate to the Cantonal Court. In submitting his request to such a court, the employer in question included the following:

When a Netherlands girl marries and has a baby, she stops working. Our foreign women workers, on the other hand, take the child to neighbours or family and at the slightest set-back disappear on sick-leave under the terms of the Sickness Act. They repeat that endlessly. Since we almost do our utmost to avoid going under, we cannot afford such goings-on.

*Id.* The Court agreed to terminate the employment contract, where upon Mrs. Yilmaz requested several prosecutors, a minister, and courts to prosecute the employer on the ground that his observations (quoted above) constituted offenses under the Netherlands’ Penal Code. Ultimately, the Court of Appeal rejected her petition, stating that it could not be determined that the defendant intended to discriminate by race or that his actions resulted in racial discrimination. The Court concluded that “the institution of criminal proceedings [was] not in the public interest or in the interest of the petitioner.” *Id.* Mrs. Yilmaz then sent a communication to the CERD Committee, asking that it find the Netherlands had violated its obligations under the Convention.

378. *Id.* at 64.

379. The Committee found that the state had not adequately protected the petitioner’s right to work under Article 5(e)(i) because in reviewing the petitioner’s claim, the state failed to take into account all the circumstances of the case, and in particular, that the deciding court never addressed the alleged discrimination in the employer’s letter which requested the termination of the petitioner’s employment contract. *Id.* at 63.

380. Summary Records of the 831st to 862nd meetings, CERD, 37th Sess., U.N. Doc. CERD/C/SR.831-862 (1990) at 11.

381. *Id.*

whether that was so, and suggested that such publication was "not conducive to racial harmony."<sup>382</sup>

The next speaker on the Committee, Mr. Shahi, agreed, noting that freedom of expression was not absolute, and that the Convention "excluded the right to propagate racist doctrines."<sup>383</sup> He added that if France had a blasphemy law, he hoped that it would provide for the one and a half million Muslims in France the opportunity for legal redress "against the insults that had been offered to their religion."<sup>384</sup> This exchange illustrates the complexity and the dangers foretold in the drafting debates of applying an anti-hatred provision.

## V.

### THE COUNCIL OF EUROPE SYSTEM

#### A. *The European Convention on Human Rights*

Unlike the International Covenant on Civil and Political Rights, the [European] Convention for the Protection of Human Rights and Fundamental Freedoms<sup>385</sup> does not require states parties to prohibit hate propaganda.<sup>386</sup> The Convention's freedom of expression provision,<sup>387</sup> however, has been interpreted to permit states to prohibit such expression. The organs to which member states have entrusted supervision of the Convention's application,<sup>388</sup> in decisions articulating strong support for the principle of freedom of expression, have had no difficulty imposing limitations on that freedom where the expression is hate speech.

As its counterpart in the Civil and Political Rights Covenant, the right to freedom of expression in the European Convention is not an absolute right.<sup>389</sup>

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382. *Id.* This remark indicates that the speaker viewed the alleged target of the book as a racial rather than religious group, which would of course be the only way to bring the situation within the competence of the CERD Committee.

As for the query posed by Mr. Aboul-Nasr, the representative of France explained that in fact no such authorization was necessary in France, and that there had been no preliminary approval by the government for the Rushdie book. He went on to indicate that Muslim associations had filed a complaint against Salman Rushdie and his publisher for incitement to racial hatred, and that the courts would decide whether passages in the book did indeed constitute insults, defamation or incitement to racial hatred, as prohibited by French law. *Id.* at 17-18.

383. *Id.*

384. *Id.* at 12.

385. Nov. 4, 1950, 213 U.N.T.S. 222, entered into force, Sept. 3, 1953; as amended by Protocol No. 3, entered into force Sept. 21, 1970, and Protocol No. 5, entered into force Dec. 21, 1971.

386. The Convention was drafted before the Civil and Political Rights Covenant and the CERD Convention. Omission of a hate speech restriction does not mean, therefore, that the drafters of the European Convention considered and then rejected such language.

387. Article 10 declares that "[e]veryone has the right to freedom of expression."

388. The European Commission on Human Rights and the European Court of Human Rights, both established by provisions of the European Convention itself.

389. In the first case invoking freedom of expression before the European Commission on Human Rights, the Commission approved the state party's restriction of that freedom. The case was brought in 1957 by the German Communist Party, which alleged that the decision of the German Constitutional Court declaring the Party unconstitutional violated Articles 9, 10 and 11 of the European Convention. App. No. 250/57. The Commission declared the petition inadmissible on the ground that Article 17 of the Convention supported the government's abolition of that Party. Decision on App. No. 250/57, in European Commission of Human Rights, Documents and Decisions

After first proclaiming the right to freedom of expression, Article 10 states that the right “carries with it duties and responsibilities, and may be subject to such . . . restrictions . . . as are necessary in a democratic society . . . for the protection of the reputation or rights of others . . . .”<sup>390</sup> This limitation, as well as the

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1955-1956-1957, at 222-225, *also cited as* [1957] 1 Y.B. Eur. Conv. on H.R. 222-225. Quoting a Communist Party document that stated a Party goal was to “establish in society a Communist Social Order by means of proletarian revolution and dictatorship of the proletariat,” the Commission determined that the applicant was engaged in an activity aimed at the destruction of the rights or liberties recognized in the Convention. *Id.* at 224 (translation by the author from the French). The Commission noted that *even if the activities used to achieve these goals were constitutional*, the ultimate goal of establishing a dictatorship was incompatible with the Convention, in that it would involve the destruction of a number of the rights and liberties in the Convention. *See* Article 17, European Convention, and *infra*, notes 395-396 and accompanying text. Thus, the Commission found that the organization and functions of the German Communist Party constituted an activity within the meaning of Article 17, and that the Party could therefore not look for support to any of the Articles in the Convention. *Id.* at 225.

Soon after the European Commission’s decision, three individuals tried to reconstitute the Communist Party in a substitute form. Two of the three applicants were acquitted because of lack of evidence, but the third was sentenced to one year’s imprisonment for failing to deliver to the authorities a printing press that belonged to the German Communist Party and for harboring an official of that party. That individual petitioned the European Commission, alleging violation of rights under the Convention. App. No. 277/57. Although the Commission declared the submission inadmissible on exhaustion of remedies grounds, it noted that the result would have been the same as the first Communist Party application that had come before it, stating that the applicant’s file “does not disclose any *prima facie* violation of the rights and freedoms set forth in the Convention.” Decision on App. No. 277/57, in European Commission of Human Rights, Documents and Decisions 1955-1956-1957, at 221, *also cited as* [1957] 1 Y.B. Eur. Conv. on H.R. 221.

In three cases submitted by persons convicted of Nazi or Neo-Nazi activities, the Commission has determined that the convictions did not violate Article 10 of the Convention without specifically addressing whether Article 17 would add additional reasons to consider the application inadmissible. *See* App. No. 134/55, Decision of May 31, 1956, [1957] 1 Y.B. Eur. Conv. on H.R. 234; Decision of July 14, 1966, [1966] 9 Y.B. Eur. Conv. on H.R. 102; and *X v. Austria*, App. No. 1747/62 [1963] 6 Y.B. Eur. Conv. 424. In a later case involving someone convicted of participation in Communist activities in West Germany, the Commission determined that a prosecution and subsequent revocation of suspended sentence did not violate Article 10 of the Convention because of the limitations on that right articulated in Article 10 itself. App. No. 2428/65, Decision of October 5, 1967, Eur. Comm’n H.R. Dec. & Rep. 1 (1968).

390. The phrase “restrictions . . . necessary in a democratic society” has been applied to permit prohibition of neo-Nazi activity. In a 1963 decision, the European Commission determined that an Austrian law providing for criminal penalty for engaging in “National-Socialist activities” did not violate the applicant’s rights to freedom of thought and expression guaranteed in Articles 9 and 10 of the European Convention. *X v. Austria*, App. No. 1747/62 [1963] 6 Y.B. Eur. Conv. on H.R. 424. The applicant had been convicted on charges of neo-Nazi activities and was sentenced to nine months’ imprisonment. The applicant alleged violations of Article 6, paras. (2) and (3)(b), Articles 9, 10 and 14 of the Convention.

The Commission rejected the applicant’s argument that the penal provision was vague and that it violated the European Convention. After finding that the applicant was “duly convicted for activities aimed at the re-introduction into Austria of National Socialistic activities,” the Commission found that those restrictions were “necessary in a democratic society in the interests of public safety and national security and for the protection of the rights and freedoms of others,” and that therefore the sentence of the applicant was justified under Article 9(2) and Article 10(2) of the European Convention. *Id.* at 444.

Having found the government’s measures to be justified under Articles 9 and 10, the Commission determined that it did not need to reach the issue whether those measures were also justified under Article 17 of the Convention. The Commission found no violation of the other Articles mentioned in the complaint, and thus declared the application inadmissible. A finding of inadmissibility is akin to failure to state a claim.



more general limitations clauses in Articles 5 and 17, have led the European Commission on Human Rights to determine that prohibitions on hate propaganda are entirely consistent with the obligations of states parties under the Convention. As a former president of the European Commission has stated in justifying limitations on rights: "Human dignity requires a minimum of freedom. But, pushed to the extreme, such freedom becomes anarchy."<sup>391</sup>

### 1. *Preparatory Work of the European Convention*<sup>392</sup>

"In drawing up this code let us not think only . . . against the tyrannic acts of those who misuse power, but also against those who misuse freedom."<sup>393</sup> These words, spoken at the first meeting of the Council of Europe's Consultative Assembly as it met to consider a draft human rights treaty, reflect the theory ultimately used as a basis for finding that suppression of hate speech does not violate freedom of expression under the European Convention.<sup>394</sup> The *travaux* do not reveal discussion of hate propaganda *per se*, but they do show that the Convention's limitations provisions were included because of concerns about potential abuse of the freedoms enumerated in the Convention.

In language presaging what would become Article 17 of the Convention, a speaker in that first meeting of the Consultative Assembly stated: "[H]uman freedom, just because it is sacred, must not become an armoury in which the enemies of freedom can find weapons which they can later use unhindered to destroy this freedom."<sup>395</sup> Echoing the same sentiments, another speaker emphasized: "We do not desire . . . to give evilly disposed persons the opportunity to create a totalitarian Government which will destroy human rights altogether."<sup>396</sup> A general limitations clause was then inserted in the draft European Convention "which corresponds to Article 29 of the United Nations Declaration. . . . [R]ights

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391. Statement of Max Sorensen, then-president of the European Commission, [1968] 11 Y.B. Eur. Conv. on H.R. 136.

392. Even though preparatory work does not constitute authoritative interpretation of a treaty under the Vienna Convention, see *supra* note 17, it nonetheless provides insight into the theoretical basis the drafters considered underlay the convention provisions.

393. EUR. CONSULT. ASS. DEB. 1st Sess. 110 (Aug. 17, 1949), in I COLLECTED EDITION OF THE *TRAVAUX PREPARATOIRES* of the European Convention on Human Rights (1975) (statement of Mr. Maccas of Greece).

394. See *infra* notes 395-402 and accompanying text.

395. EUR. CONSULT. ASS. DEB. 1st Sess. 108 (Aug. 17, 1949), in I COLLECTED EDITION OF THE *TRAVAUX PREPARATOIRES* of The European Convention on Human Rights (1975). Article 17 provides:

Nothing in this Convention may be interpreted as implying for any State, group or person any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms set forth herein or at their limitation to a greater extent than is provided for in the Convention.

Article 17 has been relied upon by the European Commission in determining that restrictions on hate speech are permissible. As discussed above, the same concern about the abuse of rights led to similar limitations provisions in the Universal Declaration and in the then draft Civil and Political Rights Covenant.

396. *Id.* at 118; Sir David Maxwell-Fyfe (United Kingdom), a rapporteur of the body that produced the first draft European Convention on Human Rights. A.H. Robertson, *Introduction to I COLLECTED EDITION OF THE TRAVAUX PREPARATOIRES* of the European Convention on Human Rights xxiv (1975).

must not infringe the legal rights of others or public order, including the safety of the community.”<sup>397</sup> The text of that clause provided:

The exercise of these rights, the enjoyment of the liberties guaranteed by the Convention, shall only be limited by requirements of laws whose sole aim is to ensure the recognition and respect for the rights and liberties of others, and by the just requirements of public morality, order and security in a democratic state.<sup>398</sup>

During early deliberations on the Convention, one representative proposed a clause authorizing states parties to restrict expression intended to incite violence. Specifically, the proponent wished to authorize “special measures to deal with those who, under pretext of expressing their opinions, have resort to violence, or else try to provoke it.”<sup>399</sup> It was decided, however, that this point was already covered in another clause of the draft convention, that quoted above.

Limitations on rights were seen as “necessary to prevent totalitarian currents from exploiting in their own interests the principles enunciated by the Convention; that is to invoke the rights of freedom in order to suppress human rights.”<sup>400</sup> Several articles delineating specific rights, including Article 10 on freedom of expression, ultimately contained limitations provisions. In addition, what became Article 17 was added by the Committee of Experts, the body appointed by the Committee of Ministers to draft a convention based upon the proposals of the Consultative Assembly. This general limitations clause was

397. I COLLECTED EDITION OF THE *TRAVAUX PRÉPARATOIRES* of The European Convention on Human Rights 118 (1975). Article 29 of the Universal Declaration states:

1. Everyone has duties to the community in which alone the free and full development of his personality is possible.
2. In the exercise of his rights and freedoms, everyone shall be subject only to such limitations as are determined by law solely for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society.
3. These rights and freedoms may in no case be exercised contrary to the purposes and principles of the United Nations.

Universal Declaration, *supra* note 3.

398. EUR. CONSULT. ASS. DEB. 1st Sess. 208 (Sept. 5, 1949) in I COLLECTED EDITION OF THE *TRAVAUX PRÉPARATOIRES* of The European Convention on Human Rights (1975). The Italian representative, Mr. Benvenuti, expressed some caution about this article, stating that “[e]very State which violates human rights and above all the rights of freedom, will always have an excuse: morality, order, public security and above all democratic rights, which are obviously only properly safeguarded by those totalitarian States which are not democracies, but ‘true democracies.’ That is a vocabulary to which we have been accustomed in the last 20 years!” *Id.* at 138. As a partial solution to this problem, he proposed that every member of the Council of Europe include in its Constitution the principles adopted by the United Nations in Article 30 of the Declaration of Human Rights, which states: “Nothing in this Declaration may be interpreted as implying for any State, group or person any right to engage in any activity or to perform any act aimed at the destruction of any of the rights and freedom set forth herein.” He added that he was “frankly surprised that such an important and fundamental principle. . . has not been introduced into our Convention.” *Id.* at 140. An article along those lines was ultimately included in the European Convention: Article 17, discussed *supra* note 395 and accompanying text.

399. EUR. CONSULT. ASS. DEB. 1st Sess. 200-01 (Sept. 5, 1949) in I COLLECTED EDITION OF THE *TRAVAUX PRÉPARATOIRES* of The European Convention on Human Rights (1975) (statement of Mr. Callias of Greece).

400. *Id.* at 136 (statement of Mr. Benvenuti of Italy). He noted that this problem was raised in Article 30 of the Universal Declaration. *Id.* For the drafting debates of Article 30, see *supra* notes 101-06 and accompanying text.

designed to protect states "against activities which threaten the preservation of a democratic rights and freedoms themselves."<sup>401</sup> The Committee explicitly modeled this provision on the corresponding article from the draft International Covenant at the United Nations.<sup>402</sup>

Thus, the drafters of the European Convention, while proclaiming certain rights, laid the groundwork for the European Commission's interpretation of Article 10 that was to allow restriction on the freedom of expression in the hate speech cases.

## 2. Hate Speech Cases Under the European Convention

To date, the European Court of Human Rights has judged only one hate speech case.<sup>403</sup> All the others brought to the Council of Europe human rights system have been dismissed by the European Commission on Human Rights.<sup>404</sup> The Court case is best understood in the context of those cases dismissed by the European Commission before ever reaching the Court.

The decisions of the European Commission indicate that although prohibitions on hate speech are not mandated by the Convention, they are entirely consistent with the obligations of states parties under that Convention.<sup>405</sup> In the few hate speech cases that have been decided under the European Convention, the analysis has centered on the content of the opinions expressed.<sup>406</sup> One case addressed by the European Commission on Human Rights involved two members of a white supremacist group, "Nederlandse Volks Unie," who claimed that their conviction violated their right to freedom of expression.<sup>407</sup> The two had been convicted under Dutch criminal law of possession, with intent to distribute, of leaflets which the Dutch court held constituted incitement to racial discrimination.<sup>408</sup> The leaflets, directed at "white Dutch people," declared that "the major part of our population has long since had enough of the presence in our country of the hundreds of thousands of Surinamese, Turks and other so-called guest workers, who, moreover, are not needed here at all," and that "[a]s soon as the Nederlandse Volks Unie has gained political power in our country, it will set

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401. Meetings of the Committees of Experts (2 Feb.- 10 Mar. 1950) in III COLLECTED EDITION OF THE *TRAVAUX PRÉPARATOIRES* of The European Convention on Human Rights 266 (1975).

402. *Id.* For a discussion of the corresponding article in the Civil and Political Rights Covenant (art. 5(1)), see *supra* text accompanying notes 243-48.

403. *Jersild v. Denmark*, 19 Eur. Ct. H.R. (ser. A) 1 (1994).

404. These cases, discussed *infra*, have been found "inadmissible" by the Commission. A finding of inadmissibility is akin to dismissal for failure to state a claim for which relief can be granted.

405. Interestingly, not only may hate speech be punished, but according to the European human rights bodies, but so may pacifist speech. One need hardly point out the irony in prosecuting someone for propaganda opposing war when Article 20(1) of the Civil and Political Rights Covenant requires states to punish propaganda for war. In a 1960 decision, the European Commission on Human Rights found that Austria's conviction and sentencing of a pacifist was in keeping with Article 10(2) of the European Convention. 3 Y.B. Eur. Conv. H.R. 318 (Appl. No. 753/60).

406. In fact, this content-based analysis is generally accepted in European jurisprudence. See, e.g., *Jakhellin*, *supra* note 328, at 114 ("The decisive factor must be the content of the opinions spread . . .") (citing 1978 NRT 1072).

407. *J. Glimmerveen and J. Hagenbeek v. Netherlands*, App. Nos. 8348/78 and 8406/78, [1980] 23 Y.B. EUR. CONV. ON H.R. 366 (Eur. Ct. H.R.).

408. *Id.* at 368.

things right and, as the first item, will remove all Surinamese, Turks and other so-called guest workers from the Netherlands.”<sup>409</sup>

Convicted of violating Dutch criminal law, the two petitioned the European Commission on Human Rights, alleging violation of their rights under the European Convention. The Commission declared the applications inadmissible, stating that the leaflets were indeed the expression of the political views of the applicants, but that they were not protected under the Convention.<sup>410</sup>

As an expression of racial discrimination, the Commission explained, the statements in the leaflets were prohibited by both the European Convention and other international instruments, in particular, the International Convention on the Elimination of all Forms of Racial Discrimination.<sup>411</sup> The Commission stated that if the Netherlands authorities allowed the applicants to proclaim their views without penalty, that “would certainly *encourage* the discrimination prohibited” by the European and Racial Discrimination conventions.<sup>412</sup>

The Commission then stated that the applicants were not protected under the freedom of expression provision, because of another provision of the Convention designed to prevent the abuse of freedoms in the Convention by groups supporting totalitarian policies, Article 17.<sup>413</sup> Article 17 states that no provision in the Convention is to be “interpreted as implying . . . any right to engage in any activity aimed at the destruction of any of the rights and freedoms set forth” in the Convention.

The Commission said that the applicants were “clearly seeking to use Article 10” as the basis for a “right to engage in activities which are . . . contrary to the text and spirit of the Convention and which right, if granted, would contribute to the destruction of the rights and freedoms” which are to be secured without discrimination.<sup>414</sup> Therefore, the applicants did not suffer a violation of their right to freedom of expression.

Another case before the Commission dealt with an applicant from Germany who had posted pamphlets on a board outside a garden fence describing the Holocaust as an “unacceptable lie and zionist swindle.”<sup>415</sup> When a court order was entered prohibiting him from repeating the statements, he filed a complaint

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409. *Id.*

410. *Id.* at 382.

411. *Id.*

412. *Id.* (emphasis added).

413. *Id.* at 350. Another important case where Article 17 was applied to find no violation of the Convention is that of Girard Lawless (Gearoid O-Laughleis), an Irish citizen who argued that his rights had been violated when he was arrested for, among other things, membership in a “subversive organization,” the Irish Republican Army (IRA). Lawless Case, [1961] 4 Y.B. Conv. on H.R. 430 (Eur. Ct. H.R.). The Commission determined that members of an organization found to be engaged in activities aimed at the destruction of the rights and freedoms in the Convention are barred by Article 17 from invoking in their own favor the freedom of association or freedom of expression provisions of the Convention. In its decision, the Commission cited the German Communist Party Case, discussed *supra* note 389.

414. *Id.* at 382.

415. *X v. Federal Republic of Germany*, App. No. 9235/81, 29 Eur. Comm’n H.R. Dec. & Rep. 194 (1982).

with the European Commission on Human Rights, claiming that the order violated his right to freedom of expression.

Finding that the pamphlets were defamatory and insulting to Jews, the European Commission stated that prohibition of the pamphlets was necessary to protect the reputation of others, as provided in Article 10(2) of the Convention. The Commission stated that “the racist pamphlets could properly be regarded as a defamatory attack on each individual member of the Jewish community.”<sup>416</sup>

One rationale for the Commission’s decision was that the pamphlets failed to observe that a democratic society rests on the principles of tolerance and broadmindedness. The Commission added that “[t]he protection of these principles may be especially indicated vis-à-vis groups which have historically suffered from discrimination.”

### 3. *The European Court of Human Rights*

Although the European Commission on Human Rights declared inadmissible several hate speech cases, it did find a violation of freedom of expression in *Jersild v. Denmark*, in which freedom of the press was also implicated.<sup>417</sup> In 1994, the European Court of Human Rights delivered a historic judgment in the case, the first hate speech case to reach the Court. The applicant in that case, Jens Olaf Jersild, was a Danish television journalist who had been convicted and sentenced to a fine for aiding and abetting the dissemination of racist statements. In a television documentary on a racist youth group, the self-styled “Greenjackets,” Mr. Jersild included several minutes of an interview he had conducted with three members of the group in which they made some extraordinarily offensive statements about immigrants and ethnic groups in Denmark.<sup>418</sup> After the broadcast, a bishop complained to the Minister of Justice. Criminal proceedings were instituted against the three youths for violating the anti-hate speech provision of

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416. *Id.*

417. *Jersild v. Denmark*, 19 Eur. Ct. H.R. (ser. A) 1 (1994).

418. It is one thing to read a characterization of a statement as offensive and racist, and quite another to read the statements themselves. The statements in question described foreigners in general and black people in particular as being subhuman: “the niggers . . . are not human beings. . . . Just take a picture of a gorilla . . . and then look at a nigger, it’s the same body structure . . . A nigger is not a human being, it’s an animal, that goes for all the other foreign workers as well, Turks, Yugoslavs and whatever they are called.” (Quotes from Greenjackets in Jersild’s interview, as quoted in the European Court of Human Rights judgment in *Jersild*). I stated in the *amicus* brief I wrote for Human Rights Watch in this case that just telling the public that these youths made “racist comments” could lead people to view their actions as “youthful pranks,” and not realize just what seriously troubling beliefs motivated their activities. In a less than oblique reference to relatively recent European history, the brief stated: “Only by informing people just what the youths’ views are the public not have a basis for saying: But we did not know.”

the Danish Penal Code<sup>419</sup> and against the journalist for aiding and abetting the violation of that provision.<sup>420</sup>

All the defendants were convicted at trial.<sup>421</sup> The Greenjackets did not appeal their conviction; the journalist appealed and lost before both the intermediate appellate court and the Danish Supreme Court.<sup>422</sup> Having exhausted domestic remedies, Mr. Jersild filed an application with the European Commission on Human Rights, alleging that by convicting him Denmark had violated its obligations under the freedom of expression provision of the European Convention on Human Rights, Article 10.<sup>423</sup> By a vote of 12 to 4, the Commission agreed that there had been a violation of Article 10.<sup>424</sup>

The European Commission having expressed its views, the case then went to the European Court of Human Rights for judgment.<sup>425</sup> Up to that point, the European Commission had dismissed every hate speech case that had come before it, on the ground that restrictions on hate speech are permissible limitations on the right to freedom of expression under Article 10 of the European Convention.<sup>426</sup> That jurisprudence still left room to argue, however, that a state violates its Article 10 obligations if it prosecutes a television journalist for broadcasting racist statements.

On September 23, 1994, the Court delivered its judgment, finding a violation of Article 10 by vote of twelve to seven.<sup>427</sup> First, the Court briefly noted that the conviction and sentence met the first two requirements of a limitation of freedom of expression: it was undisputed that the interference with that freedom was prescribed by law, being based on Article 266 of the Penal Code, and that the interference pursued a legitimate aim under Article 10(2), the "protection of the reputation or rights of others."<sup>428</sup> The focus of the Court's judgment, therefore, addressed whether the measures met the third requirement of a limitation on expression, that it be "necessary in a democratic society."<sup>429</sup>

419. At the time, Article 266(b) of the Danish Penal Code provided:

Any person who, publicly or with the intention of disseminating it to a wide circle of people, makes a statement, or other communication, threatening, insulting or degrading a group of persons on account of their race, colour, national or ethnic origin or belief shall be liable to a fine or to simple detention or to imprisonment for a term not exceeding two years.

420. Specifically, Jersild was charged with violation of Article 266(b) in conjunction with Article 23, which makes criminal offenses applicable to anyone who "has assisted in the commission of the offence by instigation, advice or action." That Article further provides that "punishment may be reduced if the person in question only intended to give assistance of minor importance or to strengthen an intent already resolved. . . ."

421. *Jersild v. Denmark*, 19 Eur. Ct. H.R. at 8.

422. *Id.* at 9.

423. *Id.* at 13.

424. *Id.*

425. When cases go to the Court, it is not that the Commission decision is being appealed; rather, the Commission in a sense acts as fact-gatherer, and expresses its "views." The case then goes for decision either to the Court or to the Committee of Ministers, depending on the nature of the case and other factors.

426. See *Glimmerveen and X. v. Germany*, *supra* notes 407-16 and accompanying text.

427. *Jersild v. Denmark*, 19 Eur. Ct. H.R. at 1.

428. *Id.* at 15.

429. *Id.* at 15-18.

One argument among several the applicant had made was that the measures could hardly be “necessary” because, after Mr. Jersild’s conviction, Denmark had changed its media law so that, subject to exceptions inapplicable here, only the person who makes the statement is liable.<sup>430</sup> The government, however, disputed whether that change in the law would preclude the prosecution of Mr. Jersild.<sup>431</sup> The government argued, among other things, that by editing the interviews as he had done, the journalist had created a sensationalist rather than informative program, and that he had failed to counter the racist views of the interviewees, claiming that it was “too subtle to assume that viewers would not take the remarks at their face value.”<sup>432</sup>

The Court responded first by reiterating that “freedom of expression constitutes one of the essential foundations of a democratic society,” and that in playing its vital role of “public watchdog” the press must be free to impart information and ideas of public interest, which the public has a right to receive.<sup>433</sup>

Because of the “vital importance” of combatting racial discrimination, the Court stated, the object and purpose of the U.N. Convention on Racial Discrimination carry “great weight” in determining whether the applicant’s conviction was “necessary” within the meaning of Article 10(2).<sup>434</sup> In conducting this evaluation, an “important factor” would be whether the purpose of the program in question appeared to be the propagation of racist views and ideas.<sup>435</sup> Thus, the intent in disseminating the racist statements was important.

It was indeed “relevant,” the Court stated, that the applicant had initiated the interviews and that without his involvement, the racist remarks would not have been disseminated to a wide circle of people.<sup>436</sup> However, the context in which the interview was presented made it clear that the program “clearly sought - by means of an interview - to expose, analyse and explain this particular group of youths” and thus dealt with a matter “of great public concern.”<sup>437</sup> It was for the media, not a court, to determine the news or information value of a program.<sup>438</sup> As for the susceptibility of the audience, a concern expressed by a Commission dissenter and by the government, the Court noted that the item broadcast was part of a serious Danish news programme “intended for a well-informed audience.”<sup>439</sup>

The Court was not persuaded by the argument that the broadcast was presented with no counterbalancing views.<sup>440</sup> The Court did *not* say that a jour-

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430. *Id.* at 24.

431. *Id.*

432. *Id.*

433. *Id.* at 25-26 (citing *The Observer and The Guardian v. United Kingdom* [The Spycatcher case], Judgment of 26 Nov. 1991, 216 Eur. Ct. H.R. (ser. A) (1991)).

434. *Id.* at 25.

435. *Id.* at 26.

436. *Id.* at 26-27.

437. *Id.* at 27.

438. *Id.*

439. *Id.*

440. *Id.* at 27.

nalist has no duty to present counterbalancing views; it simply noted that the journalist did in fact present other views, both in the introduction to the program as well as by various statements he made during the interview.<sup>441</sup> The Court was thus satisfied that he had disassociated himself from the interviewees' views.<sup>442</sup>

In language strongly protective of freedom of the press, the Court rejected the government's point that the limited nature of the fine rendered the sanction acceptable under the Convention:

News reporting based on interviews, whether edited or not, constitutes one of the most important means whereby the press is able to play its vital role of "public watchdog." The punishment of a journalist for assisting in the dissemination of statements made by another person in an interview would seriously hamper the contribution of the press to discussion of matters of public interest and should not be envisaged unless there are particularly strong reasons for doing so.<sup>443</sup>

The limited nature of the fine simply was not relevant, the Court stated. Instead, "what matters is that the journalist was convicted."<sup>444</sup>

The Court therefore concluded that the limitation on the applicant's freedom of expression was not "necessary in a democratic society;" in particular, the means were disproportionate to the aim of protecting "the reputation or rights of others."<sup>445</sup> Thus, the measures constituted a breach of Article 10 of the Convention.<sup>446</sup>

441. For example, by referring to them as members of "a group of extremist youths," by referring to the criminal records of some of them, and by rebutting some of the racist statements they made. *Id.*

442. *Jersild v. Denmark*, 19 Eur. Ct. H.R. at 27.

443. *Id.* at 28.

444. *Id.*

445. *Id.*

446. *Id.* Three dissenting opinions were filed in the *Jersild* case. *Id.* at 30-33. The dissent filed by the President of the Court, Judge Ryssdal, and two other judges, criticized the majority for giving "much more weight to the freedom of the journalist than to the protection of those who have to suffer from racist hatred." *Id.* at 31. Because the interview was edited down to the most crude remarks, it was "absolutely necessary" to include in the broadcast "a clear statement of disapproval." *Id.* A journalist's good intentions are not enough, these judges stated. Moreover, "what must be the feelings of those whose human dignity has been attacked, or even denied, by the Greenjackets?" *Id.* Although the CERD Convention "probably does not require the punishment" of the journalist, it does support the contention that the media have an obligation "to take a clear stand" regarding racial discrimination and hatred. *Id.* (emphasis added). The Danish courts had given considerable thought to the conflicting rights involved here and made their decision. It is not for the European Court, the judges contended, "to substitute its own balancing" of the interests involved for that of the Danish Supreme Court. *Id.*

A second dissent, filed by three other judges, asserted that the broadcast amounted to "incitement to contempt" of foreigners, and of black people in particular. *Id.* at 32. Freedom of expression should not "extend to encouraging racial hatred, contempt for races other than" one's own, and to think that the broadcast would "provoke a healthy reaction of rejection" was unrealistically optimistic, for in the existing economic climate, people are "only too willing to seek scapegoats who are held up to them without any real word of caution." *Id.* It was critically important to these dissenting judges that the journalist "made no real attempt to challenge the points of view he was presenting." *Id.*

Two of these three judges filed a supplementary dissent to the compensation awarded the applicant, stating that they were "so firmly convinced that the applicant was wrong not to react" against the racist remarks that to award him any compensation was "wholly unjustified." *Id.* at 33.



The judgment demonstrates that the European Court does see certain limits on states' authority to restrict hate speech. As for the law regarding the relation between Article 4 of the CERD Convention and Article 10 of the European Convention, even the dissenters conceded that Article 4 "probably does not require" conviction of the journalist.<sup>447</sup>

#### 4. *Additional Council of Europe Measures to Combat Fascism and Racism*

In addition to targeting racial and other hatred via the European Convention, the Council of Europe has taken additional measures aimed at combatting such hatred. One such measure was a model anti-hate speech law proposed by the Council's Consultative Assembly in 1966. The model law was sent to the Committee of Ministers, a Council of Europe body consisting of member states' foreign ministers or their representatives, as part of a Recommendation regarding "measures to be taken against incitement to racial, national and religious hatred."<sup>448</sup> The Recommendation proposed that the Committee of Ministers urge governments to enact legislation against incitement to racial, national and religious hatred, review the scope of any existing laws to that effect, ensure their rigorous enforcement, and finally, transmit to member governments the text of a model law that the Assembly had drawn up in this regard.<sup>449</sup>

The Committee of Ministers, after discussing the Assembly's recommendation, indicated that it would be helpful to have a study examining whether existing national legislation was sufficient, whether the non-discrimination clause of the European Convention (Article 14) already was adequate to cover the situation, whether the United Nations Convention on Racial Discrimination was ad-

447. *Id.*

448. *Id.*

449. [1966] 9 Y.B. Eur. Conv. H.R. 66 at 427. The text of the model law is as follows:

##### Article I

A person shall be guilty of an offence:

- (a) if he publicly calls for or incites to hatred, intolerance, discrimination or violence against persons or groups of persons distinguished by colour, race, ethnic or national origin, or religion;
- (b) if he insults persons or groups of persons, holds them up to contempt or slanders them on account of the distinguishing particularities mentioned in paragraph (a).

##### Article 2

(a) A person shall be guilty of an offence if he publishes or distributes written matter which is aimed at achieving the effects referred to in Article I.

- (b) "Written matter" includes any writing, sign or visible representation.

##### Article 3

A person guilty of an offence under Article I or Article 2 shall be liable . . .

##### Article 4

Organisations whose aims or activities fall within the scope of Articles 1 and 2 above shall be prosecuted and/or prohibited.

##### Article 5

(a) A person shall be guilty of an offence if he publicly uses insignia of organisations prohibited under Article 4 above.

- (b) "Insignia" are, in particular, flags, badges, uniforms, slogans and forms of salutes.

##### Article 6

A person guilty of an offence under Article 5(a) shall be liable . . .

*Id.* at 66-68. Consultative Assembly, *Recommendation 453 (1966)*.

equate and effective, and whether the measures proposed in the Recommendation would provide additional useful safeguards.<sup>450</sup>

Another body of the Council of Europe, the Parliamentary Assembly, passed a resolution in 1980 urging governments “to attack the root causes of the ills from which such [hate] propaganda springs by insuring access for all to justice, to the right to work, and to culture and education, which should in particular include adequate teaching of modern history, so that young people will be better prepared to promote democracy.”<sup>451</sup> The Resolution also called upon the Committee of Ministers to urge member governments to take “more positive and appropriate actions against subversive, fascist and Nazi groups.”<sup>452</sup>

The Committee of Ministers has also passed several resolutions on the need to stem racism and intolerance.<sup>453</sup> In one such resolution, the Ministers noted just what the rising tide of intolerance represents: a “threat to democracy.”<sup>454</sup> In their 1981 “Declaration regarding Intolerance — A Threat to Democracy,” the Ministers announced their commitment to “reinforce efforts . . . to prevent the spread of totalitarian and racist ideologies and to act effectively against all forms of intolerance.”<sup>455</sup> Attacking the spread of racist ideas does not constitute “intolerance,” in their view, yet there is no question of the importance that the Ministers attach to freedom of expression. Their 1982 “Declaration on the Freedom of Expression and Information” states that the freedom of expression is a “fundamental element” of “the principles of the genuine democracy, the rule of law and respect for human rights,” and “the principles of freedom of expression and information [are] a basic element of democratic and pluralist society.”<sup>456</sup> The Ministers’ concept of pluralism, however, excludes tolerance for racist views.

The Ministers articulated a traditional rationale supporting freedom of expression when they indicated that states, in order to fulfill their duty to safeguard freedom of expression, should adopt policies “to foster as much as possible a variety of media and a plurality of information sources, thereby allowing a plu-

450. *Id.* at 74. Although the Model Law was proposed in 1966, two authors writing in 1983 noted that there was “no evidence that States ha[d] utilized the text in drafting their national laws on the subject.”

451. Resolution 743(9)(a), [1980] 23 Y.B. Eur. Conv. H.R. 66 (Assembly of the Council of Europe).

452. Resolution 743 ¶ 10, [1980] 23 Y.B. Eur. Conv. H.R. 68. The Resolution further urges governments which have not already done so to enact anti-discrimination legislation in accordance with Article 2(1)(d) of the CERD Convention.

453. One such resolution, adopted by the Committee of Ministers in 1968, addresses “measures to be taken against incitement to racial, national and religious hatred.” In it the Ministers urge all governments that have not yet done so to ratify the CERD Convention and urge progress on the draft Convention on the Elimination of Religious Intolerance and Discrimination. Resolution 30, [1968] 11 Y.B. Eur. Conv. H.R. 94.

454. Declaration Regarding Intolerance ¶ 9(VI), [1981] 24 Y.B. Eur. Conv. H.R. 98.

455. *Id.* ¶ 9(IV)(i).

456. Declaration ¶ 8(I), [1982] Y.B. Eur. Conv. H.R. at 25-26 (Council of Europe).

rality of ideas and opinions.”<sup>457</sup> As indicated above, however, states are not to foster racist ideas but should instead prevent such ideas from spreading.<sup>458</sup>

The Committee’s resolutions frequently refer to the need to address the root causes of racism and intolerance, though few specific measures are suggested. The Ministers did note in the 1981 Declaration Regarding Intolerance, for example, that “the best way” of countering intolerance is to “preserve and consolidate democratic institutions, to foster citizens’ confidence in those institutions and to encourage them to take an active part in their operation.”<sup>459</sup> Furthermore, they were convinced of “the vital part played by education and information in any action against intolerance, whose origin frequently lies in ignorance, source of incomprehension, hatred and even violence.”<sup>460</sup> Thus, they did include one specific measure which states were to pursue in their efforts against racist ideologies: that of human rights education, and the creation in schools “of a climate of active understanding of and respect for the qualities and culture of others.”<sup>461</sup>

### B. *British CLU Draft Charter*

The theories reflected in the interpretation of the European Convention as well as in the International Covenant are evident in the work of civil libertarians in England. A draft Bill of Rights has been proposed by Liberty, the British counterpart to the American Civil Liberties Union (ACLU). Liberty urges that the article declaring the right to freedom of expression also specify that that right is subject to limits necessary “to prevent incitement to racial hatred.”<sup>462</sup> Article 20(2) of the Civil and Political Rights Covenant is cited as one of the sources of the “Incitement to Racial Hatred” clause. In the commentary following the draft freedom of expression article, Liberty states that the “Incitement to Racial Hatred” clause represents a “widely-accepted boundary to this right in human rights discourse.”<sup>463</sup> This exemplifies the degree to which hate speech restrictions are accepted by civil libertarians outside the United States.

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457. *Id.* ¶ 6.

458. *See supra* text accompanying note 432.

459. Declaration Regarding Intolerance ¶ 8, [1981] 24 Y.B. Eur. Conv. H.R. 100.

460. *Id.* ¶ 9. The emphasis on educational measures to prevent racial hatred also appears in the CERD Convention, *supra* note 3, art. 7. *See supra* note 286.

461. *Id.* ¶ 9(IV)(iii).

462. NATIONAL COUNCIL FOR CIVIL LIBERTIES, A PEOPLE’S CHARTER: LIBERTY’S BILL OF RIGHTS, A CONSULTATION DOCUMENT art. 10(1) (1991) (copy on file with author). The full limitations clause reads that the right to freedom of expression is “subject only to such limits as are prescribed by law, strictly necessary and demonstrably justified in a democratic society for the protection of individuals from imminent physical harm or to prevent incitement to racial hatred, and for the protection of the rights and freedoms of others as laid down in the Bill.”

463. Liberty also notes that current British incitement legislation covers hatred on the basis of national origin, race and color (“to include Jews, Sikhs and Gypsies for example”), but not religion. They indicate that the Commission for Racial Equality has proposed extending the legislation to cover religious groups, and that British blasphemy law could be challenged on discrimination grounds because it covers only the Christian religion. *Id.*

### C. The European Approach — An Overview of Issues

#### 1. Limiting and Balancing Rights

Hate speech cases involve a balance of rights — the right to freedom of expression by the speaker versus the right to be free from defamatory remarks and from discrimination on the part of the target of the speaker's hatred. In general, when the European Court and European Commission have balanced competing interests protected by the Convention, the balance has been struck in favor of the rights of the individual rather than the claims of the government in a high proportion of the cases before the Court.<sup>464</sup> Francis Jacobs has noted that this is "all the more striking in view of the 'margin of appreciation' which the Court leaves to the state."<sup>465</sup> Taking an approach radically different from that used by the U.S. Supreme Court, he concludes that it is "preferable, in a system where express limitation clauses are laid down, that the balancing exercise should be carried out in terms of the limitation clause itself, and not in terms of the right guaranteed."<sup>466</sup> An interference with a right should be treated "as *prima facie* unlawful unless its lawfulness can be established" under the conditions required by the limitation clause in question. This approach, he believes, is likely to lead to a more effective, as well as better articulated, protection of human rights.<sup>467</sup>

This approach certainly explains the very different result in European hate speech cases from those in the U.S., because the increased weight given in Europe to the interests of society in general, usually characterized as legitimate state interests, is justified by the specific conditions in the limitation clause in the European Convention.

This difference in emphasis, or in weight given to competing interests, is evident in much writing on freedom of expression by non-Americans.<sup>468</sup> It is not that freedom of expression is given short shrift. "The freedom to express opinions must be strongly protected," therefore "any limitation must be well-founded."<sup>469</sup> With specific respect to hate speech, Henning Jakhelln writes: "it

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464. Francis G. Jacobs, *The "Limitation Clauses" of the European Convention on Human Rights*, in *LIMITATION OF HUMAN RIGHTS*, *supra* note 28, at 39.

465. *Id.*

466. *Id.*

467. *Id.*

468. See, e.g., Jakhelln, *supra* note 328, at 102-03. Although Europe has not followed the path of the United States in prohibiting restrictions on racist speech, some have looked with admiration at another aspect of how freedom of expression flourishes in the U.S. in a way that it has not or would not in Europe. Alluding to public reaction in the U.S. to the My Lai massacre, then-President of the European Court of Human Rights, M. Rollin, noted that "massive public opinion has been greatly upset by acts committed by members of the American Armed Forces in Viet Nam. . . . [H]undreds of thousands of Americans have manifested their determination that these acts shall be thoroughly investigated and have demanded — and obtained — that the trials take place in public, and that the sentences passed, if any, should be severe . . ." He commented: "there are many countries in Europe where it would be extremely difficult to mobilise public opinion in this way and to be allowed by the authorities to denounce publicly, in the middle of a war, members of the forces engaged in it and the way in which the war is being carried on, even the very fact of our intervention." [1970] 13 Y.B. Eur. Conv. H.R. 100-02.

469. Jakhelln, *supra* note 326, at 102.

is clear that increased tolerance and humanism, and the suppression of racial prejudice and the underlying attitudes, can only be achieved by way of information and persuasion."<sup>470</sup> Yet the same author follows that statement with one demonstrating the belief that prohibitions on hate speech are unquestionably well-founded, because of the effect of such expression.

A too lenient attitude toward public utterances about, e.g., foreign workers, may contribute to creating and strengthening the impression that different standards of behavior apply in relation to them. This may have most serious consequences for an individual belonging to another ethnic group. The fact that such attitudes may be built up, with disastrous results for entire minority groups of a population, is clearly and sadly proved in history. *There is little reason to protect the unscrupulous, insulting exercise of the freedom to express opinions that may endanger the life, health or welfare of such people.* Here, other interests must be considered paramount.<sup>471</sup>

## 2. Government Control of Private Actors

The views of the European Commission on Human Rights and those of other Council of Europe bodies indicate no reluctance to view individual rights enforceable not only as against a state but also as against another individual. It is well-settled that the European Convention provides protection not only from certain government action (e.g. torture, arbitrary arrest, etc.), but also from certain actions by private individuals. This is evident in the findings that governments may prohibit expression that targets individuals or groups, as well as in cases involving other rights.<sup>472</sup> In a case involving the right to peaceful assembly, the European Court of Human Rights stated: "A purely negative conception of freedom of peaceful assembly, whereby it was reduced to a mere duty on the part of the state not to interfere, would not be compatible with the object and purpose of Article 11, which sometimes requires positive measures to be taken, even in the sphere of relations between individuals if need be."<sup>473</sup> The Consultative Assembly has articulated the same concept with respect to the right to privacy:

The right to privacy afforded by Article 8 of the Convention on Human Rights should not only protect an individual against interference by public authorities, but also against interference by private persons or institutions, including the mass media. National legislation should comprise provisions guaranteeing this protection.<sup>474</sup>

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470. *Id.*

471. *Id.* at 102-03 (emphasis added). The author also proposes that factors in determining whether to limit speech should include "whether the group exposed to criticism is small or large, big or strong, etc.," for the larger and stronger the group, the more easily it may defend itself. *Id.*

472. See, e.g., Plattform "Ärzte für das Leben" v. Austria, Judgment of 21 June 1988, 139 Eur. Ct. H.R. (Ser. A) (1988) (ruling that the government had a duty to take measures to protect protesters' right under Article 11 to peacefully assemble, in case where a demonstration had been violently disrupted by counter-demonstrators).

473. *Id.*

474. Declaration on "mass communication media and human rights," [1970] 13 Y.B. Eur. Conv. H.R. 66.

An additional source of a government obligation to control certain acts by private individuals lies in the non-discrimination clause of European Convention, Article 14. It provides that:

The enjoyment of rights and freedoms set forth in this Convention shall be secured without discrimination on any grounds such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.

The clause "shall be secured" refers to a government obligation to secure the enjoyment of these rights, which necessarily entails control of private actors.<sup>475</sup>

## VI.

### THE INTER-AMERICAN HUMAN RIGHTS SYSTEM

#### A. *The American Convention on Human Rights*

The American Convention on Human Rights contains a hate propaganda provision similar to that of Article 20(2) of the International Covenant on Civil and Political Rights, but arguably less broad. The final paragraph of the Convention's freedom of expression article declares that propaganda for war and advocacy of hatred that constitute incitements to violence or other similar illegal action shall be considered an offense punishable by law.<sup>476</sup> This limitation on a freedom appears in the very article that proclaims that "everyone has the right to freedom of thought and expression," which includes the "freedom to seek, receive, and impart information and ideas of all kinds . . ." The article provides in general for limitations "established by law to the extent necessary to ensure . . . respect for the rights or reputations of others or the protection of national security, public order, or public health or morals."<sup>477</sup> Despite this general limitation, the drafters saw fit to include the very specific limitation contained in paragraph 5, just as the drafters of Article 20 of the Civil and Political Rights Covenant thought that specific language was necessary despite the general limitations on freedom of expression included in Article 19.<sup>478</sup>

The history of Article 13(5) is intriguing because the final language was drafted by the United States, which worked energetically to gain support for it

475. For further discussion of this concept, see *infra* text accompanying notes 506-11.

476. The full text of Art. 13(5) reads:

Any propaganda for war and any advocacy of national, racial, or religious hatred that constitute incitements to lawless violence or to any other similar illegal action against any person or group of persons on any grounds including those of race, color, religion, language, or national origin shall be considered as offenses punishable by law.

American Convention, *supra* note 3.

477. This language (from para. 2) allows no prior censorship, but para. 4 allows prior censorship "for the sole purpose of regulating access to [public entertainments] for the moral protection of childhood and adolescence."

A general limitation clause also appears in the Convention's article 15 on the right of peaceful assembly (permitting only those restrictions which are "necessary in a democratic society in the interest of national security, public safety or public order, or to protect public health or morals or the rights or freedoms of others"). Nearly identical language limits the freedom of association (Article 16), and the freedom of movement (Article 22).

478. See *supra* text accompanying notes 117-19.

from the other delegations.<sup>479</sup> The U.S. delegation's report on the conference that adopted the American Convention stated that "[t]he principal provision of the Article that could cause problems" was not the advocacy of hatred provision, but instead, was "the rather broad prohibition of prior censorship in paragraph 2."<sup>480</sup> How did this happen?

The draft American Convention, prepared by the Inter-American Council of Jurists (IACJ), contained an article on freedom of expression<sup>481</sup> consisting of four paragraphs, none of which addressed advocacy of hatred or war propaganda. The Chilean Government then submitted a draft which contained not only a general limitation on the freedom of expression similar to that found in the International Covenant on Civil and Political Rights, but also a separate article closely tracking the language of Article 20(2) of that Covenant, prohibiting war propaganda as well as "[e]very panegyric of national, racial, or religious hatred that constitutes an incitement to discrimination, hostility, or violence

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According to the Inter-American Commission on Human Rights, this paragraph was included in order "to coordinate the Preliminary Draft with the Covenant, inasmuch as the IACJ Draft did not include a prohibition of 'propaganda for war' or 'advocacy of national, racial, or religious hatred.'"<sup>483</sup> When paragraph 5 came up for consideration by the member states of the Organization of American States, debate initially turned more on technical precision than on substance.<sup>484</sup> The hate speech provision was not controversial until the United States delegation spoke.

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479. See *infra* text accompanying notes 492-93.

480. Report of the United States Delegation to the Inter-American Conference on Protection of Human Rights, San Jose, Costa Rica, Nov. 9-22, 1969, in 3 HUMAN RIGHTS: THE INTER-AMERICAN SYSTEM [hereinafter INTER-AMERICAN SYSTEM], Part II: The Legislative History of the American Convention on Human Rights, ch. III, Booklet 15 (Aug. 1982) (Thomas Buergeth, ed.) at 27.

481. See Draft Convention on Human Rights prepared by the Inter-American Council of Jurists, OAS Doc. 128 (English) Rev. 8 Sept. 1959, in *id.*, at Part II, Appendix, Booklet 16.1 (June 1984).

The draft was based on the European Convention on Human Rights (1950) and on the two draft Covenants on Human Rights being prepared by the U.N. Commission on Human Rights during that time. See 1 INTER-AMERICAN SYSTEM, *supra* note 480, Part I, Ch. V, Booklet 6 at 166-67 (Res. XXIV, Second Special Inter-American Conference (1965)).

482. Draft Convention on Human Rights presented to the Second Special Inter-American Conference by the Government of Chile, OAS Official Record OEA/Ser.E/XIII.I (1965) in 3 INTER-AMERICAN SYSTEM, *supra* note 480, Part II, Appendix, Booklet 16.1 (June 1984), at 31-89. Paragraph 2 of the freedom of expression clause provided that exercise of the right of freedom of expression "shall be subject to broader responsibilities" which were to be expressly established by law and be necessary in order to ensure "respect for the rights or reputations of others, or the protection of national security, public order, or public health or morals." *Id.* In observing the differences in language between this article and Civil and Political Rights Covenant Article 20(2), keep in mind that the Covenant had not yet been adopted but was still in the drafting stage as well.

483. Annotations on the Draft Inter-American Convention on Protection of Human Rights (Documents prepared by the Secretariat of the Inter-American Commission on Human Rights); previously published by the IACHR, OEA/Ser.L/V/II.19/Doc. 53, (21 March 1969) in 2 INTER-AMERICAN SYSTEM, *supra* note 480, Part II, ch.II, Booklet 13 (Aug. 1982), Doc. 12, at 46.

484. See generally, Report of the Rapporteur of Committee I (19 Nov. 1969), in 2 INTER-AMERICAN SYSTEM, *supra* note 480, Part I, ch. IX, Booklet 10 (July 1989), Doc. 60, at 159-73.

The United States delegation urged that paragraph 5 be deleted because it “requires censorship.”<sup>485</sup> Although the ideals contained in the paragraph were commendable, a U.S. delegate stated, “the cause itself was unrealistic.”<sup>486</sup> The U.S. had already submitted a written observation that “laws which attempt to suppress freedom of speech — however hateful — are difficult to enforce and frequently ineffective or self-defeating; the remedy to be applied is more speech, not enforced silence.”<sup>487</sup>

The government of Argentina had a strikingly different concern about Article 13. Rather than thinking that the article gave governments too much power, Argentina believed that it restrained governments too much in their capacity to restrict the freedom of expression.<sup>488</sup>

Responding to the U.S. statement that Article 13 “requires censorship,” Brazilian delegate Carlos Dunshee de Abranches pointed out that the Article did not state that censorship must be established, “but rather that the law shall prohibit a certain type of activity.”<sup>489</sup>

The delegate of El Salvador then spoke very powerfully in favor of Article 13(5), particularly on the prohibition on war propaganda, but also on the prohibition on hatred and violence. He stated that if such propaganda would cease there would likely be a solution to the conflict between Honduras and El Salvador. These words brought applause in the room.<sup>490</sup> The U.S. delegation reported that both Honduras and El Salvador praised paragraph 5 as desirable,

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485. Observations of the Governments of the Member States Regarding the Draft Inter-American Convention on Protection of Human Rights, United States (6 October 1969), in 2 INTER-AMERICAN SYSTEM, *supra* note 480, Part II, ch. II, Booklet 13 (Aug. 1982), Doc. 10, at 157 [hereinafter “*Government Observations*”].

486. Summary Minutes of the Conference of San Jose, (1982) Minutes of the Eighth Session of Committee I Summary Version, Doc. 48 (Nov. 15, 1969), in 2 INTER-AMERICAN SYSTEM, *supra* note 457, Part II, ch. I, Booklet 12 (Aug. 1982), at 88 [hereinafter “*Summary Minutes*”].

The U.S. remarks focused more on the prohibition of war propaganda than on suppression of hate speech. See generally, *id.* The U.S. delegate argued that “[a]n absolute prohibition on free speech, such as that contained in sub-paragraph (a) [on war propaganda], appears inconsistent with the fundamental guarantees in paragraph 1 of this Article.” *Government Observations, supra* note 485, at 157. He provided the following illustration regarding the breadth of the language:

Insofar as propaganda for war, a series of classical works such as Homer’s *Illiad*, a good part of the works of Shakespeare and of St. Thomas Aquinas, in which there is propaganda for war, would be prohibited by law.

Summary Minutes, *supra* note 485, at 88.

487. *Government Observations, supra* note 485, at 157.

488. Paragraph 3 was too restrictive and unnecessary, it said, and paragraph 4 “excessively restricts and limits the exercise of the functions that belong to the state in the sphere of public morals, national security, and public order . . . .” Draft Inter-American Convention on Protection of Human Rights and Observations and Comments of the American Governments, Working Document Prepared by the Secretariat of the Inter-American Commission on Human Rights, OEA/Ser.L/V/II.22/Doc. 10 (10 Sept. 1969), in 3 INTER-AMERICAN SYSTEM, *supra* note 480, Part II, ch. II, Booklet 14 (Aug. 1982), Doc. 13, at 32-33.

489. *Summary Minutes, supra* note 486, at 89. The Minutes also indicate that the Colombian delegate pointed out “certain difficulties of a juridical nature” would arise under Colombian law with respect to Article 13. *Id.* However, no details are provided.

490. *Id.* at 89. The rapporteur described the exchange of statements by El Salvador and Honduras as an “inspiring episode.” Report of the Rapporteur of Committee I (19 Nov. 1969), in 2 INTER-AMERICAN SYSTEM, *supra* note 480, Part I, ch. IX, Booklet 10 (July 1989), Doc. 60, at 165.



“stating that the press has exacerbated the tense conditions between the two countries. . . . The other delegates, anxious for a reconciliation between Honduras and El Salvador, warmly applauded when the Honduran and Salvadoran delegates embraced at the conclusion of their statements. It was clear that the Conference would not delete the paragraph entirely.”<sup>491</sup>

After the applause died down, debate on Article 13(5) was declared closed and the following draft was approved:

Any propaganda for war shall be prohibited by law, as shall any advocacy of national, racial, or religious hatred that constitutes incitement to discrimination, hostility, crime or violence.

It is evident that the U.S. delegates realized that paragraph 5 would remain in Article 13 in some form. They reported that other delegations “wanted to go on record in opposition to at least certain types of propaganda for war and advocacy of race hatred.”<sup>492</sup> Because the U.S. delegation considered paragraph 5 to be in conflict with the First Amendment of the U.S. Constitution, it “engaged in extensive consultations with other delegations in an attempt to draft a revision acceptable to them and yet consistent with the First Amendment.”<sup>493</sup> According to one account, the U.S. delegation “had little difficulty in winning support for amendments to the draft language, intended to make it conform to stricter standards of free speech.”<sup>494</sup>

The language as finally adopted in the plenary session was drafted and proposed by the United States after much consultation with other delegations.<sup>495</sup> In drafting paragraph 5, the U.S. delegation “was guided by the latest Supreme Court decision on the subject then available to it, *Brandenburg v. Ohio*, 395 U.S. 444 (1969).”<sup>496</sup> The U.S. delegates stated that paragraph 5 was consistent with *Brandenburg* in that it required the prohibition only of “propaganda or advocacy that actually constitutes an incitement to violence.”<sup>497</sup> The U.S. delegation reported that paragraph 5 as ultimately adopted was “consistent with the First Amendment.”<sup>498</sup> “Under paragraph 5 of the Article,” the U.S. delegates re-

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491. Report of the United States Delegation to the Inter-American Conference on Protection of Human Rights, San Jose, Costa Rica, Nov. 9-22, 1969, in 3 INTER-AMERICAN SYSTEM, *supra* note 480, Part II, ch. III, Booklet 15 (Aug. 1982), at 26 [hereinafter “U.S. Report”].

492. *Id.*

493. *Id.*

494. Report on the American Convention on Human Rights Adopted by Inter-American Specialized Conference on Human Rights, San Jose, Costa Rica (Nov. 7-22, 1969), by Sidney Liskofsky, Director, Division of International Organizations, American Jewish Committee, in 3 INTER-AMERICAN SYSTEM, *supra* note 480, Part II, ch. III, Booklet 15 (Aug. 1982), at 90.

495. U.S. Report, *supra* note 468, at 26. The Minutes do not indicate whether a roll call vote was taken, but simply that the text was “approved.” See also 2 INTER-AMERICAN SYSTEM, *supra* note 480, Part II, ch. I, Booklet 12: Summary Minutes of the Conference of San José (Aug. 1982), at 89.

496. U.S. Report, *supra* note 491, at 26.

497. *Id.* The Supreme Court held in *Brandenburg* that the Constitution does not allow a state to proscribe “advocacy of the use of force or of law violation” unless “such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action.” 395 U.S. at 447.

498. U.S. Report, *supra* note 491, Part II, ch. III, Booklet 15 (Aug. 1982), at 26. In fact, paragraph 5 appears to be at odds with current First Amendment jurisprudence. The U.S. delegation’s

ported, "the advocacy must not only be *directed to* inciting lawless action or *be likely to* incite such action, but it must *actually constitute incitement* to lawless action of a violent nature before the State is required to prohibit it."<sup>499</sup> This interpretation of paragraph 5 is highly questionable. Advocacy of hatred that actually incites violence is clearly not the only type of advocacy considered an offense punishable by law under paragraph 5, for that paragraph prohibits advocacy of hatred that constitutes incitements to violence "or to any other similar illegal action." The question, then, is what "illegal action" should be deemed "similar" to "lawless violence." According to several drafters of Article 20 of the International Covenant, advocacy of hatred that incites discrimination is similar to advocacy of hatred that incites violence, because in their view, hatred is violence.<sup>500</sup> Others have said that incitement to hatred allows an atmosphere that promotes violence to fester.<sup>501</sup> Under either of these interpretations, then, incitement to the "illegal action" of discrimination could arguably constitute an offense that should be punishable by law under paragraph 5.

### 1. Proposed U.S. Reservation to American Convention

Given its concerns about the consonance of Article 13 with the First Amendment, the State Department proposed a reservation in its memorandum accompanying the President's letter of submittal of the Convention to the United States Senate in 1977. It states:

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interpretation of paragraph 5 is certainly at odds with the State Department's view in its letter of transmittal to the U.S. Senate, which recommends that the United States enter a reservation to Article 13 declaring that the U.S. "does not adhere to paragraph (5) of Article 13." Four Treaties Pertaining to Human Rights, Message from the President of the United States, Letter of Submittal, S. Exec. Doc. 95th Cong., 2nd Sess., XVIII, XX (Feb. 23, 1978).

The U.S. delegation also reported that by limiting the prohibition to "manifestations which 'constitute incitement to lawless violence or any other similar illegal action,'" the clause "thus avoids civil-libertarian difficulties, such as those presented by the U.N. Convention on the Elimination of Racial Discrimination, which prohibits 'dissemination of ideas based upon racial superiority and hatred.'" Report on the American Convention on Human Rights Adopted by Inter-American Specialised Conference on Human Rights, San Jose, Costa Rica (Nov. 7-22, 1969), by Sidney Lis-kofsky, Director, Division of International Organizations, American Jewish Committee, in 3 INTER-AMERICAN SYSTEM, *supra* note 480, Part II, ch. III, Booklet 15 (Aug. 1982), at 90 (emphasis in original).

However, Article 14 of the American Convention requires that the right of reply be given to "[a]nyone injured by inaccurate or *offensive statements or ideas* disseminated to the public" by a regulated medium. A group might not have recourse under this provision, but an individual injured by "offensive ideas" would have recourse to the right of reply.

Having satisfied themselves of paragraph 5's conformity with the First Amendment, the U.S. delegates reported that "[t]he principal provision of the Article that could cause problems is the rather broad prohibition of prior censorship in paragraph 2." *U.S. Report, supra* note 491, at 27.

499. *Id.* at 26-27 (emphasis added).

500. See *supra* text accompanying notes 138-48. Critical race theorists make this very point. See, e.g., Mari Matsuda, *Public Response to Racist Speech: Considering the Victim's Story*, 87 MICH. L. REV. 2320, 2332 (1989) ("In addition to physical violence, there is the violence of the word.").

501. For documentation and discussion of this point in the context of the United States, see Matsuda, *supra* note 500, at 2335 (citing, *inter alia*, THEY DON'T ALL WEAR SHEETS: A CHRONOLOGY OF RACIST AND FAR-RIGHT VIOLENCE — 1980-1986 17 (C. Lutz comp. 1987)) ("There are no areas of the country where white supremacist organizations have been extremely active without correspondingly high levels of bigoted violence.").

The United States reserves the right to permit prior restraints in strictly-defined circumstances where the right to judicial review is immediately available; the United States does not adhere to paragraph (5) of Article 13.<sup>502</sup>

## 2. *The Inter-American Commission and Court on Article 13*

Neither the Inter-American Commission nor the Court has directly addressed a case involving paragraph 5 of Article 13.<sup>503</sup> The Inter-American Commission on Human Rights has stated that the denial of freedom of expression is a factor which "contributes to the violations of other human rights."<sup>504</sup> Were it called upon to judge the legality of hate propaganda legislation, however, the Commission might well interpret Article 13(5) in a manner consistent with the relevant decisions of the European Commission and the Human Rights Committee.<sup>505</sup> This is because Article 29 of the Convention declares the same principle that appears in the Civil and Political Rights Covenant and the European Convention which have served as justification for upholding hate propaganda laws,<sup>506</sup> that is, the Convention's provisions may not be used to suppress the rights of others.<sup>507</sup>

An interpretation of Article 13(5) as allowing the prohibition of hate speech would be consistent with both the general and the specific limitations clauses in the Convention.<sup>508</sup> In language similar to that found in other human rights in-

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502. Four Treaties Pertaining to Human Rights, Message from the President of the United States, Letter of Submittal, State Department (Dec. 17, 1977).

503. The Commission's attention to freedom of expression has focused on freedom of the press. See *STRIKING A BALANCE*, *supra* note 4, at 34; *Inter-American Commission on Human Rights: Individual Case Resolutions*, 10 AMER. U.J. INT'L L. & POL'Y 19-332 (1994); Dinah Shelton, *The Jurisprudence of the Inter-American Court of Human Rights*, 10 AMER. U.J. INT'L L. & POL'Y 333-71 (1994).

504. IACHR, *Ten Years of Activities, 1971-1981*, General Secretariat, Organization of American States, at 324 (1982); IACHR, *Annual Report for 1982-83*, OEA/Ser.L/V/II.61 Doc. 22 rev. 1, 27 September 1983, in 5 INTER-AMERICAN SYSTEM, *supra* note 480, Part III, Booklet 24.1 (Nov. 1986), at 15.

In a section entitled "*Right to Freedom of Investigation, Opinion, Expression and Dissemination*," the Commission stressed that when the principle of freedom of expression "is injured, the nation's thought and political activities are not the only things affected. Cultural development also suffers; artistic freedom is restricted; and cultural expressions as important as the theater, and literary productions and books which show the characteristics of the countries with their virtues and shortcomings do not find a favorable environment for working freely and thus progressing." This, too, was stated in the context of attacks on freedom of expression during prolonged states of emergency, which, the Commission stated, create "an atmosphere of fear and insecurity." *Id.*

505. Indeed, in one case, the Inter-American Court of Human Rights ruled that the definition of a term in the American Convention's freedom of expression provision had to comport with the definition of that term given by the European Court under the corresponding provision of the European Convention. *Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism*, Advisory Opinion OC-5/85 of 13 Nov. 1985, Series A No. 5, cited in *THE ARTICLE 19 FREEDOM OF EXPRESSION MANUAL: INTERNATIONAL AND COMPARATIVE LAW, STANDARDS AND PROCEDURES* 45 (1993).

506. See *supra* notes 385-91 and accompanying text.

507. The corresponding provisions are Article 5 of the Civil and Political Rights Covenant, see *supra* text accompanying notes 278-82, and Article 17 of the European Convention, see *supra* text accompanying note 413.

508. Regarding the scope of restrictions, the American Convention does specify in Article 30 that any restrictions on the exercise of the rights in the Convention must be "in accordance with laws

struments, the American Convention declares in Article 29 that “[n]o provision. . . shall be interpreted as permitting any State Party, group, or person to suppress the enjoyment or exercise of the right of freedom recognized in this Convention.” This clause addresses not only suppression of rights by government but suppression by private persons as well.

Significantly, the Convention highlights the importance of the relationship between duties and rights. Article 32(2) declares that “[t]he rights of each person are limited by the rights of others, by the security of all, and by the just demands of the general welfare, in a democratic society.” This statement follows the statement in paragraph 1 that “[e]very person has responsibilities to his family, his community, and mankind.”

Although it is likely that the Inter-American Commission and Court would allow restrictions on hate speech, they would probably require any such legislation to be narrowly tailored. With respect to limitations on freedom of expression, the Inter-American Commission has stated that although “freedom of expression may be legally restricted . . . , these limitations should always be clearly and explicitly defined such as to avoid abuses of power on the part of the State.”<sup>509</sup> Referring to restrictions on the press in a number of countries, the Commission has felt compelled to “reaffirm that freedom of expression is an essential right of every means of social communication, so as to safeguard it from governmental abuse; the Commission would also like to reaffirm the right of every person to be fully informed without arbitrary interferences from the State or international structures that deliver distorted information.”<sup>510</sup> The Inter-American Commission might interpret hate propaganda itself as delivering distorted information. It is likely, though, that in judging a grey area involving the question whether or not certain expression falls within the hate speech provision of Article 13, the Commission would scrutinize a government’s prohibition closely, to assess whether the government was abusing its power in fashioning its limitation to the important right to freedom of expression.

For its part, the Inter-American Court of Human Rights has explained that any restrictions on freedom of expression must be “necessary,” and that a restriction is not necessary if its intended results can reasonably be achieved by a less restrictive means.<sup>511</sup> Less restrictive means of suppressing hate propaganda

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enacted for reasons of general interest and in accordance with the purpose for which the restrictions have been established.”

509. IACHR, *Annual Report for 1980-1981*, OEA/Ser.L/V/II.54, doc. 9 rev. 1 (16 Oct. 1981), in 4 INTER-AMERICAN SYSTEM, *supra* note 480, Part III, Booklet 24 (May 1983), at 38. These concerns were expressed in the context of severe limitations on freedom of expression imposed during prolonged states of emergency.

510. *Id.* at 39.

511. Advisory Opinion OC-5/85, *supra* note 503. The case involved a journalist sentenced in Costa Rica to three months’ imprisonment for exercising the profession of journalism without a license. The Commission had upheld the licensing law on the ground that the freedom of expression provision addressed only the means of transmitting and remitting information, and that licensing journalists was a permissible regulation. The Inter-American Court determined, however, that the licensing requirement did constitute a violation of Article 13, on the ground that freedom of expression also encompasses the right to receive and seek information.

could include government speech countering the hate propaganda, and/or providing a forum for others to counter the propaganda.

Paragraph 5 of Article 13 is the only section of the American Convention that explicitly declares what constitutes a punishable offense.<sup>512</sup> It does not, however, state what penalty is required. With respect to the question of proportionality of a sanction, therefore, a fine rather than imprisonment might meet the requirements of Article 13(5), at least when applied to one who is not a persistent offender.

### 3. *Remedy for Violation*

Should a government fail to enact legislation pursuant to Article 13(5), the only recourse would be to ask the Commission to exercise its power under Article 41 to make a recommendation to the government to adopt measures to give effect to the Convention. There is no periodic reporting mechanism such as that which exists in the Civil and Political Rights Covenant.<sup>513</sup> The Convention has a detailed individual complaint mechanism,<sup>514</sup> but that mechanism is available only if alleging violation of a right protected by the Convention. The conceptual problem one would face, then, is the same as that faced when attempting to obtain enactment of domestic legislation pursuant to Article 20(2) of the Civil and Political Rights Covenant.<sup>515</sup> One could argue a violation of Article 2, under which states parties are obliged to adopt legislation to give effect to the Convention. One would also have to allege injury suffered as a result of the government's failure to enact such legislation. Presumably such injury would be established by proving that statements advocating hatred of the complainant's group were made. Research has not unearthed any examples of petitions submitted on the basis of violation of Article 2 for failure to enact required legislation.<sup>516</sup>

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512. The other human rights instrument that requires a criminal penalty is the CERD Convention, *supra* note 5, art. 4. The Civil and Political Rights Covenant, *supra* note 3, art. 20(2), simply requires that advocacy of hatred be "prohibited by law."

513. See *supra* text accompanying notes 254-56.

514. The Convention provides in Articles 48-51 for a right of individual petition to the Inter-American Commission on Human Rights, under which individuals may file complaints against a state party before the Commission alleging violation of a right or rights protected by the Convention. In addition, an optional right of interstate complaint is available when a state makes a declaration under Articles 44-45 of the Convention. The Commission has "extensive fact-finding, conciliatory, and quasi-judicial powers." THOMAS BUERGENTHAL, *HUMAN RIGHTS: THE INTER-AMERICAN SYSTEM* iv (1991). Upon receiving a complaint, the Commission investigates the charges and attempts to achieve a friendly settlement. Article 48-49. The Commission decides on the admissibility of complaints, Article 46, and may rule on the merits of the complaint. Articles 50-51. Complaints that have been ruled admissible may be referred to the Court of Human Rights if the states involved have recognized the Court's jurisdiction under Article 62 of the Convention. In addition, the Court is authorized to render advisory opinions interpreting the Convention and other human rights treaties. Article 64.

515. For a discussion of the argument that Article 20(2) does in fact establish a substantive right, see *supra* notes 212-14 and accompanying text.

516. On the positive obligation of governments to protect the rights specifically articulated in the Convention, see, e.g., Case 7615 (Brazil), IACHR, Annual Report 1984-85, Res. No. 12/85 of 5 March 1985, at 213 (finding that by, *inter alia*, authorizing massive encroachment of the lands of the Yanomani Indians by mining companies and prospectors including many with contagious diseases,

### B. American Declaration of the Rights and Duties of Man

The American Declaration of the Rights and Duties of Man<sup>517</sup> does not contain a specific hate propaganda provision, but it does contain language which, if interpreted in the same manner as Article 10 of the European Convention has been interpreted, could allow restrictions on such propaganda.

The American Declaration opens with a preambular clause emphasizing freedom, equality and dignity,<sup>518</sup> in language almost identical to Article 1 of the Universal Declaration of Human Rights.<sup>519</sup> As the name of the document indicates, it is concerned not only with rights but also with duties of each individual. The second preambular paragraph states that “[t]he fulfillment of duty by each individual is a prerequisite to the rights of all. . . . While rights exalt individual liberty, duties express the dignity of that liberty.”<sup>520</sup> Chapter One of the Declaration sets forth the rights of individuals, and Chapter Two, the duties. Article IV declares the right of every person to, among other things, freedom of expression and dissemination of ideas.

The rights of individuals are “limited by the rights of others, by the security of all, and by the just demands of the general welfare and the advancement of democracy.”<sup>521</sup> The limit on freedom of expression, therefore, does not appear as a duty to refrain from expression that might injure others,<sup>522</sup> but rather, as a limit on the right itself.

An earlier draft of the Declaration, in addition to being for the most part more detailed than the Declaration that was ultimately adopted, contained a provision specifying that “[i]n the case of immoral or libelist publications, or such as incite to violence, only measures of a civil or penal character may be applied,

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the government had “failed to take timely and effective measures to protect the human rights of the Yanomamis,” including the right to the preservation of health and well-being). See also Judgment of 29 July 1988, Inter-Am. Ct. H.R. (ser. C), No. 4, 28 I.L.M. 294 (1989) [the Velasquez Rodriguez Case] (finding that governments have an obligation to investigate and prosecute “disappearances” and murders committed by death squads).

517. O.A.S. Res. 30, adopted by the Ninth International Conference of American States, Bogota, 1948, OEA/Ser. L./V/I.4 Rev. (1965) [hereinafter American Declaration]. The American Declaration was incorporated in 1960 into the Statute of the Inter-American Commission on Human Rights. 1960 Statute, Article 2. In 1970, the Commission became an official organ of the OAS. OAS Charter, Article 51(e) (as amended by the Protocol of Buenos Aires). Although it was adopted as a non-binding resolution, the American Declaration is the instrument on which the Inter-American Commission bases much of its work; it is generally considered to be a normative instrument. INTERNATIONAL HUMAN RIGHTS: DOCUMENTS AND INTRODUCTORY NOTES 282 (Felix Ermacora et al. eds., 1993). It is the instrument of reference for those states in the Americas that are not party to the American Convention, such as the United States. As of 1 January 1993, 24 states were party to the Convention. *Id.*

518. “All men are born free and equal, in dignity and in rights, and, being endowed by nature with reason and conscience, they should conduct themselves as brothers one to another.” *Preamble* to American Declaration, *supra* note 517.

519. Article 1 of the Universal Declaration begins: “All human beings are born free and equal in dignity and rights.”

520. *Preamble* to American Declaration, *supra* note 517.

521. American Declaration, *supra* note 517, art. 28.

522. *Cf.* Article 30 of the Universal Declaration, Article 5 of the Civil and Political Rights Covenant, and Article 17 of the European Convention.

in accordance with due process of law.”<sup>523</sup> Other rights clauses also contained specific limitations. The Working Group chose to delete from the Rio draft the limitations on rights which were set forth in some detail in each article declaring a right, and replace those passages with a single article describing the scope of rights indicated earlier.<sup>524</sup> The Group’s report notes that the deleted passages simply indicated those cases “in which the State — by the very reason of having to defend the rights of man — would be obligated to fix reasonable limitations upon those rights.”<sup>525</sup> Since the European Commission has interpreted restrictions on hate propaganda as necessary to defend the rights of others,<sup>526</sup> it is quite possible that the Inter-American Commission would interpret the Declaration’s general limitations clause in a similar manner.

### C. *Additional Inter-American Documents on Racial Discrimination and Freedom of Expression*

The Inter-American Conference on Problems of War and Peace held in Mexico City in 1945 resulted in several resolutions addressing the problem of discrimination and hatred. One resolution, “Peaceful Orientation of the American Peoples,” states in Article I that “the American States shall, by all means at their disposal, strive to spread the ideals of peace and the principles of mutual respect and shall curb all activities or propaganda that directly or indirectly tend to sow hatred or division between their respective peoples.”<sup>527</sup> The third preambular paragraph of the resolution declares that one of the “essential activities” necessary to maintaining and safeguarding peace must be “the suppression of whatever might contribute to the spread of hatred among peoples.”<sup>528</sup> Use of the broad phrase “might” indicates that suppression of hate propaganda would

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523. Inter-American Juridical Committee, “Draft Declaration of the International Rights and Duties of Man,” in 1 INTER-AMERICAN SYSTEM, *supra* note 480, Part I, ch. IV, Booklet 5 (April 1982), at 10. An interesting historical note is that the Draft American Declaration was prepared on December 8, 1947, and the draft Universal Declaration of Human Rights was prepared by U.N. Commission on Human Rights on December 2-17, 1947. The Working Group took into account the draft Declaration prepared by the Inter-American Juridical Committee, the Draft Universal Declaration of Human Rights, prepared by the U.N. Commission on Human Rights, and observations and amendments to the Draft Declaration. *Id.* at 15. Present at the drafting were delegations from the following countries: Argentina, Bolivia, Brazil, Columbia, Cuba, United States, Mexico, Peru, and Venezuela. Uruguay was unable to send a representative due to other obligations at the Conference at the time. *Id.* at 15-16.

524. Report of the Working Group, Novena Conferencia Internacionale Americana, *Actas y Documentos*, Vol. 5 (Bogotá: Min. de Relaciones Exteriores, 1953) 474-78; Original Report identified as CB-310/CIN-41, reproduced in *id.* at 15-23.

525. *Id.* at 16. The general limitations clause in the final document was based on a similar clause in the draft Universal Declaration, according to the Working Group. *Id.*

526. See *supra* text accompanying notes 404-16.

527. Resolution 43, *Final Act of the Inter-American Conference on Problems of War and Peace*, Mexico City, Feb-March, 1945 (10 American Union 1945) 80, in 1 INTER-AMERICAN SYSTEM, *supra* note 480, Part I, ch. V, Booklet 6 (April 1982), at 62-63 (Res. approved at the Plenary Session of March 7, 1945) (emphasis added).

528. *Id.* at 62. Much of the focus of the resolution is on education. The second operative clause indicates that the means to “spread the ideals of peace and the principles of mutual respect” is to be done principally in the primary schools. Paragraph 3 indicates that additional means include campaigning through the press, radio and other means of dissemination. *Id.*

be permissible even absent strong evidence that such propaganda actually causes hatred among peoples.

Another resolution adopted by American governments at the Inter-American Conference, entitled "Racial Discrimination," first reaffirmed the principle of equality regardless of race or religion. It then recommended that "the governments of the American Republics, without jeopardizing freedom of expression, either oral or written, make every effort to prevent in their respective countries all acts which may provoke discrimination among individuals because of race or religion."<sup>529</sup> This resolution at least recognizes the need to confine the meaning of the phrase "every effort" to those measures which do not jeopardize freedom of expression.

## VII.

### THE GENOCIDE CONVENTION

The Genocide Convention<sup>530</sup> is another treaty whose goal is to protect racial, national, ethnic and religious groups. Its incitement provision limits the punishable act to "direct and public incitement to genocide," i.e. to violence.<sup>531</sup> The *travaux* reveal that the Soviets proposed an amendment that would penalize "all forms of public propaganda (press, radio, cinema, etc.) aimed at inciting racial, national or religious enmities or hatreds," in addition to "provoking the commission of acts of genocide."<sup>532</sup> That proposal was not adopted, so the final language of the Convention prohibits incitement to violence but not hatred that might eventually lead to violence.

## VIII.

### THE U.N. COMMISSION ON HUMAN RIGHTS

The question of hate propaganda has drawn the attention not only of international and regional treaty bodies, but also of the U.N. Commission on Human Rights, which drafted the International Covenant and the Racial Discrimination

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529. Resolution 41, approved at the Plenary session of March 7, 1945, in 1 INTER-AMERICAN SYSTEM, *supra* note 480 Part I, ch. V, Booklet 6 (April 1982), at 61.

A resolution approved at an earlier conference in 1936, the Inter-American Conference for the Maintenance of Peace, recommended "that the Governments Seek to Avoid the Exhibition of Theatrical Productions and Motion Pictures Which . . . disturb good relations between peoples, or incite hatred against foreigners." (Resolution XIII) "Public Performances and Peace," *Final Act* at 11, reproduced in *id.* at 24.

530. 78 U.N.T.S. 277, U.N. GAOR 1st Sess., Res. 96 (1949).

531. The initial draft of the Genocide Convention listed only genocide itself as an offence. Belgium proposed adding incitement to commit genocide to the list of punishable acts. "Belgium: Amendment to Draft Convention (E/794), in "Genocide: Draft Convention (E/794) and Report of the Economic and Social Council," U.N. GAOR, 6th Comm., 3d sess., U.N. Doc. A/C.6/217 (5 Oct. 1948). The Belgian amendment also proposed additional punishable acts, all of which were ultimately included in the Convention: conspiracy to commit, attempt to commit, and complicity in genocide.

532. U.N. GAOR, 3d sess., 6th Comm., "USSR: Amendments and Additions to the Draft Convention," U.N. Doc. A/C.6/215 (4 Oct. 1948). The Soviet proposal would also have amended the Preamble to require states parties "to suppress and prohibit the stimulation of racial, national and religious hatred" in addition to genocide itself. *Id.*



Convention. The Commission has passed a succession of resolutions on "Measures to be Taken Against All Totalitarian or Other Ideologies and Practices, Including Nazi, Fascist, and Neo-Fascist, Based on Racial or Ethnic Exclusiveness or Intolerance, Hatred, Terror, Systematic Denial of Human Rights and Fundamental Freedoms, or Which Have Such Consequences."<sup>533</sup> These resolutions have emphasized that "the doctrines of racial or ethnic superiority on which the totalitarian entities and regimes are based contradict the spirit and principles of the United Nations and that the application of such doctrines in practice leads to wars, mass and flagrant violations of human rights and crimes against humanity."<sup>534</sup> ECOSOC has published reports on the steps states have taken in response to a call by the U.N. Secretary-General for states to provide information on measures they have taken against these ideologies and practices.<sup>535</sup> The information contained in these reports is similar to that submitted to such treaty bodies as the Human Rights Committee and the CERD Committee. The government of Bulgaria reported in 1988, for example, that among its measures designed to ensure respect for human rights and intolerance for theories of racial superiority is a Constitutional provision stating that "the propagation of hatred or humiliation of man on grounds of race, nationality or religion are prohibited and shall be punishable by law."<sup>536</sup> The Panamanian government submitted a Constitutional provision, Article 39, which provides that "recognition shall not be granted to associations which hold ideas or theories based on the alleged superiority of a race or ethnic group, or which justify or promote racial discrimination . . . ."<sup>537</sup> And the government of Mongolia reported that Article 53 of its Criminal Code states that "propaganda or agitation with a view to inciting national or racial enmity or discord, or direct or indirect advantages of citizens on grounds of their nationality or race shall be punishable with up to three years' deprivation of liberty or banishment."<sup>538</sup>

## IX.

### U.N. SPECIAL RAPORTEURS ON FREEDOM OF OPINION AND EXPRESSION

The Commission on Human Rights has expressed concern about the "widespread incidents of detention for people expressing their beliefs."<sup>539</sup> Its Sub-

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533. *Id.*, Resolution 1988/63, at 135-37.

534. *See, e.g.*, Commission on Human Rights, Report on the 44th Session, ECOSOC Official Records 1988, Supp. No. 2, Resolution 1988/37, "Right to Freedom of Expression and Opinion," U.N. Doc. E/CN.4/1988/88, at 135.

535. *See, e.g.*, ECOSOC Report, U.N. Doc. A/41/317, E/1986/36 (1 May 1986), Summary of Comments Submitted by German Democratic Republic, at 3-5. *See also* Report of the Secretary-General, in "Measures to be Taken Against Nazi-Fascist and Neo-Fascist Activities and all Other Forms of Totalitarian Ideologies and Practices Based on Racial Intolerance, Hatred and Terror," ECOSOC, U.N. Doc. A/41/317/Add.1, E/1986/36/Add.1 (12 Sept. 1986).

536. *Id.* at 2.

537. *Id.* at 7.

538. *Id.* at 6.

539. *See, e.g.*, Commission on Human Rights, Report on the 44th Session, ECOSOC Official Records 1988, Supp. No. 2, Resolution 1988/37, "Right to Freedom of Expression and Opinion," U.N. Doc. E/CN.4/1988/88, at 96-97.

Commission<sup>540</sup> appointed two Special Rapporteurs to undertake an extensive study of the right to freedom of opinion and expression. Their studies<sup>541</sup> provide considerable insight on several issues arising from international law on hate speech. The views of the Special Rapporteurs on hate speech restrictions, must be seen in light of the deep concern their reports express over government abuse of the right to freedom of expression.<sup>542</sup> The limitations provision of the freedom of expression provision of the International Covenant, Article 19(3)(d),<sup>543</sup> is "the power of restriction most frequently exercised in internal legislation,"

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540. The Sub-Commission on Prevention of Discrimination and Protection of Minorities.

541. The six papers comprising their work are: Louis Joinet, *Working Paper Concerning the Detention of Persons Who Exercise the Right to Freedom of Opinion and Expression*, U.N. Doc. E/CN.4/Sub.2/1987/15, Annex I, at 11 [hereinafter "Working Paper of Mr. Joinet"]; *The Right to Freedom of Opinion and Expression: Working Paper Prepared by Mr. Danilo Türk*, U.N. Doc. E/CN.4/Sub.2/1989/26 (22 June 1989) [hereinafter "Working Paper of Mr. Türk"]; *The Right to Freedom of Opinion and Expression: Current Problems of Its Realization and Measures Necessary for Its Strengthening and Promotion*, Preliminary Report prepared by Mr. Danilo Türk and Mr. Louis Joinet, Special Rapporteurs, U.N. Doc. E/CN.4/Sub.2/1990/11 (18 July 1990) [hereinafter "Preliminary Report"]; *Update of the Preliminary Report Prepared by Messrs. Türk and Joinet*, U.N. Doc. E/CN.4/Sub.2/1991/9 (19 July 1991) [hereinafter "Update of Preliminary Report"]; *The Right to Freedom of Opinion and Expression: Final Report by Mr. Danilo Türk and Mr. Louis Joinet, Special Rapporteurs*, U.N. Doc. E/CN.4/Sub.2/1992/9 (14 July 1992) [hereinafter "Final Report"]; and *Final Report, Conclusions and Recommendations*, U.N. Doc. E/CN.4/Sub.2/1992/9/Add.1 (14 July 1992). The Preliminary Report, among other things, analyzes the interpretations given to the right to freedom of expression at the international level as well as the domestic level, and evaluates the normative differences among those interpretations; it also provides a concise outline of comparative law on the right to freedom of expression throughout the world and limitations on that freedom, at 10-16. The most detailed examination of the question of freedom of expression and the struggle against racism appears in the Update to the Preliminary Report, at 8-20.

542. Special Rapporteur Danilo Türk emphasizes that detention for peaceful expression of opinion is "one of the widespread and reprehensible practices of silencing people and therefore a serious violation of human rights." Working Paper of Mr. Türk, *supra* note 541, at 14; *see also* Final Report, *supra* note 541, para. 34. It appears from his periodic references to other factors which in reality also limit freedom of expression, i.e., social and political factors, that Mr. Türk recognizes the silencing effect of these other methods, as well.

Even though they stressed the central importance of the right to freedom of expression, the Special Rapporteurs also noted that the right to freedom of expression is not absolute; in fact, they saw fit to point out that even in the United States, it is not absolute. In the Update to the Preliminary Report, they described the U.S. Supreme Court decision finding it unconstitutional to prohibit the broadcast of General Noriega's recorded telephone conversations in prison. Update to Preliminary Report, *supra* note 541, at 16 (citing 1991 report of Reporters Sans Frontières).

543. Allowing limits on freedom of expression to protect national security, public order, or public health or morals. Freedom of speech is limited not only by provisions in law, but by other factors as well. F. Delperre has listed four obstacles to the exercise of free speech: (1) economic limitations making the transmittal of information difficult and sometimes impossible; (2) technical limitations; (3) sociological limitations that result from the social environment; and (4) institutional limitations reflecting the hierarchically organized groups in which individuals live. F. Delperre, "Libres prepos sur la Liberté d'Expression," *Revue de la loi publique 1977-78*, cited in Working Paper of Mr. Louis Joinet, *supra* note 541, at n.11.

and is often misused by legislators or the judiciary,<sup>544</sup> and the most common derogation under Article 4 of the Covenant is to Article 19.<sup>545</sup>

The Special Rapporteurs saw freedom of expression as lying at the center of concentric circles of human rights.<sup>546</sup> Referring to the maxim that human rights are indivisible and interdependent, Special Rapporteur Danilo Türk envisioned the relationship among rights as a set of concentric circles, wherein freedom of expression might be put in the center, and all other human rights would be placed in concentric circles with different degrees of relevance to that right.<sup>547</sup> Thus, all other civil and political rights are indirectly connected with the right to freedom of expression. The nature of these interrelationships varies from country to country depending on the social context found there.<sup>548</sup>

The link between freedom of expression and other human rights is most evident from the fact that the abuse of freedom of expression often leads to violations of other fundamental rights, including the right to liberty, security, life, protection against torture, and freedom of movement.<sup>549</sup> This link is crucial in examining the tension between the right to freedom of expression and the right to non-discrimination.

In light of the centrality of freedom of expression to the protection of other rights, the Special Rapporteurs raised the question whether “the rights, freedoms and reputation of others . . . [can] be used, for example, to guard against the expression of racist views.”<sup>550</sup> The Rapporteurs answered that question with a resounding “yes.” They emphatically stated that reservations to Article 20 of the Covenant are unfounded<sup>551</sup> in that Article 20 easily meets a crucial test required of a limitation on freedom of expression: “legitimacy,” and specifically, the requirement that the restriction be necessary in a democratic society. They stated:

Inasmuch as Article 20 is somewhat redundant in relation to Article 19, paragraph 3, and appears above all to have an educative and symbolic value, it is indeed difficult to understand why some States see broader restrictions on freedom of

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544. Working Paper of Mr. Joinet, U.N. Doc.E/CN.4/Sub.2/1987/15, at 12. The consequences of abuses of the right to freedom of expression are grave indeed. A great many applications before the Human Rights Committee involve violations of both the right to be free from torture and the right to freedom of expression. Summary executions and “disappearances” also frequently result from abuse of the right to freedom of expression. Preliminary Report, *supra* note 541, para. 6.

545. Report of Mr. Despouy, U.N. Doc. E/CN.4/Sub.4/1987/19/Rev.1, para. 54. The other most frequently-mentioned provisions in derogations are Article 9 (liberty and security), Article 12 (freedom of movement), Article 17 (privacy) and Article 21 (peaceful assembly).

546. See Final Report, *supra* note 541, para. 5; Working Paper of Mr. Türk, *supra* note 541, at 4.

547. Working Paper of Mr. Türk, *supra* note 541, at 4.

548. *Id.*

549. See Preliminary Report, *supra* note 541, citing U.N. Doc. E/CN.4/Sub.4/1987/Rev.1 (Report of Mr. Despouy) para. 82. The Rapporteurs also saw a link between freedom of expression and freedom of information, and stated that “the expression of racist ideas may perhaps be regarded as an act of disinformation that legitimizes limitations.” Update of Preliminary Report, *supra* note 518, para. 37.

550. Preliminary Report, *supra* note 541, para. 128.

551. In the view of the Special Rapporteurs, the reservations to Article 20 of the Covenant “seem to arise from a misreading or a misunderstanding of the necessary restrictions provided for in Article 19.” Preliminary Report, *supra* note 541, para. 49.

expression in its provisions than those permitted in Article 19, paragraph 3. The *rights of others and democratic necessity* make it permissible to have penalties to combat propaganda for war and advocacy of racial hatred.<sup>552</sup>

Special Rapporteur Joinet noted the Human Rights Committee's General Comment stating that the prohibitions of Article 20 "are fully compatible with the right to freedom of expression . . . the exercise of which carries with it special duties and responsibilities."<sup>553</sup> He added, however, that an additional General Comment would be helpful in order to clarify such concepts as "advocacy of hatred."<sup>554</sup> It would also be useful to have guidance as to when insult becomes advocacy of hatred, and how to assess statements of religious fervor which on the surface might seem inciteful of religious hatred but are simply a traditional means of communicating one's religious beliefs without being aimed at any other individual or group in fact. At a minimum, any laws implementing Article 20(2) must be narrowly-drawn and precisely crafted. For example, laws which simply criminalize "hostile propaganda" are overly broad and so unclear as to threaten the right to freedom of expression itself.<sup>555</sup>

#### A. *What are the "Rights of Others" in the Limitations Clause?*

According to the Special Rapporteurs, only the need to protect the rights of others may justify restrictions against racist speech.<sup>556</sup> If freedom of expression may be limited to protect the "rights of others," what specifically are those rights? In the context of freedom of expression, they include the right to equality, dignity, and protection against degrading treatment. The Special Rapporteurs express the belief that "only the concept of the rights of others" could "justify the restrictions needed in the struggle against racism."<sup>557</sup> This would, they believe, strictly limit the behavior deemed prohibited and neutralize the risk of criminalizing "mere departures from the prevailing norm."<sup>558</sup> The term "propagande" used in the French version of Article 20 gives a better sense of just what is supposed to be prohibited by states under that Article. The Special Rapporteurs indicate that the term "propagande" implies "the notion of indoctrination. . . and false information or disinformation."<sup>559</sup> Thus, an insulting re-

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552. *Id.* at para. 129 (emphasis added). The rapporteurs refer in this context to Article 7 of the European Convention on Transfrontier Television of 5 May 1989, which includes among the "responsibilities of the broadcaster," a requirement that broadcasters "shall respect the dignity of the human being and the fundamental rights of others. In particular, they shall not: . . . give undue prominence to violence or be likely to incite racial hatred." *Id.*, para. 130.

553. Working Paper of Mr. Türk, *supra* note 541, at 11, para. 40 (quoting Human Rights Committee, General Comment on Article 20).

554. Working Paper of Mr. Türk, *supra* note 541, at 11, para. 41. The Rapporteurs have indicated a desire to work with the members of the CERD Committee on the definition of offenses under CERD Convention art. 4. See Update to Preliminary Report, *supra* note 541 at 18.

555. Working Paper of Mr. Türk, *supra* note 541, at 11, para. 44.

556. Final Report, *supra* note 541, para. 99.

557. Update of Preliminary Report, *supra* note 541, para. 46.

558. *Id.*

559. *Id.* para. 55. The right to be well informed is proffered by the rapporteurs as one ground for prohibiting the dissemination of revisionist ideas and of ideologies based on the superiority of a particular race. They also indicate their desire that the term "race" not be used in international instruments, because it "has no scientific meaning. Unequivocal recognition of the human race as

mark would be insufficient to give rise to culpability. This implies, of course, that intent would have to be an element of the offense.<sup>560</sup>

### B. Civil or Criminal Sanction? The Question of Proportionality

Even if international law accepts sanctions against hate propagandists, the question arises whether imprisoning someone for expression which does not directly incite violence violates the principle of proportionality. Because the right to freedom of expression is so subject to abuse, any penalties for violating permissible restrictions on that right must be closely scrutinized. The Special Rapporteurs question whether imprisonment is ever an appropriate sanction, even if seemingly necessary to secure respect for Article 20.<sup>561</sup> As the Rapporteurs point out, “[c]riminal proceedings are normally instituted because of the element of violence.”<sup>562</sup> Thus, a state might impose criminal sanctions on hate speech on the theory that such speech is tantamount to violence. But the proponents of Article 20(2) during its drafting stages rejected that argument as the basis for the clause, instead arguing that hatred and discrimination were in and of themselves sufficiently heinous to give rise to the prohibition on their incitement.<sup>563</sup>

The Rapporteurs are not clear in their final determination whether imprisonment might be an appropriate sanction for hate propaganda. In their Final Report, after examining the question in great detail, they reach the conclusion that “deprivation of liberty is clearly a disproportionate sanction.”<sup>564</sup> They add that imprisonment inherently risks the violation of numerous other human rights; “in principle,” they state, “it should not be provided for as a penalty save in wholly exceptional cases in which there is a clear and present danger of vio-

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one and indivisible appears to be regarded as the indispensable preliminary for the struggle against racism.” *Id.* para. 56.

560. The French term “propagande” implies that an element of the proscription should be intent, or at least conscious publicizing and urging, indoctrination, or the spreading of false information. Final Report, *supra* note 541, para. 107. In a disturbing decision relating to another incitement provision, the Human Rights Committee has indicated that intent need not be required, and even that public debate alone can constitute “incitement.” In that case, which involved a criminal law that prohibited “encouraging the public to engage in indecent behaviours between individuals of the same sex,” the Committee determined that “the mere broadcasting of a debate on this subject [of homosexuality] may constitute an incitement to homosexuality.” Preliminary Report, *supra* note 541, para. 99 (paraphrasing Committee decision). Special Rapporteur Joinet roundly criticized this approach, *id.*, and it is probably no longer good law. See, e.g., *Toonen v. Australia*, U.N. Doc. CCPR/C/50/D/488/1992 (concluding that legislation prohibiting private consensual adult homosexual activity violated the Civil & Political Rights Covenant’s protection of privacy rights). See also the *Dudgeon Case*, Eur. Ct. H.R., Judgment of 22 Oct. 1981 (Ser. A, No. 45) (finding that the penalization of homosexuality in Northern Ireland violated the right to privacy under Article 8(1) of the European Convention).

561. See Preliminary Report, *supra* note 541, paras. 150-53.

562. Final Report, *supra* note 541, para. 28.

563. See *supra* notes 138-48 and accompanying text. A number of states allow criminal sanctions for defamation, although some legal systems do not allow the sentence of imprisonment for defamation. Working Paper of Mr. Joinet, *supra* note 541, at 12 (pointing out that even those states that do not allow imprisonment acknowledge that laws prohibiting defamation fall within the permissible limits of freedom of expression, and such laws certainly fall within Article 19(3)(a) allowing limits on freedom of expression in order to protect the rights and reputations of others).

564. Final Report, *supra* note 541, para. 83.

lence.”<sup>565</sup> The words “in principle” do leave room for allowing imprisonment in certain cases. But in the Update to the Preliminary Report, they stated that “even if the opinion expressed is open to sanction in view of a permissible restriction” to freedom of expression, “that sanction should never go so far as imprisonment.”<sup>566</sup>

An analysis of the proportionality of a sanction requires comparing the extent of the restriction with the seriousness of the behavior. Applying the principle of proportionality in assessing the legitimacy of a penalty “necessarily entails a value judgment on the ideas expressed.”<sup>567</sup> International law has declared that hate propaganda has no value, so the inquiry should then focus on what goal would be achieved by imprisoning for hate propaganda that might not be achieved through some other sanction. Acknowledging the educative function that the criminal penalty required under Article 4 of the CERD Convention is supposed to have, the Rapporteurs indicate that this function is served by the trial itself rather than by whatever sentence may follow. Given the fact that some states impose very high maximum sentences, and that abuses can arise from resort to imprisonment, the Rapporteurs ask: “Can the abuse of expression really justify deprivation of liberty?”<sup>568</sup>

## X.

### SOME THOUGHTS ON THE DIVERGENCE OF U.S. JURISPRUDENCE FROM INTERNATIONAL NORMS

In the perennial struggle between individual rights and the equality principle, the U.S. has given primacy to individuals’ rights.<sup>569</sup> Why is the United States so isolated in its freedom of expression jurisprudence? Professor Ted Meron has sought to explain this phenomenon as follows:

[T]he different approach in the United States should not be explained on constitutional grounds alone. It also reflects, at least in recent history, the feeling of confidence and security in a developed and relatively stable society . . . . In some other countries, however, activities and organizations that in the United States would often be regarded as creating only a marginal possibility of violence and threat to public order might be regarded as a clear and present danger.<sup>570</sup>

Samuel Asante of Ghana expressed similar thoughts in 1969:

It is clearly pertinent to ask whether a particular country in a particular situation can absorb the strains and stresses of exuberant enjoyment of the fundamental

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565. *Id.*

566. Update of Preliminary Report, *supra* note 541, para. 23.

567. Final Report, *supra* note 541, para. 139.

568. Update of Preliminary Report, *supra* note 541, para. 100. Even less severe penalties, such as withdrawing the right to be elected or to be an editor of a newspaper, for example, “should imposed only as a deterrent, i.e. at the end of a period of multiple recidivism,” after warnings to cease and desist. *Id.* para. 103.

569. This was less so in the late 1930s and early 1940s; in the 1940s, however, “questions about the relationship between inequality and free speech were pushed aside” and the U.S. returned to the “first amendment classicism of the 1920s.” Norman Rosenberg, *Another History of Free Speech: The 1920s and 1940s*, 7 *LAW AND INEQUALITY* 333, 335 (1983).

570. Theodor Meron, *Article: The Meaning and Reach of the International Convention on the Elimination of All Forms of Racial Discrimination*, 79 *A.J.I.L.* 283, 288-89 (1985).

freedoms. It seems quite obvious that limits of freedom of association and expression, for example, in a stable democracy are not necessarily coterminous with those of an infant nation, threatened by disintegration . . . The fear of disintegration haunts every African nation. . . . The new African states have to tackle the fundamental problem of welding a heterogeneous conglomeration of tribes and communities into a united nation. . . .<sup>571</sup>

Other reasons are needed, however, to explain the existence of hate speech legislation in countries with a long-standing democracy and heterogeneous population. Professor Kathleen Mahoney has noted, in examining the difference between the U.S. and Canadian approaches, that Canadian law places a stronger emphasis on collective rights and on the goal of equality than does U.S. law, under which the First Amendment trumps other rights when liberty and equality come into conflict.<sup>572</sup> She explains that Canada takes into greater account than does the U.S. the views of historically-discriminated against groups.<sup>573</sup>

Freedom of speech as defined by women and minority groups looks different than freedom of speech defined by others. They look at freedom of expression in terms of the liberal ideal and ask, does this make us free? . . . They wonder how something experienced by one person can be called freedom, when it is simultaneously experienced by another as violence, oppression, containment, or some other variation of non-freedom.<sup>574</sup>

She points out that the Canadian Charter of Rights and Freedoms, unlike the U.S. Bill of Rights, contains a provision explicitly committing it to preserving and enhancing the country's multicultural heritage.<sup>575</sup> That goal "is particularly important when courts are required to balance freedom of expression of hate propagandists against the multiculturalism ideal, especially when read with the powerful equality provision."<sup>576</sup> The Ontario Court of Appeal "affirmed the importance of hate laws when it said that multiculturalism cannot be preserved, let alone enhanced, if free reign is given to the promotion of hatred against identifiable cultural groups."<sup>577</sup>

Critical race theorists assert that racism is a significant reason that racist speech continues to enjoy such strong protection in the U.S., when speech affecting privacy, for example, is not given such protection, and speech such as perjury is criminally sanctioned.<sup>578</sup> As Professor Lawrence Douglas has noted, "the contours of toleration will always be traced by the demarcation of the intolerable."<sup>579</sup> Under U.S. law, racist speech is not considered intolerable, unlike defamatory speech, invasion of privacy and fraud.

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571. S.K.B. Asante, *Nation Building and Human Rights in Emergent African Nations*, 2 CORNELL INT'L L.J. 72, 97 (1969).

572. Kathleen Mahoney, The James McCormick Mitchell Lecture, *Language as Violence v. Freedom of Expression: Canadian and American Perspectives on Group Defamation*, 37 BUFF. L. REV. 337, 345 (1988/89).

573. *Id.*

574. *Id.* at 345-46.

575. *Id.* at 346.

576. *Id.*

577. *Id.*

578. See, e.g., Lawrence, *supra* note 67.

579. Douglas, *supra* note 54, at 173.

David Kretzmer, an Israeli who was recently elected to the Human Rights Committee, has provided additional suggestions as to why U.S. jurisprudence has developed so differently from that in the rest of the world. He indicates that in the U.S. we are more concerned about the "slippery slope," whereas that is of little concern in civil law systems.<sup>580</sup> Furthermore, he states, "accepting the slippery slope argument must rest on an assessment that the dangers of slipping are greater than the dangers of treating racist speech with impunity."<sup>581</sup>

Among the U.S. theories frequently criticized in other countries is that of the "marketplace of ideas." This theory, which I call the Darwinian theory of free speech, is based on the notion that what emerges is "better," whereas in fact, there is a strong argument that the marketplace approach simply results in the survival of the views of the most powerful sectors of society.<sup>582</sup> The freedom of expression ideology grounded in the "marketplace" approach has thrived because of this country's culture of capitalism and individualism. A country's political and social culture makes up the fabric of society, to use a worn metaphor, a quilt, so to speak. If one changes the free speech thread in that quilt, one changes the very pattern of the quilt itself. In a political culture that believes in restricting hate speech, changing that thread so as not to punish hate speech might let that new thread take over the quilt and obliterate the other patterns.<sup>583</sup> For those living in a society that already allows hate propaganda, other patterns have already been obliterated by silencing potential participants.<sup>584</sup>

U.N. Special Rapporteur Danilo Türk saw implicit weakness in the marketplace theory of ideas when he pointed to the particular relevance of "respect for historical reality" in examining the right to freedom of expression.<sup>585</sup> That right, he says,

has had usually a lot to do with changes in the power structure: the powerful (whatever the source of their power) have usually had the freedom to express their thoughts, while the powerless have had to struggle for it. Legal norms relating to this right therefore have to be seen against a background of the actual distribution of economic, political and military power in a given society.<sup>586</sup>

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580. David Kretzmer, *Free Speech and Racism*, 8 CARDOZO L. REV. 445, 472-73, 491-92 (1987).

581. *Id.* at 492.

582. Calling the "marketplace of ideas" a "legitimizing myth," Stanley Ingber has written that "in reality, the market is severely skewed in favor of an entrenched power structure and ideology," for it "simply fine-tunes differences among elites, while diffusing pressure for change by preserving a myth of personal autonomy needed to legitimate a governing system strongly biased toward the status quo." Stanley Ingber, *The Marketplace of Ideas: A Legitimizing Myth*, 1984 DUKE L.J. 1 (1984).

583. Richard Falk describes the extreme reach of this scenario when he writes that attempts to implement human rights in some cultural settings "may produce a devastating breakdown of social order." Richard Falk, *Cultural Foundations for the International Protection of Human Rights, in HUMAN RIGHTS IN CROSS-CULTURAL PERSPECTIVES: A QUEST FOR CONSENSUS* 44, 58 (Abdullahi Ahmed An-Na'im ed., 1992).

584. On the silencing effect of racist speech, see, e.g., Lawrence, *supra* note at 472; cf. CATHERINE MACKINNON, *A FEMINIST THEORY OF THE STATE* 206 (1989)(asserting the silencing effect of pornography).

585. Working Paper of Mr. Türk, *supra* note 541, at 4.

586. *Id.*



Any legal analysis of freedom of expression must not examine that right in isolation from other rights, he writes. As indicated earlier, he envisions this relationship as a set of concentric circles, with freedom of expression in the center, and all other human rights in concentric circles with varying relationships to the right placed at the center.<sup>587</sup> If, as he says, the nature of these interrelationships varies from country to country depending on the social context found there,<sup>588</sup> it appears that the United States, freedom of expression has been placed not just at the center of concentric circles of other rights, but on an altar above those rights.

What effect can the failure to restrict hate propaganda have? Commenting on the transformative effect that hate speech restrictions can have, Clyde Ferguson once commented: "Since the *Beauharnais* decision there has been further impressive evidence, within the context of the classic Holmes opinions, that incitement to racial discrimination leads to public acts having a potential for provoking violence."<sup>589</sup> This recognizes what the drafters of the Civil and Political Rights Covenant maintained, that is, that hate propaganda creates a society that makes hate violence possible.

Although the U.N. Special Rapporteurs appointed to study freedom of opinion and expression question imprisonment as an appropriate sanction for hate speech,<sup>590</sup> they do not question the need to prohibit such speech. Their Conclusions and Recommendations do, however, end with a cautionary note. After examining the increase in legislation passed in reaction to the rise of xenophobia and racism, they point out the need "to ensure that the cure — in other words, the permissible restrictions — is not worse than the evil it is designed to remedy."<sup>591</sup>

## XI. CONCLUSION

How to stem hatred is a continuing enigma. The "Anatomy of Hate" conferences organized by Elie Wiesel<sup>592</sup> reflect that the world still puzzles over how to achieve the goals set forth in the Universal Declaration of Human Rights and other human rights instruments.<sup>593</sup> Much of the world has decided that hate

587. *Id.*

588. For example, in one country the right to freedom of expression might only be realized if illiteracy is eliminated, while in another country the right might be realized only upon removal of political structures that prevent popular participation in government. *Id.*

589. Clarence Clyde Ferguson, *The United Nations Convention on Racial Discrimination: Civil Rights by Treaty*, 5 *LAW TRANS. Q.* 61, 74 (1968) (citing *REPORT U.S. COMMISSION ON CIVIL RIGHTS* 105-24 (1963); *FELLMAN, THE LIMITS OF FREEDOM* 45-86 (1959)); cf. Note, *Abortive Efforts to Combat Hate Propaganda*, 61 *YALE L.J.* 252 (1952). As for the impact of hate speech restrictions on hate-mongering speech, see *supra* note 33 (noting that Le Pen has reportedly toned down his remarks since his conviction).

590. See *supra* text accompanying note 564-65.

591. Final Report, Conclusions and Recommendations, U.N. Doc. E.CN.4/Sub.2/1992/9/Add.1 (14 July 1992) para. 4(c).

592. The 1990 Hate Conference was held in Oslo; the 1991 conference, reflecting that year's dramatic changes in Europe, was held in Moscow.

593. As A.M. Rosenthal has asked: "Why is man not satisfied with just hating by himself but has a drive to hate collectively, banding together for that purpose . . ." N.Y.T., Aug. 30, 1990.

propaganda restrictions are a necessary step to achieve the most fundamental aspects of those instruments: non-discrimination and respect for the dignity of every human person.<sup>594</sup>

Are hate speech restrictions open to abuse? Yes, but so is the power to arrest and imprison, yet civil libertarians do not argue that government should not have the power to arrest and imprison because it is open to abuse. One should keep in mind that the international law which allows or requires restrictions on hate speech also emphasizes fundamental freedoms, so that those restrictions are themselves to be read restrictively. As Alexandre Kiss has written: "[T]he ultimate objective of the limitation clauses is not to increase the power of a state or government but to ensure the effective enforcement of the rights and freedoms of its inhabitants."<sup>595</sup> Restrictions on hate speech are allowed insofar as they help enforce the right of everyone to enjoy rights on a basis of equality and non-discrimination.<sup>596</sup>

The rationales developed by critical race theorists in the United States in support of hate speech restrictions track closely the rationales that emerge from the drafting history of the international law on the subject. Both critical race and international law theory recognize the importance of listening and giving significant weight to the experience of the targets of hate speech; both acknowledge that the injury that such words cause is serious; and both note the silencing effect that hate speech can have.

Also common to both critical race and international law theory is the central importance of the equality principle. Both theories view the failure to restrict hate speech as constituting a failure to fulfill a state's obligation to give effect to the right to equality and non-discrimination. Both critical race and international law theory require a highly contextual analysis of any case that might arise under a hate speech law; the detailed examination of the facts of cases by the European Commission on Human Rights and the European Court of Human Rights exemplifies this approach. Both theories conceptualize a right to be free from hateful speech, as well as a government obligation to protect against private actors. And both reject the notion that racist speech must be protected so as not to hinder discovery of the Truth. The bedrock of the international law on hate speech is the belief that there is indeed a wholly unacceptable ideology, one that is not deserving of legal protection: that of discrimination on the basis of race, sex, and other prohibited grounds.

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594. This is not to say that there is unanimity of views on this point outside the U.S. See e.g., Yutaka Thaima, *Protection of Freedom of Expression by the European Convention*, 2 *REVUE DES DROITS DE L'HOMME* 658, 672 (1969) (pointing out that Article 4 of the CERD Convention and Article 20(2) of the Civil and Political Rights Covenant may in fact have the reverse effect of that desired, that is, they "may have a chilling effect upon those who want seriously and objectively to describe the problems. . . of racial discrimination.")

595. Alexandre Charles Kiss, *Permissible Limitations on Rights*, in HENKIN, *supra* note 253, at 310.

596. As has been written of the decisions of the Canadian courts upholding the constitutionality of hate speech restrictions, "they do not restrict freedom of expression, but they protect it." René Pepin, *La vérité et la liberté d'expression*, 18 *REVUE GÉNÉRALE DE DROIT* 869, 874 (1990) ("elles ne restreignent pas la liberté d'expression, mais la protègent").

Although there are many parallels in the critical race and international law theories supporting hate speech restrictions, one concept that is basic to international law theory is not so evident in critical race theory, though it appears by implication; it is that no one may use a right with the aim of destroying others' rights. Since hate mongers aim to deprive members of the target group of their right to non-discrimination, their hate speech may be prohibited. This concept appeared in the very first drafts of the Universal Declaration of Human Rights;<sup>597</sup> it was an important reason given by many for their support of hate speech restrictions during the drafting of the Civil and Political Rights Covenant,<sup>598</sup> and it has formed the basis for findings by the European Commission on Human Rights that a criminal conviction under hate speech laws does not violate the petitioner's right to freedom of expression.<sup>599</sup>

I find the abuse of rights theory to be one of the most persuasive among those advanced in support of hate speech restrictions. The goal of hate mongers is to convince others that the members of the target group are not entitled to equal protection of the laws; the hate mongers seek a society of discrimination, where they are in the dominant group. They should not be entitled to claim protection under the right to freedom of expression for their abuse of speech rights to achieve that goal.

This theory merits closer examination in the debates in the United States on hate propaganda. Granted, it does not address the line-drawing problems so commonly raised by opponents of hate speech restrictions. I am not convinced, however, that the line-drawing questions posed by potential hate speech restrictions are any more complex those those posed by other laws. Just what constitutes "due process" has been the subject of much discussion, yet voices have not been raised to abolish the due process requirement because of difficulty in determining where to draw the line. At a minimum, the abuse of rights theory should move the debate in the United States past the threshold question of whether to fashion a restriction in the first place.

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597. The freedom of expression provision in one of the earliest drafts of the Universal Declaration of Human Rights allowed restrictions on "publications aimed at the suppression of human rights and fundamental freedoms." U.N. Doc. E/CN.4/21, 1 July 1947, Annex B, at 35 (Article 14(3); the clause appears in square brackets).

598. See *supra* note 121 and accompanying text.

599. See *supra* notes 403-12 and accompanying text.