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Freedom of Expression and Religious Sensitivities in Pluralist Societies: Facing the Challenge of Extreme Speech

*Jeroen Temperman**

I. INTRODUCTION

Recently, with respect to religion, the meaning and scope of the freedom of expression has been tested. Specifically, concerns about religious sensitivities within religiously pluralist societies have made a profound impact on the workings of the political bodies of the United Nations, with respect to which special mention must be made of the “Combating Defamation of Religions” resolutions adopted in recent years by the General Assembly and the Human Rights Council.¹

In response to these resolutions, legal scholars have expressed sincere concern that the emerging counter-defamation discourse appears to overstep the mark and may very well foster illegitimate interferences

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1. And, previously, by the former Commission on Human Rights. *See* Comm’n on Human Rights Res. 1999/82, Report on the 55th Sess., Mar. 22–Apr. 30, 1999, U.N. Doc. E/CN.4/1999/167, at 280 (Apr. 30, 1999); Comm’n on Human Rights Res. 2000/84, Report on the 56th Sess., Mar. 20–Apr. 28, 2000, U.N. Doc. E/CN.4/2000/167, at 336 (Apr. 26, 2000); Comm’n on Human Rights Res. 2001/4, Report on the 57th Sess., Mar. 19–Apr. 27, 2001, U.N. Doc. E/CN.4/2001/167, at 47 (Apr. 18, 2001); Comm’n on Human Rights Res. 2002/9, Report on the 58th Sess., Mar. 18–Apr. 26, 2002, ESCOR, Supp. No. 3, U.N. Doc. E/CN.4/2002/200, at 59 (Apr. 15, 2002); Comm’n on Human Rights Res. 2003/4, Report on the 59th Sess., Mar. 17–Apr. 24, 2003, U.N. Doc. E/CN.4/2003/135, at 34 (Apr. 14, 2003); Comm’n on Human Rights Res. 2004/6, Report on the 60th Sess., Mar. 15–Apr. 23, 2004, U.N. Doc. E/CN.4/2004/127, at 28 (Apr. 13, 2004); Comm’n on Human Rights Res. 2005/3, Report on the 61st Sess., Mar. 14–Apr. 22, 2005, U.N. Doc. E/CN.4/2005/135, at 21 (Apr. 12, 2005); *see also* Human Rights Council Res. 4/9, Rep. to the Gen. Assembly on the 4th Sess. of the Human Rights Council, Mar. 12–30, 2007, U.N. Doc. A/HRC/4/123, at 19 (Mar. 30, 2007); Human Rights Council Res. 7/19, Rep. of the Human Rights Council, 7th Sess., Mar. 3–Apr. 1, 2008, U.N. Doc. A/HRC/7/78, at 54 (Mar. 27, 2008); Human Rights Council Res. 10/22, Rep. of the Human Rights Council, 10th Sess., Mar. 2–Mar. 27, 2009, U.N. GAOR, 64th Sess., Supp. No. 53, A/64/53, at 74 (Mar. 26, 2009); Human Rights Council Res. 13/16, Res. Adopted by the Human Rights Council, 13th Sess., U.N. Doc. A/HRC/Res/13/16, at 1 (Mar. 25, 2010); G.A. Res. 60/150, U.N. Doc. A/RES/60/150 (Dec. 16, 2005); G.A. Res. 61/164, U.N. Doc. A/RES/61/164 (Dec. 19, 2006); G.A. Res. 62/154, U.N. Doc. A/RES/62/154 (Dec. 18, 2007); G.A. Res. 63/171, U.N. Doc. A/RES/63/171 (Dec. 18, 2008); G.A. Res. 64/156, U.N. Doc. A/RES/64/156 (Dec. 18, 2009).

with the fundamental right to freedom of expression and the religious rights of minorities.² The emerging counter-defamation discourse introduces new grounds for limiting human rights, notably with respect to the right to freedom of expression—limitations that are not recognized by international law. It is largely intrinsic to religious belief to deem all contradicting, unorthodox, or otherwise deviant religious doctrine and religious manifestations as, if not “heretical,” then at least erroneous, misguided, or misdirected. Accordingly, in any pluralist society where more than one religion is practiced, an intensified focus on protecting religions against defamation may very well be counterproductive as far as the right to freedom of religion or belief itself is concerned. The examples of the persecution of numerous “deviant” or “break-away” sects, or of individual “heretics,” in different parts of the world, done in the interest of safeguarding “pure” religious orthodoxy, are striking.

In sum, the counter-defamation discourse is not the appropriate way of dealing with contemporary issues of religious intolerance. Specifically, the counter-defamation approach is unacceptable because it seeks to shift the emphasis from the protection of the rights of individuals to the protection of religions per se. In so doing, new grounds for limiting human rights are introduced that are not and should not be recognized by international human rights law (e.g., respect for religions or respect for people’s religious feelings) because such restrictions are open to governmental abuse.

The question that we must then answer is how we can solve the challenges posed by religious sensitivities in religiously pluralist societies. The answer, which is seen in international monitoring bodies, the consensus of independent human rights experts, and legal doctrine, boils down to recognizing that adequate legal standards are already in place to deal with free speech *and* with the possible limitations thereto in

2. See, e.g., Sejal Parmar, *The Challenge of “Defamation of Religions” to Freedom of Expression and the International Human Rights System*, 3 EUR. HUM. RTS. L. REV. [E.H.R.L.R.], 353, 354 (2009); Julian Rivers, *The Question of Freedom of Religion or Belief and Defamation*, 2 RELIGION & HUM. RTS. 113, 115 (2007); Aurel Sari, *The Danish Cartoons Row: Re-Drawing the Limits of the Right to Freedom of Expression?*, 16 FINNISH Y.B. INT’L L. 363, ¶ VI (2005); Jeroen Temperman, *Blasphemy, Defamation of Religions & Human Rights Law*, 26(4) NETH. Q. HUM. RTS. 517, 530–533 (2008); Allison G. Belnap, Comment, *Defamation of Religions: A Vague and Overbroad Theory that Threatens Basic Human Rights*, 2010 BYU L. REV. 635, 642–685; Rebecca J. Dobras, Note, *Is the United Nations Endorsing Human Rights Violations?: An Analysis of the United Nations’ Combating Defamation of Religious Resolutions and Pakistan’s Blasphemy Laws*, 37 GA. J. INT’L & COMP. L. 339, 366–380 (2009); Maxim Grinberg, Note, *Defamation of Religions v. Freedom of Expression: Finding the Balance in a Democratic Society*, 18 SRI LANKA J. INT’L L. 197, 210–222 (2006).

the event of extreme speech.³ Specifically, there is no need for additional bans in addition to the ones presently recognized by international law. In short, we need to work with the existing standards and existing limitation clauses and further gear these instruments towards newly emerging challenges, such as the interplay between freedom of expression and religious sensitivities in pluralist societies. This Article asks to what extent international monitoring bodies succeed in using the existing structures to deal with emerging challenges, and inquires into what states may learn from these international benchmarks, expert opinions, and relevant case law.

II. EUROPEAN COURT OF HUMAN RIGHTS: MAKING DO WITHOUT A HATE SPEECH PROHIBITION

The European Court of Human Rights has taken a somewhat unconvincing and rather incoherent approach to cases revolving around freedom of expression and religious sensitivities in pluralist societies. Specifically, the Court often—although a few notable exceptions can be identified⁴—fails to distinguish between forms of criticism or insult that do and those that do not actually jeopardize public order and/or the rights and freedoms of others, notably their religious rights.⁵ This distinction

3. I.e., both *freedom of expression* and the *prohibition of advocacy of hatred* are enshrined in international law. Expert bodies increasingly engage head-on with the interplay between these two interrelated norms (see *infra* Part III, particularly the drafting by the Human Rights Committee of a new General Comment on freedom of expression, which will also deal with the issue of hate speech). Political bodies have occasionally recognized the existence of these complimentary norms. See, e.g., G.A. Res. 217A, U.N. GAOR, 3d Sess., U.N. Doc. A/RES/217(III)E (Dec. 10, 1948) (noting that all “human beings shall enjoy freedom of speech,” but requiring states to police against incitement to discrimination).

4. See, e.g., *Giniewski v. France*, App. No. 64016/00, 2006-I 45 Eur. H. R. Rep. 23 (2006), available at <http://www.echr.coe.int/echr/> (click “Case-law,” then “Decisions and judgments,” then “HUDOC,” select “decisions” on the left-hand column, and search for application number 64016/00). In this case the Court held that a scholar’s critical analysis of Catholic doctrine, shocking to religious adherents particularly on account of the proposed link made to the origins of the Holocaust and the proposed linkage between Catholic doctrine and anti-Semitism more generally, should, according to the Court, not have been limited by France as this type of religious criticism is protected speech, and as, among other reasons, the berated publications did not amount to hate speech (some of the other reasons here listed by the Court seem beside the point, though). *Id.* ¶ 52. The former European Commission on Human Rights did on at least one occasion point out that criticism of religion under circumstances must be protected rather than countered by states. See *Church of Scientology and 128 of its Members v Sweden*, App. No. 8282/78, 21 Eur. Comm’n H.R. Dec. & Rep. 109 (1980). In this case the Commission stated that it “is not of the opinion that a particular creed or confession can derive from the concept of freedom of religion a right to be free from criticism.” *Id.* at 111.

5. See, e.g., *X. Ltd. and Y. v. United Kingdom*, App. No. 8710/79, 28 Eur. Comm’n H.R.

would be helpful since it can be argued that only verbal attacks that actually do jeopardize public order and/or the rights and freedoms of others may legitimately be restricted.⁶

More particularly, three trends discernable in the Court's jurisprudence are rather helpful from a human rights perspective:

(A) the Court's gradual development of a "right not to be insulted in one's religious feelings;"

(B) the Court's failure to realize that there is no conflict between freedom of religion or belief and freedom of expression *in abstracto*;

(C) the Court's sanctioning of inherently discriminatory laws.

These trends will be discussed in the following portion of the Article.

A. The Court's Development of a "Right Not to Be Insulted in One's Religious Feelings"

In its early case law, the European Court of Human Rights took an overly extensive reading of freedom of religion or belief so as to limit the freedom of expression. In a series of cases, the Court held that Article 9 of the European Convention on Human Rights⁷ includes, *inter alia*, a "right not to be insulted in one's religious feelings."⁸ This interpretation

Dec. & Rep. 77 (1982); *Otto Preminger-Institute v. Austria*, 19 Eur. H. R. Rep. (ser. A) 34 (1994), available at <http://www.echr.coe.int/echr/> (click "Case-law," then "Decisions and judgments," then "HUDOC," select "decisions" on the left-hand column, and search for application number 13470/87); *Wingrove v. United Kingdom*, 24 Eur. H. R. Rep. 1 (1996), available at <http://www.echr.coe.int/echr/> (click "Case-law," then "Decisions and judgments," then "HUDOC," select "decisions" on the left-hand column, and search for application number 17419/90); *Murphy v. Ireland*, 38 Eur. H. R. Rep. 13 (2003), available at <http://www.echr.coe.int/echr/> (click "Case-law," then "Decisions and judgments," then "HUDOC," select "decisions" on the left-hand column, and search for application number 44179/98). For a more extensive discussion of these cases, see Jeroen Temperman, *Blasphemy, Defamation of Religions & Human Rights Law*, 26 NETH. Q. HUM. RTS. 517, 533-544 (2008).

6. *But see, e.g., Otto Preminger-Institute*, 19 Eur. H. R. Rep. (ser. A) 34, at ¶ 48, indicating that persons have a right not to be insulted in their religious belief. Reading this right into Article 9 of the European Convention on Human Rights is dubious. *See infra* Part II.A.

7. 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).

8. *See, e.g., X. Ltd. and Y.*, 28 Eur. Comm'n H.R. 28 Dec. & Rep. at 83 ("the right of citizens not to be offended in their religious feelings by publications"); *Otto Preminger-Institute*, 19 Eur. H. R. Rep. (ser. A) 34, at ¶ 48, ("the right of citizens not to be insulted in their religious feelings"); *Wingrove*, 24 Eur. H. R. Rep. 1, at ¶ 47, ("the right of citizens not to be insulted in their religious feelings"). In other cases, the notion of respect for the religious doctrines and beliefs of others is not recognized as a right as such, but is nonetheless considered as a recognized ground for

of religious freedom creates absurd results, as it means that there is virtually always a clash of rights—that is, freedom of religion vs. freedom of expression—whenever someone expresses anything remotely critical of religion. Long-established legal doctrines provide that the right to freedom of religion or belief encompasses the freedom to have or adopt a religion or belief (the so-called *forum internum*) and the freedom to manifest that religion or belief (the *forum externum*).⁹ As a result, if a person is insulted in his or her religious feelings, that person's religious freedoms are not *ipso facto* violated. Thus, international human rights law does not recognize the right to have one's religion or belief at all times exempted from criticism, ridicule, or insult, or the right to have one's religious feelings respected.¹⁰ Put differently, the right to freedom of religion or belief does not by implication place a duty on all people to at all times have respect for everyone's religion or belief. For a state to legitimately interfere with a shocking or offensive speech or publication, a much higher threshold will need to be satisfied than the assertion that certain people have been shocked or insulted or that people are likely to be shocked or insulted.

B. The Court's Failure to Realize that there is No Conflict Between Freedom of Religion and Freedom of Expression In Abstracto

In more recent cases, the European Court of Human Rights, recognizing the need for a higher threshold than shocking a religious person's conscience, has revised its approach in deciding religious expression cases. Specifically, the Court seems to be abandoning the right not to be insulted in one's religious feelings. Instead, it increasingly refers to the literal, codified grounds for limiting freedom of expression, which include phrases from Article 9(2) of the European Convention such as "public safety," "public order," "health," "morals," or "the

limiting free speech. See, e.g., *Murphy*, 38 Eur. H. R. Rep. 13, at ¶¶ 63–64 (“[T]he prohibition sought to ensure respect for the religious doctrines and beliefs of others so that the aims of the impugned provision were public order and safety together with the protection of the rights and freedoms of others. . . . The Court does not see any reason to doubt that these were indeed the aims of the impugned legislation and considers that they constituted legitimate aims . . .”).

9. See Brett G. Scharffs, *The Freedom of Religion and Belief Jurisprudence of the European Court of Human Rights: Legal, Moral, Political and Religious Perspectives*, 26 J.L. & RELIGION 249, 255 (2011).

10. See Special Rapporteur on Freedom of Religion or Belief, *Implementation of General Assembly Resolution 60/251 of 15 March 2006 Entitled “Human Rights Council”*, U.N. Doc. A/HRC/2/3 at ¶ 36 (Sept. 20, 2006) (by Asma Jahangir and Doudou Diène).

protection of the rights and freedoms of others.”¹¹ In the context of cases revolving around free speech and religious sensitivities of third persons, it is clear that “public order” and “the protection of the rights and freedoms of others” may at times be relevant. The protection of the right to freedom of religion or belief of a third person is most definitely a legitimate ground for limiting free speech, but it should not be equated with a right not to be insulted in one’s religious feelings.¹² For a speech or publication to actually affect someone’s fundamental (religious) rights, we enter the realm of “extreme speech.” This ground for limitation, as is the case with any ground for limitation, cannot be advanced by a state without at least some sort of substantiation, the onus here being on the state to establish that fundamental rights and/or public order are truly at stake.¹³

In recent cases, the Court identified the rights of others to freedom of religion as a legitimate ground for limitation, rather than relying on the dubious right not to be insulted.¹⁴ However, the Court recognized in these cases that there indeed was a clash of rights and that a balance needed to be struck.¹⁵ It is not enough for a state to submit that the religious rights of others are at stake; rather, the state needs to indicate concretely why the religious rights are at stake. Moreover, as we are dealing with possible limits to the paramount democratic right to freedom of expression, some marginal assessment of that justification by the Court would seem to be in order.

The leap from the likelihood of people being insulted by a certain publication or public speech to the rights of these people being effectively undermined must also be considered. The Court is probably

11. See Scharffs, *supra* note 9, at 249 (“During the past fifteen years, the European Court of Human Rights has been engaging seriously with the freedom of religion and belief under Article 9 of the European Convention for the Protection of Human Rights and Fundamental Freedoms.”).

12. See discussion *supra* Part II.A.

13. JEROEN TEMPERMAN, STATE-RELIGION RELATIONSHIPS AND HUMAN RIGHTS LAW: TOWARDS A RIGHT TO RELIGIOUSLY NEUTRAL GOVERNANCE 252 (2010).

14. See, e.g., I.A. v. Turkey, 45 Eur. H. R. Rep. 30, ¶¶ 23–32 (2005), available at <http://www.echr.coe.int/echr/> (click “Case-law,” then “Decisions and judgments,” then “HUDOC,” select “decisions” on the left-hand column, and search for application number 42571/98).

15. For an exception, see Klein v. Slovakia, 50 Eur. H. R. Rep. 15 (2006), available at <http://www.echr.coe.int/echr/> (click “Case-law,” then “Decisions and judgments,” then “HUDOC,” select “decisions” on the left-hand column, and search for application number 72208/01). In this case the Court concluded that a verbal attack on a high representative of the Roman Catholic Church could not have threatened the religious rights of individuals, meaning that the fundamental religious rights of others could not be relied on as legitimate ground for limiting the applicant’s free speech. *Id.* ¶¶ 52–54.

right to look into demographic figures on the percentage of the population that adheres to certain religions as part of its analysis, but it could also be argued that the Court's use of them is counter-intuitive at best. For example, in *I.A. v. Turkey*, the fact that many people were active, Muslim believers added weight to their arguments that their religious rights were being threatened by disturbing, shocking, or provocative statements on Islam.¹⁶ One could easily reverse the argument: if the overwhelming majority of a society adheres to one and the same religion, a perhaps shocking view presented by an outsider is not likely to undermine any person's individual religious rights. Demographic figures can certainly come into play in this type of balancing, yet it would seem that they are only appropriate if they substantiate that the group of people targeted by a speech or publication is a vulnerable minority,¹⁷ or if the statistics show that the group at hand does indeed suffer from hate crimes or other similar persecution. In those cases, such data could arguably be construed to add weight to the pressing social need to interfere with free speech.

In the classic *Otto Preminger* case, concerning Austria's seizure and forfeiture of a film that was no doubt blasphemous, the Court made the same error when it reasoned that

[t]he Court cannot disregard the fact that the Roman Catholic religion is the religion of the overwhelming majority of Tyroleans. In seizing the film, the Austrian authorities acted to ensure religious peace in that region and to prevent that some people should feel the object of attacks on their religious beliefs in an unwarranted and offensive manner.¹⁸

Again, the reverse argument seems the strongest one: as the local population overwhelmingly adhered to this dominant majority, their individual rights were never going to be undermined by a small-scale art cinema screening of this film. Of course, in these types of circumstances there is always the chance that the majority's outrage may, in fact,

16. *I.A. v. Turkey*, 45 Eur. H. R. Rep. 30 at ¶¶ 20–29. Thus, the Court seems to endorse to an extent the Turkish Government's views: "The Government submitted that the applicant's conviction had met a pressing social need in that the book in issue had contained an abusive attack on religion, in particular Islam, and had offended and insulted religious feelings. They argued in that connection that the criticism of Islam in the book had fallen short of the level of responsibility to be expected of criticism in a country where the majority of the population were Muslim." *Id.* at ¶ 20.

17. See Nazila Ghanea, *Minorities and Hatred: Protections and Implications*, 17 INT. J. ON MINORITY AND GROUP RTS. 423, 432–436 (2010).

18. *Otto Preminger-Institute v. Austria*, 19 Eur. H. R. Rep. (ser. A) 34, at ¶ 56 (1994), available at <http://www.echr.coe.int/echr/> (click "Case-law," then "Decisions and judgments," then "HUDOC," select "decisions" on the left-hand column, and search for application number 13470/8).

actually threaten the rights of the person(s) responsible for the speech, publication, or film, but such could not naturally be construed as a “rights-of-others” argument. If anything, this scenario provides a “public order” argument. However, in a democratic society there are very good reasons for the state to take additional measures to protect such unpopular speech (and the persons behind it) rather than to limit it.

To an extent, this criticism applies to the Court’s “Holocaust denial” case law as well.¹⁹ In those cases revolving around denial or trivialization of the Holocaust, the Court has more or less equated Holocaust denial with incitement to discrimination. In the *Garaudy* case, the Court considered:

There can be no doubt that denying the reality of clearly established historical facts, such as the Holocaust, as the applicant does in his book, does not constitute historical research akin to a quest for the truth. The aim and the result of that approach are completely different, the real purpose being to rehabilitate the National-Socialist regime and, as a consequence, accuse the victims themselves of falsifying history. Denying crimes against humanity is therefore one of the most serious forms of racial defamation of Jews and of incitement to hatred of them. The denial or rewriting of this type of historical fact undermines the values on which the fight against racism and anti-Semitism are based and constitutes a serious threat to public order. Such acts are incompatible with democracy and human rights because they infringe the rights of others.²⁰

On the one hand, surely one must appreciate where the Court is coming from; insofar as the entire contemporary human rights framework stems from the horrors of the Holocaust, a denial of it equals a denial of everything that framework stands for. On the other hand, the Court’s automatic, self-evident correlation between Holocaust denial and the denier’s active undermining of the rights of others perhaps boils down to overrating the impact of such statements while at the same time underrating a democratic society’s capability of identifying both the truth and the grotesque.

19. *Garaudy v. France*, 2003-IX. Eur. Ct. H.R. 369 (2003), <http://www.echr.coe.int/echr/> (click “case law” then “Decisions and judgments,” then “HUDOC,” select “decisions” on the left-hand column, and search for application number 65831/01)

20. *Id.* at ¶ 40. In the earlier case of *Lehideux and Isorni v. France* App. No. 55/1997/839/1045, at ¶ 47, the Court had similarly considered that in “the category of clearly established historical facts—such as the Holocaust” speech or publications that come down to a “negation or revision [are to be] removed from the protection of Article 10 by Article 17.”

C. The Court's Sanctioning of Inherently Discriminatory Laws

In dealing with freedom of expression and religious sensitivities in pluralist societies, the European Court of Human Rights has never convincingly dealt with blasphemy or defamation prohibitions that are inherently discriminatory in that they *de jure* or *de facto* apply only to protect the predominant religion.²¹ It is hard to see how an inherently discriminatory law could ever form the basis for restrictions “necessary in a democratic society.”

D. Reconceptualizing the “Abuse of Rights” Doctrine?

The challenge of dealing with religious sensitivities in pluralist societies, and particularly the Court's noted difficulties in distinguishing genuine hate speech from shocking-yet-protected speech within the European context, is significantly fueled by the fact that the European Convention does not entail a proper religious hate speech prohibition.²² That is to say, in the European Convention one will look in vain for the equivalent of Article 20(2) of the International Covenant on Civil and Political Rights (ICCPR or “the Covenant”), which codifies the duty for the state to prohibit advocacy of religious hatred (see the discussion in Part III, *infra*), to provide assistance in answering these difficulties.²³ However, different, but possibly complimentary, solutions to circumventing this omission are imaginable: (1) “reading” a hate speech prohibition “into” Article 10(2) of the European Convention,²⁴ and (2)

21. *Wingrove v. United Kingdom*, 24 Eur. H. R. Rep. 1, at ¶ 50 (1996), available at <http://www.echr.coe.int/echr/> (click “Case-law,” then “Decisions and judgments,” then “HUDOC,” select “decisions” on the left-hand column, and search for application number 17419/90) (“It is true that the English law of blasphemy only extends to the Christian faith

. . . . The uncontested fact that the law of blasphemy does not treat on an equal footing the different religions practised in the United Kingdom does not detract from the legitimacy of the aim pursued in the present context.”). Note that England itself has come to the conclusion that its ancient blasphemy laws were inherently discriminatory and contrary to free speech, and abolished these laws in 2008. See Criminal Justice and Immigration Act 2008, 2008, c. 4, § 79 (Eng.).

22. Jeroen Temperman, *Protection Against Religious Hatred Under the United Nations ICCPR and the European Convention System*, in *LAW AND RELIGION IN THE 21ST CENTURY: RELATIONS BETWEEN STATES AND RELIGIOUS COMMUNITIES* at 222 (Silvio Ferrari & Rinaldo Cristofoi eds., 2010).

23. G.A. Res. 2200A (XXI), U.N. Doc. A/RES/2200(XXI)A (Dec. 16, 1966); International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 U.N.T.S. 171 (entered into force Mar. 23, 1976) [hereinafter ICCPR].

24. See, e.g., Taunya Lovell Banks, *What is a Community? Group Rights and the Constitution: The Special Case of African Americans*, 1 MARGINS: MD. INTERDISC. PUB. ON RACE, RELIGION, GENDER, AND CLASS 51, 70 n.107 (2001) (“Article 10 of the European Convention

reconceptualizing the abuse of rights doctrine.²⁵

1. Reading a hate speech prohibition into Article 10(2) of the European Convention

One could possibly read a hate speech prohibition into Article 10(2) of the European Convention, which lists recognized grounds for the limitation of speech, as either a public order ground or as part of the “fundamental rights and freedoms of others” ground (e.g. the right of others to be free from discrimination).²⁶ The downside of this approach, however, is that it risks being accused of precisely that which the European Court of Human Rights’ past jurisprudence may be accused of, namely, reading into the European Convention notions that are not actually enshrined (e.g., the rights of others not to be insulted).

However, the human rights framework is explicitly premised upon the assumption that a society should be free from hatred, discrimination, and marginalization.²⁷ Accordingly, this implied ground for limitation does not require an enormous leap of faith. By comparison, the UN Human Rights Committee has indeed derived from the ICCPR a “right to be protected from religious hatred.”²⁸ However, it could, of course, base itself on the existence of Article 20(2) ICCPR for that purpose. Essentially, the Committee has taken a positive reading of a negatively formulated norm; that is to say, it has distilled an individual right from a prohibition addressed at states.

2. Reconceptualizing the abuse of rights doctrine

Alternatively, or perhaps additionally, the time may be appropriate to reconceptualize and revitalize the abuse of rights doctrine. This notion is not unique to the European Convention,²⁹ but could have special legal significance here, since it is the only provision in the European

contains a limitation on freedom of expression that has been interpreted to prohibit hate speech.”).

25. TEMPERMAN, *supra* note 13, at 336.

26. *See* Banks, *supra* note 24, at 70 n.107.

27. *See generally* Special Rapporteur on Contemporary Forms of Racism, *Racism, Racial Discrimination, Xenophobia and Related Forms of Intolerance: Follow-up to and Implementation of the Durban Declaration and Programme of Action*, Human Rights Council, U.N. Doc. A/HRC/12/38 (July 1, 2009) (by Githu Muigai).

28. *See, e.g.*, Human Rights Committee, Communication No. 736/1997, Malcolm Ross v. Canada, U.N. Doc. CCPR/C/70/D/736/1997 ¶ 11.5 (2000), *available at* <http://www.unhcr.ch/tbs/doc.nsf/0/29712c8ddea3414dc12569ad003d0316?Opendocument>.

29. *See* ICCPR, *supra* note 23, which codifies an abuse of rights provision in Article 5 in addition to the prohibition of advocacy of hatred (Article 20).

Convention that has language that specifically addresses situations in which the activities of people may be construed as being aimed at the destruction of the rights and freedoms of others.³⁰ Article 17 of the European Convention reads in full:

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.³¹

One important caveat is that not all hate speech cases can be discussed under this heading. This approach could only possibly apply to potential hate speech cases brought before the Court by persons alleging to have suffered interference with their free speech (e.g., if a person had been imprisoned, fined, fired, or otherwise punished on account of their alleged hate speech). Moreover, cases referred to the Court by alleged victims of hate speech naturally cannot be dealt with under this article.³² Again, the United Nations Human Rights Committee has derived from the ICCPR a “right to be protected from religious hatred.”³³ Should that notion, once Article 20(2) ICCPR has been further elaborated upon by the Human Rights Committee,³⁴ be construed to mean an autonomous fundamental right, it could then very well be argued that people may bring a case before the Committee complaining that states have not taken sufficient measures to eradicate advocacy of religious hatred. Though it remains to be seen whether the Committee’s conceptualization of Article

30. The former European Commission on Human Rights did realize this. *See, e.g., Glimmerveen & Hagenbeek v. The Netherlands*, 18 Eur. Comm’n H.R. Dec. & Rep. 187 (1979).

31. Convention for the Protection of Human Rights, *supra* note 7, Art. 17.

32. Article 17 of the ECHR does not provide an individual entitlement, but a general limitation to the scope of the rights set out by the Convention. In a sense, Article 17 sets out what right does *not* exist, namely the “right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms.” *Id.* As such, this provision does not appear to be an individual entitlement that can be invoked by individuals before the Court, for instance by individuals who claim they are the *victims* of hate speech. Indeed, the case law of the Court shows that Article 17 has not yet been successfully invoked by an alleged victim of hate speech. Article 17 thus far has only featured in the case law of the court so as to deny standing to persons claiming that their free speech has been interfered with, or in decisions on the merits, so as to add weight to the argument that the state did not breach the right to freedom of expression of the applicant.

33. Human Rights Comm., Communication No. 736/1997, *Malcolm Ross v. Canada*, U.N. Doc CCPR/C/70/D/736/1997 ¶ 11.5 (2000), *available at* <http://www.unhcr.ch/tbs/doc.nsf/0/29712c8ddea3414dc12569ad003d0316?Opendocument>.

34. *See* discussion *infra* Part III.

20(2) ICCPR will indeed make such cases possible in the future, any such development under Article 17 of the European Convention seems to be ruled out from the outset. Article 17 is intended to reject certain human rights claims, namely those which are made with a view towards destroying the rights of others.³⁵

This leads to a second caveat. Specifically, a potential drawback of an approach that consistently dismisses relevant claims on the basis of the abuse of rights doctrine is that it tends to avoid a body of jurisprudence dealing with the merits of such hate speech cases. Judicial practice thus far is that abuse of rights concerns are dealt with as an admissibility issue, not as part of a judicial exercise of balancing different rights. Article 35(3)(a) of the European Convention, too, refers back to an “abuse of the right of individual application” as one of the grounds for declaring a case inadmissible.³⁶ The fact that the abuse of rights prohibition is actually codified as part of the section listing the substantive rights and freedoms could be used to argue in favor of consideration of the merits of complaints here, rather than in favor of *prima facie* considerations of the admissibility of a case *per se*.³⁷ In sum, “abuse of rights” concerns are ideally always tackled as a part of a discussion of the merits (i.e., in conjunction with the standard discussion of relevant grounds for limitation under Article 10(2), and of the criteria applicable to those restrictions).

35. Consequently, this provision does not seem to set out any substantive rights in addition to the ones codified by Articles 2–14 of the European Convention. However, arguably some legal significance could be derived from the fact that the abuse of rights prohibition is codified as a part of the treaty section listing the substantive rights and freedoms. *See* Convention for the Protection of Human Rights, *supra* note 7, § I (entitled “Rights and freedoms”).

36. *Id.* at Art. 35(3)(a).

37. It must be noted that a (partial) focus on Article 17 of the European Convention in, for instance, the Court’s Holocaust denial case law (*Garaudy v. France*) did lead to indirect yet rather extensive considerations of the merits of the case (even though strictly speaking it was an admissibility case)—a sensible compromise. However, the fact that the Court presently seems only to be prepared to engage Article 17 in the context of Holocaust denial cases, and not in the context of other apparent instances of racist or hate speech can be criticized. *See* David Keane, *Attacking Hate Speech Under Article 17 of the European Convention on Human Rights*, 25 NETH. Q. HUM. RTS 641, 641–663 (2007) available at: <http://sim.law.uu.nl/SIM/Library/books.nsf/a75c937fd931aed7c125678d003c11fc/63924554ca2d93ccc12573a7003000d9?OpenDocument>. Also, for a comprehensive discussion of all extreme speech cases thus far in which Article 17 was alone, or in conjunction with Article 10(2), seized upon by the Court, *see id.*

III. THE HUMAN RIGHTS COMMITTEE AND THE REDISCOVERY OF THE PROHIBITION OF ADVOCACY OF RELIGIOUS HATRED

A. The Role of the Prohibition of Advocacy of Religious Hatred: A First Glance

Although Article 20(2) of the ICCPR formulates a clear duty for each state party to the Covenant to adopt legislation prohibiting religious hate speech,³⁸ until recently little activity on the part of the Human Rights Committee to scrutinize whether states actually complied with that norm could be noted. Article 20(2) provides that “[a]ny advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law.”³⁹ In recent Views (opinions regarding individual communications) and Concluding Observations (opinions regarding state reports),⁴⁰ the Committee seems to have rediscovered this legal notion. Particularly in its draft General Comment on freedom of expression,⁴¹ which is to be adopted in 2011, the Committee seems determined to conceptualize the prohibition of religious hatred so as to deal with extreme speech more actively and effectively—and, arguably, at the same time so as to differentiate this type of extreme

38. ICCPR, *supra* note 23, Art. 20(2).

39. *Id.*

40. *See, e.g.*, Consideration of Reports Submitted by States Parties Under Article 40 of the Covenant, Human Rights Comm., 67th Sess., ¶ 21, U.N. Doc. CCPR/CO/76/EGY (Nov. 28, 2002) (“The Committee is deeply concerned at the State party’s failure to take action following the publication of some very violent articles against the Jews in the Egyptian press, which in fact constitute advocacy of racial and religious hatred and incitement to discrimination, hostility and violence.”); Consideration of Reports Submitted by States Parties Under Article 40 of the Covenant, Human Rights Comm., 78th Sess., ¶ 21, U.N. Doc. CCPR/CO/78/ISR (Aug. 21, 2003) (“The Committee is concerned by public pronouncements made by several prominent Israeli personalities in relation to Arabs that may constitute advocacy of racial and religious hatred constituting incitement to discrimination, hostility and violence. The State party should take the necessary action to investigate, prosecute and punish such acts in order to ensure respect for article 20, paragraph 2, of the Covenant.”) Earlier statements include, Report of the Human Rights Committee, ¶ 181, U.N. Doc. A/50/40; GAOR, 50th Sess., Supp. No. 40 (1995) (“The Committee is concerned about the fact that, while the Human Rights Act contains a provision corresponding to article 20, paragraph 2, of the Covenant, this provision does not include a prohibition of advocacy of religious hatred”); *Id.* ¶ 322.

41. Draft General Comment No. 34, Human Rights Comm., 100th Sess., U.N. Doc. CCPR/C/GC/34/CRP.5 (Nov. 25, 2010). This version represents the Committee’s opinions after the first so-called “reading” by the Human Rights Committee; see also the version discussed earlier during that same session: CCPR/C/GC/34/CRP.4 (Oct. 22, 2010).

speech from blasphemy/defamation of religion, which as a rule must be protected rather than countered by states.

The advantage of assessing speeches or publications in light of the hate speech prohibition is clear: instead of taking subjective factors such as insult as a point of departure, more objective factors can be scrutinized in order to judge whether a state rightly interfered with the applicants' free speech. That is to say, the center of gravity of legal assessment becomes the actual speech and the reaction or potential reaction of the group or persons addressed by the speech—not the reaction or potential reaction of the targeted group itself.

To illustrate, *Ross v. Canada*⁴² concerned a teacher propagating anti-Semitic sentiments. In this case, the Committee reasoned that the teacher's right could reasonably be restricted on the basis of the rights and reputations of others, more specifically the right of the pupils to be protected from religious hatred.⁴³ Reading Article 19 of the ICCPR in conjunction with Article 20(2), the Committee reasoned that restrictions are, in principle, permitted on statements which are of such a nature as to raise or strengthen hostile feelings vis-à-vis adherents of a certain religion.⁴⁴ Scrutinizing not so much the question of whether pupils or parents were hurt in their religious feelings, but rather whether or not the berated publications could objectively threaten the rights of others, the Committee established that the rights of Jewish pupils were indeed at stake.⁴⁵ The Committee came to that conclusion on the basis of a textual analysis of the publications and in light of the actual social context in which statements were made.

In that respect two things were important to the Committee. First, the author's statements did not merely denigrate Judaism, but actually "called upon true Christians . . . to hold those of the Jewish faith and ancestry in contempt as undermining freedom, democracy, and Christian beliefs and values" (i.e., an objective incitement element).⁴⁶ Second, the Committee was concerned about the reaction or potential reaction of persons that read the publications—the group or persons targeted by the publication (i.e., is the publication of such a nature that people may

42. Human Rights Comm., Commc'n No. 736/1997, *Malcolm Ross v. Canada*, U.N. Doc CCPR/C/70/D/736/1997 (2000), available at <http://www.unhchr.ch/tbs/doc.nsf/0/29712c8ddea3414dc12569ad003d0316?Opendocument>.

43. *Id.* at ¶ 11.5.

44. *Id.* at ¶ 11.6.

45. *Id.*

46. *Id.* at ¶ 11.5.

indeed be incited to act upon it, thus threatening the rights of the people targeted by the publication?).⁴⁷ Posing this question meant that the Committee was not satisfied with the mere fact that a relevant, recognized limitation of the freedom of expression can *in abstracto* be advanced;⁴⁸ rather, it is essential to inquire into the necessity of the interference. In this particular case, the Human Rights Committee confirmed the existence of a “poisoned school environment,”⁴⁹ thus establishing the necessity to interfere with the teacher’s publications.

B. The Need for Further Conceptualization of the Prohibition of Advocacy of Religious Hatred

Thus, *prima facie* the advantages of the countering-hate-speech approach as compared to the combating-all-forms-of-defamation approach seem to be as follows. First, the mechanism is already in place, meaning we do not need to conceive of new prohibitions to deal with extreme speech in the religiously pluralist society. This legal norm does the most justice to both freedom of expression and freedom of religion, insofar as this approach would only consider “balancing” rights when there is a real or imminent clash of rights. Second, hate speech can be objectified to a greater extent than religious defamation; accordingly, there would be less scope for governmental abuse.

However, stopping our analysis here would be an oversimplification since international case law and benchmarks on religious hate speech are very scarce. Consequently, many legal issues remain unresolved and as long as these issues are unresolved, a “combating-hate-speech approach” may be equally abused. Additionally, state practice at the national level is fairly new and tentative, and ostensibly not well-informed by international benchmarks—essentially, again, because until very recently there hardly were any benchmarks.

States have opted for widely varying laws and policies. A number of states, mostly liberal democracies, have fairly recently started implementing and experimenting with religious hate speech legislation. In some of these countries, the political discussion leading up to this type

47. *Id.* at ¶ 11.6.

48. Here the ground for limitation is the rights of others.

49. *Id.* (following earlier observations made by the Canadian Supreme Court and a domestic Board of Inquiry in paragraphs 4.6 and 4.7).

of legislation revolved around the question of how tenable blasphemy bills remain today.⁵⁰ For example, in the U.K., the enacting of hate speech legislation went more or less hand-in-hand with striking the blasphemy offense from the statutes.⁵¹ In some states, however, hate speech legislation has not replaced blasphemy legislation but rather complements the latter. The Netherlands is a good example; incitement to hatred was initially supposed to replace the penal provision on blasphemy, but eventually it was simply added.⁵²

Many other notable differences among domestic legislation can be discerned. Some states have adopted fairly elaborate hate speech legislation,⁵³ whilst others have included more generic clauses in their penal codes (e.g., Canada,⁵⁴ Croatia,⁵⁵ Denmark,⁵⁶ Finland,⁵⁷

50. See the examples of the U.K. and the Netherlands, *infra*. Also in Ireland, the Irish Law Reform Commission has deemed the Irish blasphemy offense untenable. This Commission is “of the view that there is no place for the offense of blasphemous libel in a society which respects freedom of speech” and has consequently advised its abolishment. See, LAW REFORM COMM’N, CONSULTATION PAPER ON THE CRIME OF LIBEL, ¶ 231, (Aug. 1991), available at [http://www.lawreform.ie/_fileupload/consultation papers/ cpCrimeofLibel.htm](http://www.lawreform.ie/_fileupload/consultation%20papers/cpCrimeofLibel.htm). In Ireland, however, blasphemy has not yet been struck from the statutes. See TEMPERMAN, *supra* note 13 at 239–240. For a comparative legal analysis of domestic blasphemy bills around the world, see Temperman, *Blasphemy, Defamation of Religions & Human Rights Law*, *supra* note 5, at 519 *et. seq.* (section II).

51. Blasphemy and blasphemous libel were abolished as common law offenses in May 2008 as per Article 79 of the Criminal Justice and Immigration Act 2008 (c. 4) (the abolishment entered into effect on 8 July 2008). Some months earlier, on 5 March 2008, the House of Lords had voted in favor of the amendment to the Criminal Justice Bill as proposed by the Government. A House of Lords’ Select Committee on Religious Offences paved the way towards abolishment of the blasphemy offense as it considered the legal concept both obsolete as well as, in the final analysis, contrary to fundamental human rights norms (notably, freedom of expression). See House of Lords’ Select Committee on Religious Offences in England and Wales, *Religious Offences in England and Wales: First Report*, Session 2002–2003 (published in HL Paper 95-I, 2003), particularly at ¶¶ 2–13 of Appendix 3. The prohibition of incitement to racial and religious hatred was introduced as per the Racial and Religious Hatred Act 2006 (c. 1).

52. See Article 137d of the Dutch Penal Code (hate speech). In 2009, a majority in the Dutch Parliament expressed itself in favor of striking blasphemy from the Dutch criminal code. See, e.g., NRC, *Tweede Kamer wil Verbod op Godslastering uit Wetboek* (Jan. 20, 2009), http://vorige.nrc.nl/binnenland/article2126748.ece/Tweede_Kamer_wil_verbod_op_godslastering_uit_wetboek. Initially, the plan was to replace the blasphemy offense with hate speech, see, e.g., EXPATICA.COM, *Dutch to Remove Blasphemy from Penal Code*, (Nov. 1, 2008) http://www.expatica.com/nl/news/dutch-news/Dutch-to-remove-blasphemy-from-penal-code_47071.html. Ultimately, however, both offenses were enshrined in the Dutch Penal code. See Art. 147 and Art. 147a (on blasphemy and religious defamation), Art. 137c (on group defamation) and Art. 137d (incitement to hatred) of the Dutch Penal Code. Articles 147 and 147a on blasphemy and religious defamation, however, are *de facto* fairly dead letters.

53. The UK would again be a good example of this.

54. Art. 319 of the Criminal Code of Canada, R.S., 1985, c. C-46. Note that blasphemous libel, too, is criminalized (Art. 296).

55. Art. 174(3) of the Criminal Code of Croatia, Official Gazette of the Republic of Croatia

Germany,⁵⁸ India,⁵⁹ Netherlands,⁶⁰ Serbia,⁶¹ and Sweden⁶²).⁶³ Further, some of the Nordic states increasingly employ ancient defamation laws *de facto* to counter religious hate speech, providing judges with the task of interpreting existing laws in “treaty-conforming” ways.⁶⁴ Still, other states ban particular types of extreme

speech (e.g., the “denial laws” adopted by Austria,⁶⁵ Belgium,⁶⁶ and

No. 110 of Oct. 21, 1997. This provision covers the prohibition of religious hatred (among other prohibited forms of promoting hatred).

56. Art. 266b of the Criminal Code of Denmark. This provision on the dissemination of statements that are threatening to identified (religious, racial, etc.) groups was inserted in 1971 in conjunction with Denmark’s ratification of ICERD, which prohibits advocacy of racial hatred in Art. 4. International Convention on the Elimination of All Forms of Racial Discrimination, G.A. Res. 2106 (XX), Annex, 20 U.N. GAOR Supp. (No. 14) at 47, U.N. Doc. A/6014 (Dec. 21, 1965), 660 U.N.T.S. 195 (entered into force Jan. 4, 1969). *See* country entry for Denmark: http://www2.ohchr.org/english/issues/opinion/articles1920_iccpr/docs/ViennaWorkshop/Denmark.pdf.

57. Section 10 of Ch. 6 of the Criminal Code of Finland prohibits “ethnic agitation,” which prohibition also protects “religious groups.”

58. Section 130 of the German Criminal Code (1998) prohibits incitement to “hatred against segments of the population.”

59. Section 153A of the Criminal Code of India prohibits promoting enmity between different groups on grounds of religion, race, place or birth, residence, language, caste, or community.

60. *See* Art. 137d of the Dutch Criminal Code, as discussed *infra*.

61. Art. 317 of the Criminal Code of Serbia (2005) prohibits the promotion of national, religious, or racial hatred.

62. Section 8 of Chapter 16 of the Criminal Code of Sweden prohibits ethnic “agitation,” but also refers to “religious belief” as one of the prohibited grounds in the contexts of disseminating statements which threaten certain groups.

63. For more examples, see the country information collected by the UN Office of the High Commissioner for Human Rights available at http://www2.ohchr.org/english/issues/opinion/articles1920_iccpr/annexes_study_country_info.htm.

64. *See* Ghanea, *Minorities and Hatred*, *supra* note 17 at 438 (discussing Norwegian judicial practice).

65. Section 3h of the Verbotsgesetz 1947 (Prohibition Act 1947, amended 1992, *available at* http://www.nachkriegsjustiz.at/service/gesetze/gv_vg_3_1992.php).

66. Loi tendant à réprimer la négation, la minimisation, la justification ou l’approbation du génocide commis par le régime national-socialiste allemand pendant la seconde guerre mondiale [Law aimed at punishing the denial, minimization, justification, or approval of genocide by the German Nazi regime during World War II], Law of Mar. 23 1995 (amended 1999). *See also* Article

France⁶⁷).

Clearly, different states face different challenges and, as a result, it is to some extent logical that state practice is still rather “tentative.” However, from the perspective of legal certainty, it is equally clear that state practice would greatly benefit from further critical conceptualization of freedom of expression and its limits in the religiously pluralist state. To achieve these benefits, the relevant human rights monitoring bodies, jointly with the independent experts (relevant Special Rapporteurs), and legal doctrine will need to:

- further conceptualize the prohibition of advocacy of religious hatred as a notion of international law and, more particularly, identify legal benchmarks and factors that help determine the phenomenon of “advocacy of religious hatred,” so as to contrast it with protected forms of blasphemy and defamation;
- identify the precise state obligations emanating from the internationally codified prohibition of “advocacy of religious hatred;”⁶⁸ and,
- importantly, consider safeguards against governmental abuse of hate speech legislation.

The importance of these actions will now be discussed in the next section of the Article.

444 of the Penal Code of Belgium.

67. Art. 19 of Loi No. 90-615 du 13 juillet 1990 tendant à réprimer tout acte raciste, anti-Semite ou xenophobe [Law No. 90-615 of July 13, 1990 to Suppress Racism, Anti-Semitism, and Xenophobia], <http://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000000532990&dateTexte=> [“Gayssot Act”].

68. International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 U.N.T.S. 171, Art. 20(2) (entered into force, Mar. 23, 1976).

1. Further necessary conceptualization

The first question that must be resolved is defining the precise scope of the prohibition by determining what actually constitutes “advocacy of religious hatred” within the meaning of article 20(2) of the ICCPR. Since the phenomenon of religious hate speech is multi-faceted, religious hate speech may analytically be considered either as (1) hate speech *vis-à-vis* a specific religious group or (2) religion-inspired hate speech.

The first category involves incitement against a religious group, typically on the basis of specific characteristics attributed to the group/religion in question. One can think of incitement by the secular establishment against minority religions newly emerging due to migration processes. Religion-inspired hate speech involves incitement against persons triggered by one’s interpretations of one’s own belief. For instance, consider the following: ultra-orthodox Imams in mosques in Western states inciting against “western infidels”;⁶⁹ Bible-belt priests inciting against homosexuals;⁷⁰ African priests or pastors inciting against child witches;⁷¹ or “deviant” breakaway sects abandoning orthodoxy (e.g. incitement against Ahmadis).⁷²

However, this issue may be considered merely academic, since the Human Rights Committee’s Views and Concluding Observations seem to cover both angles. Nevertheless, this issue does raise questions concerning domestic processes of enacting hate speech legislation. For example, in the Netherlands, the Dutch official version of the ICCPR speaks explicitly of advocacy of hatred based on religious motives, literally “religiously-based feelings of hatred” (“*op . . . godsdienst gebaseerde haatgevoelens*”).⁷³ Dutch domestic hate speech legislation itself, on the basis of which Dutch politician Geert Wilders is being

69. See, e.g., Sam Lister, *Imam ‘Instructed British Muslims to Kill Infidels’*, THE TIMES (Jan. 23, 2003), <http://www.timesonline.co.uk/tol/news/uk/article853201.ece>.

70. See, e.g., Rev. Michael Rodriguez, *Catholics Must Oppose Sinful Actions*, EL PASO TIMES (Feb. 5, 2011, 12:00 AM), http://www.elpasotimes.com/opinion/ci_17297986.

71. See, e.g., *Nigeria ‘Child Witch Killer’ Held*, BBC NEWS (Dec. 4, 2008, 3:35 PM), <http://news.bbc.co.uk/2/hi/africa/7764575.stm>; *Angola Witchcraft’s Child Victims*, BBC NEWS (Jul. 13, 2005, 1:13 PM), <http://news.bbc.co.uk/2/hi/4677969.stm>; *Rise in African Children Accused of Witchcraft*, BBC NEWS (Jul. 17, 2010, 11:34 AM), <http://www.bbc.co.uk/news/world-africa-10671790>; Mike Thomson, *Crisis in DR Congo*, BBC NEWS (Feb. 26, 2010, 8:35 AM), http://news.bbc.co.uk/today/hi/today/newsid_8530000/8530686.stm.

72. See, e.g., *Mosque Linked to Hate Campaign Causes Rift in Muslim Community*, THIS IS LOCAL LONDON (Nov. 3, 2010, 7:20 AM), http://www.thisislocallondon.co.uk/news/8489948.Mosque_linked_to_hate_campaign_causes_rift_in_Muslim_community/.

73. ICCPR, *supra* note 23, at Art. 20. An official Dutch translation of the ICCPR is available at http://wetten.overheid.nl/BWBV0001017/geldigheidsdatum_11-03-2011#VertalingNL.

prosecuted,⁷⁴ interestingly, is exclusively premised on the need to ban hate speech vis-à-vis a specific religious group, regardless of what motives are at play. The Dutch Penal Code provides, *inter alia*, that “[a]ny person who publicly, either orally or in writing or by image, incites hatred of or discrimination against persons . . . on the grounds of *their* . . . religion or personal belief . . . is liable to a term of imprisonment not more than one year or a fine of the third category.”⁷⁵ Thus, it appears that the provision prohibits incitement against people on account of their adherence to a certain religion. Ostensibly, the provision does not cover forms of advocacy of hatred based on one’s own religious motives (e.g., religion-inspired hatred against homosexuals).

This example raises several questions. First, can the Dutch law be seen as giving effect to the international prohibition of Article 20(2) of the ICCPR? It is, ironically, the Dutch official translation of the ICCPR itself that provides that the ICCPR purports to ban advocacy of hatred based on religious motives (literally: “religiously-based feelings of hatred”). Second, and more importantly, what acts does Article 20(2) of the ICCPR actually purport to prohibit? It would appear that the object and purpose of the provision on advocacy of religious hatred, and of the ICCPR more generally, is to ensure that people can live free from marginalization, discrimination, hostility, and violence. In that respect, it should not matter what is actually motivating religious hate speech.

It is part of the Human Rights Committee’s mandate to construe Article 20(2) of the ICCPR in a manner in which contemporary challenges can be tackled.⁷⁶ In that respect, it is encouraging to see that the Committee in recent times has taken up the task of elaborating further on freedom of expression (Article 19 ICCPR), and the interplay of this right with Article 20(2) on hate speech, in the form of a new General Comment.⁷⁷ The draft General Comment resolves many long-standing

74. The initial trial commenced in 2010, was shortly suspended, and has resumed with new judges in 2011. *Dutch MP Geert Wilders Back in Court Over ‘Hate Speech’*, BBC NEWS (Feb. 7, 2011, 6:30 AM), <http://www.bbc.co.uk/news/world-europe-12380167>; *Dutch MP Geert Wilders ‘Can Challenge’ Islam Hate Trial*, BBC NEWS (Feb. 14, 2011, 1:44 PM), <http://www.bbc.co.uk/news/world-europe-12456693>.

75. Art. 137d Dutch Penal Code, in THE AMERICAN SERIES OF FOREIGN PENAL CODES: DUTCH PENAL CODE 133 (Louise Rayar & Stafford Wadsworth, trans., 1997) (emphasis added). Note that the emphasized “their” refers back to “persons.”

76. The Human Rights Committee has considered “that the [ICCPR] should be interpreted as a living instrument and the rights protected under it should be applied in context and in the light of present-day conditions.” Human Rights Comm., *Roger Judge v. Canada*, Communication No. 829/1998, U.N. Doc. CCPR/C/78/D/829/1998 (2003), Views of 5 August 2002, ¶ 10.3.

77. Office of U.N. High Comm’r for Human Rights [O.H.C.H.R.], Human Rights Comm.,

debates: the precise nature of state obligations, the relationship between the prohibition of hate speech and freedom of expression, and the precise meaning of some of the key terms. Additionally, it provides some guidance on the necessary safeguards that must be in place in order to combat hate speech.⁷⁸

Though the Committee still leaves a number of issues unresolved, it does certainly provide answers to some questions. In particular, the new draft General Comment makes clear that not every type of advocacy of hatred ought to be prohibited. Specifically, only the advocacy of religious⁷⁹ hatred that constitutes incitement to discrimination, hostility, or violence is to be *a priori* prohibited by states. Forms of advocacy that fall short of such incitement are not covered by the provisions of the Covenant. In its second and third drafts of the General Comment, the Committee had defined key terms:

- *Advocacy*: “By ‘advocacy’ is meant public forms of expression that are intended to elicit action or response.”⁸⁰
- *Hatred*: “By ‘hatred’ is meant intense emotions of opprobrium, enmity and detestation towards a target

Draft General Comment No. 34, Upon Completion of the First Reading by the Human Rights Committee, U.N. Doc. CCPR/C/GC/34/CRP.5 (Nov. 25, 2010) [hereinafter, Draft General Comment, Nov. 25]. Draft General Comment 34 on Article 19 is expected to be adopted by the Committee in 2011. The General Comment, once adopted, will replace General Comment 10 on Article 19, and will complement General Comment 11, which already—albeit very briefly—touched upon advocacy of hatred. As of November 2010, the Committee has completed its “first reading” of the document, resulting in a fourth revised draft (Member Prof. O’Flaherty is the principal drafter). The first reading and the resulting fourth draft were completed in October–November 2010, and the draft Comment has been posted on the Human Rights Committee’s website so as to invite responses from experts and stakeholders. *Human Rights Committee—General Comments: Comment 34*, OFFICE OF THE UNITED NATIONS HIGH COMMISSIONER FOR HUMAN RIGHTS, <http://www2.ohchr.org/english/bodies/hrc/comments.htm> (last visited Aug. 8, 2011). In what follows, reference is made to the draft Comment as circulated by the Committee in November 2010, U.N. Doc. CCPR/C/GC/34/CRP.5, unless expressly indicated otherwise. The document used is subject to changes.

78. See generally TOBY MENDEL, CTR. FOR LAW AND DEMOCRACY, RESTRICTING FREEDOM OF EXPRESSION: STANDARDS AND PRINCIPLES (2010), available at <http://www.law-democracy.org/wp-content/uploads/2010/07/10.03.Paper-on-Restrictions-on-FOE.pdf>.

79. Note that Art. 20(2) of the ICCPR also prohibits advocacy of *national* and *racial* hatred. This account solely focuses on advocacy of *religious* hatred.

80. Draft General Comment No. 34, Article 19, ¶ 53, U.N. Doc. CCPR/C/GC/34/CRP.2 (Jan. 29, 2010); Draft General Comment No. 34, Article 19, 2nd Revised Draft, ¶ 53 CCPR/C/GC/34/CRP.3 (June 28, 2010) [hereinafter Draft General Comment, June 28].

individual or group.”⁸¹

- *Incitement*: “‘Incitement’ refers to the need for the advocacy to be likely to trigger imminent acts of discrimination, hostility or violence It would be sufficient that the incitement relate to any one of the three outcomes: discrimination, hostility or violence.”⁸²

In the October and November 2010 drafts,⁸³ these definitions have been deleted. Although it was perhaps slightly progressive to offer such extensive definitions of the prohibition’s key terms, and although any definition provided would likely draw criticism from at least some states, altogether the deletion of these definitions is regrettable. In particular, these definitions made clearer what actually constitutes hatred.⁸⁴

Moreover, the deletion is particularly regrettable as the definitions provided the precise extent to which *mens rea* is an element of the crime of hate speech, thus indicating a threshold for this crime and, in so doing, surrounding the prohibition with concrete safeguards against abuse at the national level. Specifically, the definitions made it clear that for speech or a publication to amount to “advocacy,” one must intend to at least “elicit action or response.”⁸⁵ For the advocacy to amount to incitement, in turn, it is necessary (under the abandoned definitions) that the speech or publication be “likely to trigger imminent acts of discrimination, hostility or violence.”⁸⁶ At the same time, it is clear that not all forms of advocacy of hatred are to be prohibited, but only those instances that constitute “incitement to discrimination, hostility or violence” (it is clear, given the word “or,” that it is sufficient that the incitement relate to any one of the three outcomes).⁸⁷ It is also clear that, at a minimum, one such outcome must be intended.

Again, domestic state practices indicate that the present process of enacting hate speech legislation is a rather tentative affair and apparently not informed by international benchmarks. Let us consider the Dutch

81. Draft General Comment, June 28, *supra* note 80, ¶ 53.

82. *Id.*

83. Draft General Comment No. 34, (Upon Completion of the First Reading by the Human Rights Committee), U.N. Doc. CCPR/C/GC/34/CRP.4 (Oct. 22, 2010); Draft General Comment, Nov. 25, *supra* note 78.

84. This is true even though the Committee again failed to make explicit, for once and for all, the multifaceted nature of religious hatred. *See* discussion *supra* Part III.B.

85. Draft General Comment, June 28, *supra* note 80, ¶ 53.

86. *Id.* (emphasis added).

87. *Id.*

example once more: “A person who publicly, either orally or in writing or by image, *incites hatred of or discrimination* against persons . . . on the grounds of their . . . religion or personal beliefs . . . is liable to a term of imprisonment of not more than one year or a fine of the third category.”⁸⁸ The threshold of the Dutch offense would seem to be considerably lower than the international norm, which, again, prohibits only advocacy of religious hatred that constitutes incitement to discrimination, hostility, or violence.⁸⁹

The Comment is careful on the issue of Holocaust denial. In particular, rather than considering this form of extreme speech as falling automatically within the ambit of advocacy of hatred within the meaning of Article 20(2), the Committee’s considerations are characterized by concern about “memory-laws.” Specifically, the Committee provided that the

Laws that penalise the promulgation of specific views about past events, so called “memory-laws”, must be reviewed to ensure they violate neither freedom of opinion nor expression. The Covenant does not permit general prohibitions on expression of historical views, nor does it prohibit a person’s entitlement to be wrong or to incorrectly interpret past events. Restrictions must never be imposed on the right of freedom of opinion and, with regard to freedom of expression they may not go beyond what is permitted in paragraph 3 or required under article 20.⁹⁰

Given their general nature, these considerations cannot be deemed a departure from earlier Views,⁹¹ but the level of expressed concern is nonetheless striking.

The Draft Comment additionally explains the relationship between freedom of expression and the prohibition of hate speech:

The acts that are addressed in article 20 are of such an extreme nature that they would all be subject to restriction pursuant to Article 19, paragraph 3. As such, a limitation that is justified on the basis of article 20 must also comply with article 19, paragraph 3,

88. ART. 137D (DUTCH PENAL CODE), *reprinted in* 30 THE AMERICAN SERIES OF FOREIGN PENAL CODES: DUTCH PENAL CODE 133 (Louise Rayar & Stafford Wadsworth, trans., 1997) (emphasis added).

89. ICCPR, *supra* note 23, at Art. 20(2) (“Any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law.”).

90. Draft General Comment, Nov. 25, *supra* note 80, ¶ 51.

91. Robert Faurisson v. France, Human Rights Committee, Communication No. 550/1993, Views of 8 November 1996, UN Doc. CCCCPR/C/58/D/550/1993 (1996).

which lays down requirements for determining whether restrictions on expression are permissible.⁹²

In other words, Article 20(2) ICCPR is *lex specialis* to the extent that this is the only form of speech with respect to which an *a priori* response by the state is required (their prohibition by law).⁹³ At the same time it is clear that this ground for limitation is treated on par with those provided by Article 19(3) ICCPR. This additionally underscores the fact that interference with free speech on account of hate speech concerns must always be provided by a law prohibiting extreme speech. Furthermore, given the interrelation between Articles 19 and 20, such standard benchmarks as necessity and proportionality play a role in assessing interference based on hate speech regulations.

2. State obligations

Article 20(2) ICCPR itself leaves little doubt that legislative action is necessary since advocacy or religious hatred “shall be prohibited by law.”⁹⁴ On the other hand, a number of states upon ratification entered reservations or declarations to Article 20(2) ICCPR stating that compliance with this provision shall not, as far as http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-4&chapter=4&lang=en these states are concerned, entail the issuance of laws prohibiting extreme speech.⁹⁵ In its General Comment,

92. Draft General Comment, Nov. 25, *supra* note 80, ¶ 52 (citing *Ross v. Canada*, No. 736/1997).

93. *See id.* ¶ 53.

94. ICCPR, *supra* note 23, Art. 20(2).

95. Malta entered a reservation: “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 purposes of article 20.” *Malta Reservation 5, International Covenant on Civil and Political Rights*, U.N. TREATY COLLECTION, http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-4&chapter=4&lang=en (last visited Mar. 19, 2011). New Zealand reserves the right not to introduce *new* legislation on this point:

The Government of New Zealand having 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, and having regard to the right of freedom of speech, reserves the right not to introduce further legislation with regard to article 20.

Id. at New Zealand. U.K.:

The Government of the United Kingdom interpret article 20 consistently with the rights conferred by articles 19 and 21 of the Covenant and having legislated in matters of practical concern in the interests of public order (*ordre public*) reserve the right not to introduce any further legislation. The United Kingdom also reserve a similar right in regard to each of its dependent territories.

the Human Rights Committee reiterates its own position and makes explicit that countering advocacy of religious hatred requires the adoption of laws prohibiting such extreme speech.⁹⁶

It must be noted that in previous drafts the Committee more strongly emphasized this point by stating that:

Article 20 is an important tool for the protection of persons from discrimination, hostility or attack because of their national, racial or religious identity. It imposes an obligation on State parties with regard to the prohibition of specified forms of extreme speech. It requires legislative action of the part of States parties. Such legislation should be reviewed as necessary to take account of contemporary forms and manifestations of national, religious and racial hatred. It is not compatible with the Covenant for the legislative prohibitions to be enacted by means of customary, traditional or religious law.⁹⁷

The November 2010 draft still explicitly requires states to adopt legislation, but chooses to do so in more moderate language.⁹⁸ Yet, moderation notwithstanding, it is clear that political commitment to this international norm alone is not sufficient. Compliance requires national implementation, and more particularly, a law explicitly prohibiting advocacy of religious hatred that constitutes incitement to discrimination, hostility, or violence. This also means that the issue cannot be left to the discretion of a judge on a case-by-case basis, since limiting speech on this basis always requires a national law forbidding extreme speech. This is hardly a departure from previous doctrine (in that respect one may wonder why the Committee has toned down this part of the draft

Id. at U.K. Australia:

Australia interprets the rights provided for by articles 19, 21 and 22 as consistent with article 20; accordingly, the Commonwealth and the constituent States, having legislated with respect to the subject matter of the article in matters of practical concern in the interest of public order (*ordre public*), the right is reserved not to introduce any further legislative provision on these matters.

Id. at Australia, Article 14. USA: "That 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." *Id.* at United States of America, Reservation 1.

96. See Draft General Comment, Nov. 25, *supra* note 80, ¶ 54 ("[I]t is only with regard to the specific forms of expression indicated in article 20 that States parties are obliged to have legal prohibitions.").

97. Draft General Comment, Jan. 29, *supra* note 80, ¶ 50; Draft General Comment, June 28, *supra* note 81, ¶ 51 (citation omitted).

98. Draft General Comment, Nov. 25, *supra* note 80, ¶ 53 ("[T]he Covenant indicates the specific response required from the State: their [i.e. hate speech offenses] prohibition by law.").

Comment). General Comment No. 11, as early as 1983, provided that

For article 20 to become fully effective there ought to be a law making it clear that . . . advocacy as described therein [is] contrary to public policy and providing for an appropriate sanction in case of violation. The Committee, therefore, believes that States parties which have not yet done so should take the measures necessary to fulfil [sic] the obligations contained in article 20, and should themselves refrain from any such . . . advocacy.⁹⁹

In the eyes of the Human Rights Committee, the flip side of this increased focus on identifying what amounts to hate speech and what acts should be prohibited and combated is the decriminalization of speech and publications that do not amount to advocacy of religious hatred. Concretely, this means that states are to criminalize hate speech not alongside but *instead of* religious defamation or blasphemy offenses. The draft General Comment takes a firm stance on this debate when it provides that “States parties should repeal criminal law provisions on blasphemy and regarding displays of disrespect for religion or other belief system”¹⁰⁰ Hopefully, this paragraph will survive the final drafting stages.¹⁰¹

3. Safeguards

The Human Rights Committee is not solely concerned with states taking the prohibition of Article 20(2) ICCPR seriously in its recent efforts. The Committee equally underscores that states may not abuse the prohibition of advocacy of religious hatred to punish legal criticism of religion or to stifle unpopular and unwanted debate. First and foremost, it is clear that the threshold for acts that must be prohibited is exceptionally high: only the *qualified* act of advocating religious hatred that constitutes

99. Office of U.N. High Comm’r for Human Rights [O.H.C.H.R.], Human Rights Comm., General Comment No. 11: Article 20 (Prohibition of propaganda for war and inciting national, racial or religious hatred), HRI/GEN/1/Rev.9 (Jan. 29, 1983), reprinted in *Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies*, U.N. Doc. HRI/GEN/1/Rev.6, at 133 ¶ 2 (2003). The point has also been repeatedly made in the state reporting procedure in Concluding Observations. *E.g.*, CCPR/CO/81/BEL (Belgium); CCPR/CO/84/SNV (Slovenia).

100. Draft General Comment, Nov. 25, *supra* note 80, ¶ 50. See also paragraph 49 on defamation laws (in which States are more moderately requested to “consider” the decriminalization of defamation).

101. *See supra* Part I (introductory remarks on the human rights concerns that surround the “combating defamation of religion” paradigm).

incitement to discrimination, hostility, or violence is to be prohibited by states. Second, “[i]t is not compatible with the Covenant for the legislative prohibitions to be enacted by means of customary, traditional or religious law.”¹⁰² A legislative prohibition must be the result of competitive politics, so as to ensure that the result is not discriminatory (i.e., protects all religious minorities and other groups in need of protection), does not undermine free speech, and is otherwise in line with the state’s constitution and international human rights law. Finally, given the interrelation between Articles 19 and 20, such standard benchmarks as necessity and proportionality must play a role in assessing interferences based on hate speech regulations.¹⁰³

IV. CONCLUSION

Within the European Convention system, judgments have supported legal restrictions on hate speech, but also on blasphemy or religious defamation. The universal human rights instruments, particularly the ICCPR, are increasingly geared towards eradicating hate speech (speech that threatens the rights and freedoms of others), whilst forms of extreme speech that fall short of that category are to be protected rather than countered by states. The Human Rights Committee’s draft General Comment on freedom of expression, to be adopted in 2011, provides another strong indication that this is the envisaged way forward: repealing blasphemy and defamation bills, whilst simultaneously increasing the efforts to combat hate speech. It is important to continue taking stock of the legal justifications for restrictions that are suggested in this area and to scrutinize whether they are in fact sustainable from a human rights perspective—not only on paper, but also in actual practice. Considering the different legal standards described in the article (universal vs. regional), as well as ongoing developments in the area of domestic hate speech measures, future research must take a double comparative approach: (i) it should aim at further comparing and contrasting the universal monitoring bodies’ approach to extreme speech with that of regional monitoring bodies; and (ii) it should aim at charting, comparing, and analyzing, from an international human rights perspective, recent forms of state practice in the field of dealing with

102. Draft General Comment, Jan. 29, *supra* note 80, ¶ 50; Draft General Comment, June 28, *supra* note 80, ¶ 5. Presently this idea is more generally referred to in Draft General Comment, Nov. 25, *supra* note 80. It is to be hoped that the earlier, extended safeguard finds its way back into the Comment.

103. Draft General Comment, Nov. 25, *supra* note 41, ¶¶ 52–54.

extreme speech.