



## HATE SPEECH, HOLY PROPHETS, AND HUMAN RIGHTS: THE STRUGGLE FOR FREE SPEECH FROM 1945–2021

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This article examines how the right to freedom of expression in international human rights law has been a constant source of conflict and political power struggles since the adoption of the Universal Declaration of Human Rights (UDHR) in 1948. Applying both the UN arena as well as the Helsinki Process as institutional frameworks, the article examines how prohibitions against hate speech, incitement to hatred, blasphemy, and related legal restrictions have served as a recurrent source of conflict in international diplomacy and in the making of international free speech norms in the postwar period. From the drafting history of the UDHR and the subsequent International Covenant on Civil and Political Rights (ICCPR) to the Helsinki Final Act and contemporary UN resolutions, the article provides an overview and outlines some of the main conflicts and issues regarding the right to communicate freely about cultural, religious, and political issues in the postwar period.

Censorship and repression predate debates surrounding the prohibition of hate speech in international human rights law. And while authoritarian states are likely to use such methods to punish dissent regardless of international standards, this article nonetheless argues that obligations to ban specific categories of speech under human rights law provide formal

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legitimacy, or at least a façade of legitimacy, to authoritarian restrictions of free expression.

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#### INTRODUCTION

In 2014, the Saudi Arabian blogger Raif Badawi was sentenced to ten years in prison, a thousand public lashes, and a fine equivalent to \$300,000. His crime was insulting Islam by promoting secular values on his blog *Free Saudi Liberals*. Among other things, Badawi wrote that “as soon as a thinker starts to reveal his ideas, you will find hundreds of fatwas that accused him of being an infidel just because he had the courage to discuss some sacred topics.” He also denounced the “chauvinist arrogance” of Islamists, hailed secularism, and argued that “States which are based on religion confine their people in the circle of faith and fear.”<sup>1</sup>

Raif Badawi’s case illustrates age-old tensions between free speech and the politically or ideologically motivated censorship of authoritarian states. As such, Badawi’s fate would have been familiar to the Soviet refusenik and human rights activist Natan Sharansky, and many other dissidents in the Soviet bloc, who also faced long prison sentences and inhuman treatment during the Cold War. Although the Communist states believed in the historical necessity of their communist ideology rather than the revealed word of God, both theocratic and Communist states proclaim authoritarian rule at the expense of individual liberty and the right

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<sup>1</sup> Ian Black, *A Look at the Writings of Saudi Blogger Raif Badawi—Sentenced to 1,000 Lashes*, GUARDIAN (Jan. 14, 2015).

to speak freely about political, ideological, and religious issues. Consequently, they punish those who engage in religious or ideological heresy, leaving little room for the very idea of human rights. Therefore, it is no surprise that in 1948, Saudi Arabia and six European Communist states were among the eight countries who did not vote in favor of the United Nations Universal Declaration of Human Rights (UDHR).<sup>2</sup>

The main purpose of this article is to examine how the right to freedom of expression and its limits in international human rights law have been a constant source of conflict and fierce political power struggles since the adoption of the UDHR in 1948. Applying both the UN arena as well as the Helsinki Process as institutional frameworks, the article will examine how prohibitions against hate speech, incitement to hatred, and related legal restrictions have recurrently caused conflict in international diplomacy and in the making of international free speech norms.

First, the article will illustrate how the Eastern bloc and the Western bloc clashed over the limits of free speech during the drafting history of the UDHR and the subsequent International Covenant on Civil and Political Rights (ICCPR) adopted in 1966.<sup>3</sup> This section will examine how provisions against “hate speech” were a constant source of conflict and disagreement between the US, Western Europe, and the Soviet Bloc.

Second, the article will examine how the criminalization of “hate speech” and “incitement” was exploited by the Communist bloc to target dissidents throughout the Cold War. These states’ formal commitment to human rights and freedom of expression in the Helsinki Final Act of 1975 empowered embattled dissidents and played a key role in undermining the Communist system altogether.

Third, the article will examine how the Organization of Islamic Cooperation (OIC) launched a campaign to criminalize “defamation of religions” within the UN system and how the campaign was undermined by a comprehensive American diplomatic effort throughout the world. Having acknowledged their defeat, the OIC is

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<sup>2</sup> G.A. Res. 217 (III) A, at 71 (Dec. 10, 1948) [hereinafter UDHR].

<sup>3</sup> G.A. Res. 2200 (XXI), International Covenant on Civil and Political Rights (adopted Dec. 16, 1966) (entered into force March 23, 1976) [hereinafter ICCPR].

now promoting new international censorship norms by exploiting the same international prohibitions against hate speech that the Communist bloc advanced during the Cold War.

Needless to say, this article does not claim to contain a detailed and comprehensive history that will cover all aspects of freedom of expression since 1945. After all, the right to freedom of expression is an essentially contested concept which is being negotiated and renegotiated on a regular basis and which has different trajectories from country to country and from region to region. Hence, this article's main ambition is to provide an overview and outline some of the main conflicts and issues regarding the right to communicate freely about cultural, religious, and political issues in the postwar period. Using the UN track and the Helsinki track as two different yet interrelated processes, the article will examine how the boundary between free speech and hate speech has played out in international diplomacy and politics in the postwar period.<sup>4</sup>

As will be demonstrated, enforcing a state monopoly on truth is difficult to justify and systematically enforce in a world where the idea of universal human rights has shaped international norms and legitimate state behavior, at least to a certain extent. Therefore, and despite the grim realities and cynical human rights abuses on the ground, contemporary state leaders are forced to pay a certain amount of lip service to human rights in order to retain respectability and public legitimacy. Accordingly, both Communist and authoritarian Islamic states have developed cautious strategies to engage with the growing international human rights system in order to seek legitimacy without undermining their grip on power and the public sphere. Hence, one theoretical goal of this paper is to show how human rights language is strategically applied and put to work for political and sometimes oppressive purposes. The international human rights regime with all its declarations, treaties, and norms has become an arsenal which can be used and misused for various political and sometimes irreconcilable purposes.<sup>5</sup> Or, in the words of Anthony Chase, “[H]uman rights need to be understood not as a fixed identity, but rather as

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<sup>4</sup> Much of the research for this article was conducted as a preparation for the podcast series *Clear and Present Danger* and the ensuing book JACOB MCHANGAMA, *FREE SPEECH: A HISTORY FROM SOCRATES TO SOCIAL MEDIA* (2022).

<sup>5</sup> HEINI Í SKORINI, *FREE SPEECH, RELIGION AND THE UNITED NATIONS: THE POLITICAL STRUGGLE TO DEFINE INTERNATIONAL FREE SPEECH NORMS* (2020).

a legal-political language that can be invoked to advance any number of positions and interests.”<sup>6</sup>

### I. BETWEEN FREE SPEECH AND HATE SPEECH: THE STRUGGLE TO DEFINE ARTICLE 19 IN THE UDHR

After the horrors of World War II, fifty countries met in San Francisco to draw up the UN Charter signed on June 26, 1945. The Charter was followed up by the establishment of the eighteen-member UN Commission on Human Rights, which had a broad geographical membership, with only five of the eighteen countries belonging to the Western bloc. The negotiations on a new human rights declaration took off in San Francisco in 1946, and two years later, the vast majority of the UN member states adopted a non-binding catalogue containing thirty articles. With regard to freedom of expression, Article 19 stipulates: “Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers.”<sup>7</sup>

But the road to this achievement was not without political frictions and profound ideological disputes. On the ashes of the Holocaust and the collapse of the Third Reich, the Cold War between East and West was slowly taking shape, and the tensions between the communist East and the capitalist West were increasing.<sup>8</sup> The US ambassador to the UN, Eleanor Roosevelt, knew that the window of opportunity for agreement might soon be shut.<sup>9</sup> The ideological frictions between the United States and the Soviet Union were especially visible when negotiating the meaning and the content of freedom of expression.

The drafting process that led to Article 19 involved a vehement debate on the limits of tolerance. To what extent should Nazis and fascists be allowed to advocate the very ideologies that had covered Europe in totalitarian darkness, led to total

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<sup>6</sup> Anthony Tirado Chase, *Setting the Scene*, in *THE ORGANIZATION OF ISLAMIC COOPERATION AND HUMAN RIGHTS* 1, 36 (Marie Juul Petersen & Turan Kayaoglu eds., 2019).

<sup>7</sup> UDHR, *supra* note 2, art. 19.

<sup>8</sup> Jacob Mchangama, *Episode 40—The Age of Human Rights: Tragedy and Triumph*, *CLEAR & PRESENT DANGER: A HISTORY OF FREE SPEECH* (Feb. 3, 2020), <https://perma.cc/Q9SJ-DHL8>.

<sup>9</sup> MARY ANN GLENDON, *A WORLD MADE NEW: ELEANOR ROOSEVELT AND THE UNIVERSAL DECLARATION OF HUMAN RIGHTS* (2001); JOHANNES MORSINK, *THE UNIVERSAL DECLARATION OF HUMAN RIGHTS: ORIGINS, DRAFTING, AND INTENT* (1999).

war, and culminated in genocide? The foremost champions of not only permitting states to prohibit hate speech but making it a duty for all states to do so were the Communist states led by the Soviet Union. Article 123 of the Soviet Union's 1936 constitution held out "any advocacy of racial or national exclusiveness or hatred and contempt" for punishment.<sup>10</sup> Moscow now pushed to include a similar injunction—copied almost verbatim—against hate speech in the Universal Declaration. During negotiations, the Soviet delegation consistently demanded a zero-tolerance policy towards Nazi and fascist agitation. In the name of democracy and "the will of the people," the Soviet diplomats argued that broad and restrictive exceptions to free speech were preconditions for a just, stable, and good society.<sup>11</sup> In order to tackle this question, the UN Commission on Human Rights established a Sub-Commission on Freedom of Information and of the Press, where the heated discussions on the boundaries between free speech and hate speech continued.

American diplomats vehemently warned against any free-speech restrictions that might justify authoritarian censorship norms, and so did certain European countries. However, whether hate speech should be banned or not was an uncomfortable dilemma for European delegations. Many—including the British—were open to the idea of restricting free speech to protect the broader set of human rights. Several European states, including the Netherlands, Denmark, Germany, and Czechoslovakia, had adopted various laws against group libel, hate speech, and incitement to quell the advance of fascism in the interwar period.<sup>12</sup> However, with fascism defeated, many found it dangerous to include an *obligation* to prohibit hate speech in an international human rights declaration. They feared that such provisions might then be abused to justify state control of the public sphere and persecution of opinions that the government did not like, which was not an unreasonable worry given the excesses of Stalinism. Moreover, the peace treaties that the allies had imposed on countries like Hungary and Bulgaria after World War II included obligations to prohibit anti-democratic propaganda, which were soon (ab)used by

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<sup>10</sup> CONSTITUTION (FUNDAMENTAL LAW) OF THE UNION OF SOVIET SOCIALIST REPUBLICS, Dec. 5, 1936, ch. X, art. 123.

<sup>11</sup> See MORSINK, *supra* note 9, at 66–67.

<sup>12</sup> Karl Loewenstein, *Legislative Control of Political Extremism in European Democracies*, 38 COLUM. L. REV. 591, 603–05 (1938).

Communist governments to ban opposition parties, stifle civil society, and prosecute political and religious dissenters, even as negotiations at the UN were ongoing. As early as 1947, the US Envoy to Hungary sent a dispatch to the United States Assistant Secretary of State, warning: “[I]t appears likely that in this country, as in its eastern neighbors, the Government will not allow the terms of the Peace Treaty to stand in the way of Soviet domination, and we may expect to see the articles of the Peace Treaty relative to prohibition of fascist organizations used to nullify the guarantees of basic human and political liberties.” The envoy also noted how the Hungarian press was already “severely limited by Government censorship.”<sup>13</sup> These very real concerns ultimately swayed the British to back the American position.<sup>14</sup>

In the following years, the crackdown on “fascist” ideas, individuals, and organizations would only intensify as Communist states purged all opposition. In 1950, the UN General Assembly passed a resolution condemning Romania, Hungary and Poland for violating the human-rights obligations in their peace treaties. In order to bolster the case, the US submitted detailed reports to the UN Secretary General documenting such violations, including a meticulous report chronicling Romania’s violations of freedom of expression and the press.<sup>15</sup> Predictably, Romania insisted that its use of censorship and repression related only to the suppression of Nazism and fascism—a duty under the peace treaty obligations—while accusations that such suppression constituted systematic violations of basic human rights amounted to a “collection of lies and falsifications.”<sup>16</sup>

Accordingly, it was hardly surprising that the Soviet Union and its allies opposed the principled speech protections in Article 19 to the bitter end and submitted a flurry of drafts to counter Article 19 with different reservations and limitations. For instance, the Soviet delegation argued that “the freedom this article

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<sup>13</sup> Letter from Selden Chapin, Minister in Hungary, to Norman Armour, Assistant Secretary of State (Oct. 2, 1947), <https://perma.cc/U3US-8CXV>.

<sup>14</sup> MORSINK, *supra* note 9, at 66–67.

<sup>15</sup> See U.S. GOV’T PRINTING OFFICE, EVIDENCE OF VIOLATIONS OF HUMAN RIGHTS PROVISIONS OF THE TREATIES OF PEACE BY RUMANIA, BULGARIA, AND HUNGARY (1951). For an account of Soviet “anti-fascist” activity in Eastern Europe, see ANNE APPLEBAUM, *IRON CURTAIN: THE CRUSHING OF EASTERN EUROPE, 1944–1956* (2012).

<sup>16</sup> *U.S. Charges Rumanian Violation of Treaty Provisions on Human Rights*, 26 DEP’T OF STATE BULLETIN 496, 496 (1952).

would give to the Nazis would undercut and threaten . . . the very right affirmed in the article; without the limiting clause, the article would be self-destructive.”<sup>17</sup> Most tellingly—and perhaps most decisively for the final outcome—the Soviets pushed for a phrase explicitly criminalizing “fascism.” Most members of the UN Commission on Human Rights argued that the word “fascism” had no legal definition and could be used as an excuse for censoring whatever the government chose. The Soviet delegate, Mr. Pavlov, did not exactly ease those concerns when he defined fascism as including “the bloody dictatorship of the most reactionary section of capitalism and monopolies.”<sup>18</sup> In other words, the word “fascism” referred to Western capitalism as opposed to the one-party systems under Communist rule.<sup>19</sup> According to this line of thinking, Nazi Germany and Western capitalist democracies were but different manifestations of fascism.<sup>20</sup> Considering the authoritarian censorship laws so strictly enforced throughout the Soviet empire by the Soviet censorship office Glavlit, it was not hard to figure out what types of restriction on free speech Soviet diplomats were pushing to whitewash via the UN system.<sup>21</sup> As the Canadian diplomat Lester Pearson replied in one of the many heated debates: “The term ‘fascism’ which had once had a definite meaning was now being blurred by the abuse of applying it to any person or idea which was not communist.”<sup>22</sup>

By applying such intransigent rhetoric, the Soviet bloc had overplayed its hand and alienated those Western democracies that were sympathetic to the idea of limiting hate speech. At the end of the day, Article 19 was adopted without any limitations on the right to freedom of expression. But the arguments presented by Western diplomats did not impress the Soviets: “It was of no use to argue that ideas should only be opposed by other ideas; ideas had not stopped Hitler making war

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<sup>17</sup> MORSINK, *supra* note 9, at 68.

<sup>18</sup> *Id.*

<sup>19</sup> Jacob Mchangama, *The Sordid Origin of Hate-Speech Laws*, 170 POL’Y REV. 45, 48 (2011).

<sup>20</sup> MORSINK, *supra* note 9, at 68.

<sup>21</sup> JACOB MCHANGAMA, *FREE SPEECH: A HISTORY FROM SOCRATES TO SOCIAL MEDIA* (2022); Jacob Mchangama, *Episode 38—The Totalitarian Temptation—Part I*, CLEAR & PRESENT DANGER: A HISTORY OF FREE SPEECH (Jan. 15, 2020), <https://perma.cc/F6G9-NW9E>.

<sup>22</sup> MORSINK, *supra* note 9, at 69.

. . . . The mistake of not considering any measures for punishment might once again cost the world millions of lives.”<sup>23</sup>

While Article 19 in the UDHR emphasizes the right to free speech without any interference, the declaration contains another article, Article 7, which does limit the right to freedom of expression: “All are entitled to equal protection against any discrimination in violation of this Declaration and against any incitement to such discrimination.”<sup>24</sup> In other words, while Article 19 guarantees the right to freedom of expression, Article 7 stipulates a state’s right to criminalize incitement to discrimination. The equal protection clause of Article 7 was a direct consequence of Nazi Germany and the verbal demonization of Jews in the Third Reich.<sup>25</sup> Hence, the UDHR contained a potential friction between free speech and hate speech: a friction which persists to this very day. During the drafting process, the Soviets pushed for broader restrictions in the aforementioned Article 7. In the Sub-Commission on Prevention of Discrimination and Protection of Minorities, the Soviets promoted an obligation to criminalize “[a]ny advocacy of national, racial, or religious hostility or of national exclusiveness or hatred and contempt.”<sup>26</sup> In subsequent discussions, the Soviet delegate elaborated that “[b]etween Hitlerian racial propaganda and any other propaganda designed to stir up racial, national or religious hatred and incitement to war there was but a short step.” And such propaganda “merely served as an ideological mask for imperialistic aggression.”<sup>27</sup>

Again, this proposal was rejected as too extreme, as it implied that many forms of speech could simply be lumped together with Nazism and thus prohibited without any proper definitions to limit abuse. The French and Belgian delegations were very active in the drafting process and paved the way for the current version, which

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<sup>23</sup> Draft Universal Declaration of Human Rights, U.N. GAOR, 3d Sess., 180th plen. mtg. at 855–56, U.N. Doc. A/PV.180 (Dec. 9, 1948); Stephanie Farior, *Molding the Matrix: The Historical and Theoretical Foundations of International Law Concerning Hate Speech*, 14 BERKELEY J. INT’L L. 1, 18 (1996).

<sup>24</sup> UDHR, *supra* note 2, art. 7.

<sup>25</sup> MORSINK, *supra* note 9, at 47.

<sup>26</sup> U.N. ESCOR, Comm’n on Hum. Rts., Sub-Comm’n on Prevention of Discrimination and Protection of Minorities, 1st Sess. at 6, U.N. Doc. E/CN.4/52 (Dec. 6, 1947).

<sup>27</sup> MORSINK, *supra* note 9, at 70.

obliges states to protect everyone equally against incitement to discrimination. Importantly, Article 7 does not include an explicit obligation to prohibit advocacy. And the obligation to protect against incitement to discrimination could plausibly be undertaken with means other than criminal law such as education, information, and awareness campaigns. This line of thought was highlighted by the British delegation, which emphasized that “[t]he force of public opinion had always proved sufficient to deal with any attempts at such incitement.”<sup>28</sup> At a later meeting, the British argued that “the State should not be regarded as limiting the rights of individuals but as promoting the rights of all.”<sup>29</sup> All in all, free speech emerged from the process in good health and as a strong principle in the new declaration, which claimed to be universal in nature. Alas, the global battle over the limits of free speech was far from over.

On the basis of the historical, archival records of these passionate debates on freedom of expression during the early years of the postwar period, one might be tempted to portray the conflict as a battle between the democratic West versus the authoritarian East. However, we should not forget that colonialism and imperial rule remained central components in the policy of western powers. Indeed, when examining broader human rights debates in the early fifties, it is conspicuous to note how influential Western countries such as the US and the UK sought to close down different UN committees and commissions that were preoccupied with human rights and humanitarian issues. The pretext for these initiatives was a general “review process” evaluating the UN as a whole, and the ambition to reduce bureaucracy and the number of meetings. However, the archival records also reveal the incentive to manage and maintain a colonial world order and to downplay domestic racial segregation as a central motivation for countries like the UK and the US. When Western attempts to undermine human rights institutions in the early fifties entered the UN General Assembly, members from the “Global South” such as Mexico, Haiti, Chile and the Philippines opposed and prevailed in maintaining human-

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<sup>28</sup> U.N. ESCOR, Comm’n on Hum. Rts., 3rd Sess. at 13–34, U.N. Doc. E/CN.4/SR.52 (May 28, 1948); MORSINK, *supra* note 9, at 71.

<sup>29</sup> U.N. ESCOR, Comm’n on Hum. Rts., 2nd Sess., U.N. Doc. E/CN.4/77/Annex A (Dec. 16, 1947).

rights institutions within the UN system.<sup>30</sup> Hence, the history of human rights contains important periods where non-western actors were pivotal in protecting and promoting individual human rights.

## II. LAWS AGAINST HATE SPEECH IN INTERNATIONAL LAW: A SOVIET VICTORY

The Soviet Union had lost the battle to impose broad restrictions on Article 19 of the UDHR. However, when UN member states agreed to establish a legally binding convention on civil and political rights, the ICCPR, the Soviet Union and its allies eyed a new opportunity to restrict the right to freedom of expression. And this time, the Soviet strategy proved much more successful.<sup>31</sup>

The articles on free speech and its limits in the ICCPR are primarily Articles 19 and 20. Article 19 declares that “[e]veryone shall have the right to freedom of expression,” but that right “carries with it special duties and responsibilities.”<sup>32</sup> These restrictions include those necessary:

- (a) For respect of the rights or reputations of others;
- (b) For the protection of national security or of public order . . . , or of public health or morals.<sup>33</sup>

Article 20 not only permits but obliges states to prohibit certain forms of speech, including war propaganda. But the real controversy is found in Article 20(2):

Any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law.<sup>34</sup>

As is evident, the wording comes quite close to one of the aforementioned rejected proposals submitted by the Soviet delegate during the negotiations of the Universal Declaration. The drafting history of the ICCPR had begun in 1946 and for a while proceeded in a parallel track with the UDHR. Once again, deep disa-

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<sup>30</sup> Steven L.B. Jensen, *Inequality and Post-War International Organization: Discrimination, the World Situation and the United Nations, 1948–1957*, in *HISTORIES OF GLOBAL INEQUALITY* 135, 136 (Christian Olaf Christiansen & Steven L.B. Jensen eds., 2019).

<sup>31</sup> Fariior, *supra* note 23, at 21; Evelyn Aswad, *To Ban or Not to Ban Blasphemous Videos*, 44 *GEO. J. INT’L L.* 1313, 1320–21 (2013).

<sup>32</sup> ICCPR, *supra* note 3, art. 19(1).

<sup>33</sup> *Id.* at art. 19(3).

<sup>34</sup> *Id.* at art. 20(2).

reements over the limits of free speech became one of the most contentious debates throughout the drafting process of the ICCPR. The first draft was limited to the prohibition of “[a]ny advocacy of national, racial or religious hostility that constitutes an incitement to violence.”<sup>35</sup> The UN was largely split into two camps: The Soviet-led bloc, which worked in favor of broad hate speech prohibitions, and the American-led camp, which argued against such prohibitions.<sup>36</sup> To a certain extent, the two sides rehashed the debate from the UDHR.<sup>37</sup> The Soviet tactic once again centered on playing the Nazi card; in one of the first meetings, a Soviet diplomat argued that “[m]illions had perished because the propaganda of racial and national superiority, hatred and contempt, had not been stopped in time.”<sup>38</sup>

Again, Western European states found themselves between a rock and a hard place, caught between the draconian censorship policies promoted by the Soviet Union and the absolutist position of the US, which only accepted limitations on speech that directly incited violence. However, the US stance in the corridors of the UN system did not reflect domestic American free-speech norms under the First Amendment of the US Constitution as it was interpreted at the time.<sup>39</sup> This was a period when the US government targeted communists for their political opinions during the Second Red Scare amid the intimidating atmosphere of McCarthyism. In fact, while negotiations over Article 19 and 20 in the ICCPR took place at the UN, Congress passed the Subversive Activities Control Act of 1950, criminalizing actions that might contribute to a “totalitarian dictatorship” within the US.<sup>40</sup> In the 1951 case of *Dennis v. United States*, the Supreme Court upheld prosecutions of the leadership of the US Communist Party under the Smith Act, which made it a crime to teach or advocate the overthrow of government by force or to be a member of an

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<sup>35</sup> Draft International Covenant on Human Rights, U.N. ESCOR, Comm’n on Hum. Rts, 2d Sess. at 12, U.N. Doc. E/CN.4/77/Annex B (Dec. 16, 1947).

<sup>36</sup> Farrior, *supra* note 23, at 22; Aswad, *supra* note 31, at 1320–21.

<sup>37</sup> Farrior, *supra* note 23, at 25–26.

<sup>38</sup> U.N. ESCOR, Comm’n on Hum. Rts., 5th Sess. at 4, U.N. Doc. E/CN.4/SR.123 (June 28, 1949).

<sup>39</sup> Jacob Mchangama, *Episode 41—Free Speech and Racial Justice: Friends or Foes?*, CLEAR & PRESENT DANGER: A HISTORY OF FREE SPEECH (Aug. 21, 2020), <https://perma.cc/D748-9DYA>.

<sup>40</sup> Subversive Activities Control Act of 1950, Pub. L. No. 81-831, 64 Stat. 987.

organization engaging in such advocacy.<sup>41</sup> And furthermore, in 1954 Congress passed the Communist Control Act, prohibiting communists from holding office in labor organizations.<sup>42</sup> Moreover, Southern states routinely made a mockery of the First Amendment by imprisoning and brutalizing members of the civil rights movement for peaceful protests against segregationist policies.<sup>43</sup> So, the American approach to freedom of expression at this point was ambivalent. One should probably see the US stance in the UN system as a mix of genuine fear about the risk of authoritarian abuse of human rights and a calculated diplomatic strategy in the context of the Cold War's wider battle between communism and liberal democracy.

Yet, by the time the ICCPR was finally adopted in 1966, the Supreme Court under Chief Justice Earl Warren had expanded the protection of civil liberties and pulled the teeth from several of the anti-communist laws.<sup>44</sup> And in 1969, the Supreme Court issued the landmark decision *Brandenburg v. Ohio*, which held that a state could not forbid advocacy of violence "except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action."<sup>45</sup> As we shall see, the "imminent lawless action" doctrine in the *Brandenburg v. Ohio* opinion was used to defeat a new authoritarian assault on free speech at the UN four decades later.

Regardless of how the mix between genuine principle and calculated Cold War politics is perceived, the US took a firm position against the Soviet attempt to broaden Article 20 in the ICCPR, and Eleanor Roosevelt emerged as a dogged and eloquent defender of free speech. In 1950, she warned that "any criticism of public or religious authorities might all too easily be described as incitement to hatred and consequently prohibited."<sup>46</sup> She then argued that hate speech restrictions

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<sup>41</sup> *Dennis v. United States*, 341 U.S. 494 (1951); Alien Registration Act, 18 U.S.C. § 2385 (1940); Marcie K. Cowley, *Red Scare*, FIRST AMEND. ENCYCLOPEDIA (2009), <https://perma.cc/C8ZN-ND2S>.

<sup>42</sup> Communist Control Act, 50 U.S.C. §§ 841–44 (1954).

<sup>43</sup> Jay Stanley, *Civil Rights Movement Is a Reminder That Free Speech Is There to Protect the Weak*, AM. CIV. LIBERTIES UNION (May 26, 2017), <https://perma.cc/D3PW-2YWG>.

<sup>44</sup> Cowley, *supra* note 41.

<sup>45</sup> *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969).

<sup>46</sup> Draft International Covenant on Human Rights, U.N. ESCOR, Comm'n on Hum. Rts., 6th Sess., 174th mtg. at 6, U.N. Doc. E/CN.4/SR.174 (Apr. 28, 1950).

would only encourage Governments to punish all criticisms in the name of protection against religious or national hostility. . . . The commission must be careful not to include in the draft covenant any provision likely to be exploited by totalitarian States for the purpose of rendering the other articles null and void.<sup>47</sup>

But several countries, including Egypt, Poland, and Soviet Ukraine, criticized the “absolutist” US position, and France emphasized the middle course “[b]etween the two extremes of authoritarianism and unlimited freedom.”<sup>48</sup>

In 1953, a representative of the World Jewish Congress was invited to speak at the UN Commission on Human Rights. Perhaps understandably, given the Holocaust, he supported the French and Soviet argument that hate speech provisions were necessary in the name of human rights. He emphasized the causal link between verbal propaganda, demonization of certain groups, and genocide.<sup>49</sup> However, not everybody agreed. The Swedish delegate replied that such free-speech prohibitions would not have prevented the “fanatical persecution” during World War II. She argued instead that “[t]he effective prophylaxis lay in free discussion, information and education.”<sup>50</sup> Australia warned that “people could not be legislated into morality,” and that “the remedy might be worse than the evil it sought to remove.”<sup>51</sup> The UK representative stated that “the power of democracy to combat propaganda lay . . . in the ability of its citizens to arrive at reasoned decisions in the face of conflicting appeals.”<sup>52</sup> When challenged by the Soviet Union, the UK representative pointed out that during World War II, Hitler’s *Mein Kampf* had not been

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<sup>47</sup> *Id.* at 6–7.

<sup>48</sup> *Id.* at 10.

<sup>49</sup> Draft International Covenants on Human Rights and Measures of Implementation, U.N. ESCOR, Comm’n on Hum. Rts., 9th Sess., 378th mtg. at 4–5, U.N. Doc. E/CN.4/SR.378 (May 8, 1953).

<sup>50</sup> *Id.* at 10; Farrior, *supra* note 23, at 29.

<sup>51</sup> Draft International Covenants on Human Rights and Measures of Implementation, U.N. ESCOR, Comm’n on Hum. Rts., 9th Sess., 377th mtg. at 6–7, U.N. Doc. E/CN.4/SR.377 (Oct. 16, 1953).

<sup>52</sup> *Id.* at 9.

banned and that the British government “would maintain and fight for its conception of liberty as resolutely as it had fought against Hitler.”<sup>53</sup>

But this time around, principled warnings did not carry the day. In 1961, sixteen countries<sup>54</sup> from Eastern Europe, Latin America, Africa, and the Middle East proposed a text which was adopted into the final version and became Article 20(2) in the ICCPR: “Any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law.”<sup>55</sup> Poland worried that freedom of expression could be abused and “contribute decisively to the elimination of all freedoms and rights.”<sup>56</sup> The Yugoslav representative emphasized that it was “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>57</sup>

When the final wording of Article 20 was put to a vote in the General Assembly in October 1961, it was adopted with fifty-two votes in favor, nineteen against, and twelve abstentions. Those in favor were primarily the Communist states of Eastern Europe, as well as non-Western countries. The nineteen countries that voted against included almost all Western liberal democracies, but also a number of non-Western states such as Ecuador, Uruguay, Malaysia, and Turkey.<sup>58</sup>

When the Soviet Union had lost the political struggle to define the limits of free speech in the UDHR in 1948, there were fifty-eight member states of the UN. In 1961, membership had increased to 104 states due to decolonization. This included

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<sup>53</sup> Draft International Covenants on Human Rights and Measures of Implementation, U.N. ESCOR, Comm’n on Hum. Rts., 9th Sess., 379th mtg. at 12–23, U.N. Doc. E/CN.4/SR.379 (May 3, 1953); Mchangama, *supra* note 19, at 51.

<sup>54</sup> Aswad, *supra* note 31, at 1321. The sixteen co-sponsors of the amendment were Brazil, Cambodia, Congo, Ghana, Guinea, Indonesia, Iraq, Lebanon, Mali, Morocco, Philippines, Poland, Saudi Arabia, Thailand, United Arab Republic, and Yugoslavia.

<sup>55</sup> ICCPR, *supra* note 3, art. 20(2).

<sup>56</sup> U.N. GAOR, 16th Sess., 3d Comm., 1073d mtg. at 67, U.N. Doc. A/C.3/SR.1073 (Oct. 13, 1961).

<sup>57</sup> U.N. GAOR, 16th Sess., 3d Comm., 1079th mtg. at 97, U.N. Doc. A/C.3/SR.1079 (Oct. 20, 1961).

<sup>58</sup> U.N. GAOR, 3d comm., 1083d mtg., § 59, U.N. Doc. A/C.3/SR. 1083 (25 Oct. 1961); *see also* Farrior, *supra* note 23, at 40–41, and Mchangama, *supra* note 19, at 51.

a number of African states who under colonial rule had all experienced systematic, humiliating, and oppressive European racism, and therefore felt sympathetic towards prohibiting racist hate speech. However, European colonial powers such as Britain and France also used censorship of colonized peoples as a racist tactic to quell anti-colonial movements. Of course, using one's own recent oppression as an argument against the Soviet agenda was a rather uncomfortable strategy for Western states and wasn't advanced.

Moreover, the Soviet push for prohibiting hate speech under human-rights law was not limited to speeches at the UN. Thomas Rid has documented that the outbreak of a global "swastika-epidemic"—which involved the defacement of synagogues, the spread of anti-Semitic pamphlets, and the depiction of swastikas in graffiti, which kicked off in Cologne in 1959, and spread to most continents in 1960—was the result of "a joint Soviet bloc active measure executed on KGB orders."<sup>59</sup> The swastika epidemic caused an international outcry and became the impetus behind the International Covenant on the Elimination of all Racial Discrimination (ICERD), which also includes an obligation to prohibit racist hate speech and racist organizations.<sup>60</sup> Furthermore, when the UN General Assembly was debating decolonization in 1960—a year prior to the adoption of what would become the final version of Article 20(2)—the KGB targeted African delegations in New York with a vile racist pamphlet entitled "White America Rejects A Bastardized United Nations," purportedly sent by the KKK, as part of a larger effort to use American racial segregation to demonstrate the hypocrisy and racism of the US and the West in general.<sup>61</sup> It is difficult to know to what degree—if any—these Soviet active measures influenced the final adoption of Article 20(2), though it seems clear that they were vital to the adoption of the ICERD, which would become instrumental in shaping hate speech legislation in European democracies in subsequent decades.

Ultimately, the Western democracies had been dissuaded by the inherent vagueness of the provision. When does a book, a cartoon, an article, or an argument

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<sup>59</sup> THOMAS RID, *ACTIVE MEASURES* 130 (2021) (ebook).

<sup>60</sup> David Keane, *Addressing the Aggravated Meeting Points of Race and Religion*, 6 U. MD. L.J. RACE RELIGION GENDER & CLASS 367, 371 (2006); see also Comm'n on Hum. Rts., Rep. of the Twelfth Session of the Sub-Commission on Prevention of Discrimination and Protection of Minorities, U.N. Docs. E/CN.4/800, E/CN/Sub.2/206 (Feb. 8, 1960).

<sup>61</sup> RID, *supra* note 59, at 135.

constitute incitement to national, racial, or religious hostility? As a Norwegian diplomat concluded, the article was “so easy to misconstrue that those whom the provision was supposedly designed to protect might very well find themselves its victims.”<sup>62</sup> As we shall see, the concerns of both Eleanor Roosevelt and the Norwegian diplomat turned out to be prophetic.

### III. FREE SPEECH, COMMUNISM, AND THE HELSINKI EFFECT

Historian Samuel Moyn has argued that the seventies were in many ways the real breakthrough of human rights.<sup>63</sup> According to this account of history, the adoption of the UDHR in 1948 ushered in hope and optimism, but the lofty principles drowned in Cold War rivalry and colonialism.<sup>64</sup> State sovereignty and the principle of non-interference were still the overarching principles in international relations at the expense of individual human rights. But during the seventies, the revival of human rights made these lofty principles the common international language of good, however aspirational and imperfectly implemented.<sup>65</sup> Many factors contributed to this change, including decolonization, the American civil rights movement, the explosion of national and international human-rights NGOs, and new communication technology penetrating national borders.<sup>66</sup> Furthermore, within the Soviet Union, the death of Joseph Stalin back in 1953 had been followed by Nikita Khrushchev’s condemnation of Stalinist terror in 1956 and a comparatively milder climate for dissent compared to the mass killings of the 1930s.<sup>67</sup>

One pivotal moment in the seventies and in the modern history of human rights was the Helsinki Final Act of 1975, signed by thirty-five countries under the auspices of the Conference on Security and Cooperation in Europe (CSCE) after

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<sup>62</sup> U.N. GAOR, 16th Sess., 3d Comm., 1084th mtg. at 121, U.N. Doc. A/C.3/SR.1084 (Oct. 29, 1961); Fariior, *supra* note 23, at 41.

<sup>63</sup> SAMUEL MOYN, *THE LAST UTOPIA: HUMAN RIGHTS IN HISTORY* (2010).

<sup>64</sup> Michael Cotey Morgan, *The Seventies and the Rebirth of Human Rights*, in *THE SHOCK OF THE GLOBAL: THE 1970S IN PERSPECTIVE* 237, 238–39 (Niall Ferguson et al. eds., 2010).

<sup>65</sup> MOYN, *supra* note 63, at 56.

<sup>66</sup> *Id.*

<sup>67</sup> Morgan, *supra* note 64, at 240.

almost three years of negotiations.<sup>68</sup> The overall ambition on both sides was to formalize détente and ease tensions between the United States and the Soviet Union. The Helsinki Final Act is widely perceived as a real game changer in Cold War Europe and a precondition for a peaceful end of the Cold War.<sup>69</sup> But contrary to the aforementioned scholarship emphasizing the seventies as the decisive renaissance of modern human rights, recent research into the history of human rights has emphasized important events and developments in the sixties which contextualize the eventful seventies and the Helsinki Final Act.<sup>70</sup> One such event was the adoption of the UN Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States,<sup>71</sup> adopted in 1970 after six years of negotiations. This UN declaration contained several explicit references to human rights and served as a foundation for the CSCE negotiations.<sup>72</sup>

When the CSCE negotiations were launched, the Eastern and Western blocs sat down at the negotiating table with different agendas. On June 8, 1973, the participants agreed on a number of basic principles to be negotiated. The Soviet bloc secured principles like the “inviolability of frontiers” and “non-intervention in internal affairs,” while the West managed to secure Principle 7 on “[r]espect for human rights and fundamental freedoms, including specifically the freedom of thought,

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<sup>68</sup> DANIEL C. THOMAS, *THE HELSINKI EFFECT: INTERNATIONAL NORMS, HUMAN RIGHTS, AND THE DEMISE OF COMMUNISM* 56 (2001); Jacob Mchangama, *Episode 40—The Age of Human Rights: Tragedy and Triumph*, CLEAR & PRESENT DANGER: A HISTORY OF FREE SPEECH (Feb. 3, 2020), <https://perma.cc/H8ZF-H4XK>.

<sup>69</sup> STEVEN L. B. JENSEN, *THE MAKING OF INTERNATIONAL HUMAN RIGHTS: THE 1960S, DECOLONIZATION, AND THE RECONSTRUCTION OF GLOBAL VALUES* 209–36 (2017); *PERFORATING THE IRON CURTAIN: EUROPEAN DÉTENTE, TRANSATLANTIC RELATIONS AND THE COLD WAR, 1965–1985* (Poul Villume & Odd Westad eds., 2010); *HELSINKI 1975 AND THE TRANSFORMATION OF EUROPE* (Oliver Bange & Gottfried Niedhart eds., 2008); *ORIGINS OF THE EUROPEAN SECURITY SYSTEM: THE HELSINKI PROCESS REVISITED, 1965–75* (Andreas Wenger, Vojtech Mastny & Christian Neunlist eds., 2008); SARAH B. SNYDER, *HUMAN RIGHTS ACTIVISM AND THE END OF THE COLD WAR: A TRANSNATIONAL HISTORY OF THE HELSINKI NETWORK* (2011).

<sup>70</sup> JENSEN, *supra* note 69, at 210.

<sup>71</sup> G.A. Res. 2625 (XXV) (Oct. 24, 1970).

<sup>72</sup> JENSEN, *supra* note 69, at 210–27.

conscience, religion or belief.”<sup>73</sup> This particular right stood out as the longest and best-defined of the human rights principles in the Helsinki agreement.<sup>74</sup>

The so-called “Basket III” in the Helsinki agreement was even more specific. It called for “[i]mprovement of the Circulation of, Access to, and Exchange of Information,” which included newspapers, magazines, books, radio, and TV, as well as better working conditions for foreign journalists.<sup>75</sup> Initially, it was the Western European democracies that drove this agenda, while national-security advisor Henry Kissinger advised President Nixon and President Ford to focus on real politics rather than useless human rights sloganeering. However, a wide range of factors shifted American attitudes towards embracing a much more assertive role in driving the human rights agenda. One such factor was a speech by the world-famous Russian dissident Aleksandr Solzhenitsyn just before the Helsinki Summit in 1975. Solzhenitsyn had been deported and stripped of his citizenship in 1974 for his famous book on the Soviet prison camp system, *The Gulag Archipelago*. In *Gulag*, Solzhenitsyn wrote about Article 58 in the Soviet penal code that criminalized anti-Soviet propaganda and agitation: “Who among us has not experienced its all-encompassing embrace? In all truth, there is no step, thought, action, or lack of action under the heavens which could not be punished by the heavy hand of Article 58.”<sup>76</sup>

Solzhenitsyn wrote from experience. He had spent eight years in the Gulags after the authorities discovered private writings that were critical of Stalin.<sup>77</sup> Now, Solzhenitsyn warned that unless the US stepped up its game, the Helsinki principle of non-interference would result in “the funeral of Eastern Europe.” He implored the US to push for implementation of human rights principles and to “[i]nterfere more and more. . . . Interfere as much as you can. We beg you to come and ‘interfere.’”<sup>78</sup>

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<sup>73</sup> Conference on Security and Cooperation in Europe, Final Act (Helsinki Accord), Aug. 1, 1975, 14 I.L.M. 1292 [hereinafter Helsinki Final Act].

<sup>74</sup> THOMAS, *supra* note 68, at 61.

<sup>75</sup> MICHAEL COTEY MORGAN, *THE FINAL ACT: THE HELSINKI ACCORDS AND THE TRANSFORMATION OF THE COLD WAR* (2018); Helsinki Final Act, *supra* note 73.

<sup>76</sup> ALEKSANDR SOLZHENITSYN, *THE GULAG ARCHIPELAGO* 60 (Thomas P. Whitney trans., 2007).

<sup>77</sup> NOBEL LECTURES, LITERATURE 1968–1980 (Tore Frängsmyr & Sture Allén eds., 1993).

<sup>78</sup> ALEKSANDR SOLZHENITSYN, *DÉTENTE 19–50* (1980); THOMAS, *supra* note 68, at 123–24.

The rights and freedoms spelled out in the Helsinki Final Act obviously did not appeal to the Communist states. They were already fighting an uphill battle to jam the radio signals of Western radio stations—like Radio Free Europe, Radio Liberty, and the BBC—that broadcasted uncensored news and writings of dissidents into the homes of around a third of the population in the USSR and half the populations in the other countries behind the Iron Curtain.<sup>79</sup> During early negotiations, the Soviet Minister of Foreign Affairs, Andrei Gromyko, assured the Politburo that he “strongly . . . oppose[d] any attempt by the capitalist countries to impose on us the ‘freedom’ of spreading hostile propaganda and ideology.”<sup>80</sup> The Soviet ambassador in Helsinki emphasized that the USSR would under no circumstances tolerate “the dissemination of anti-culture—pornography, racism, fascism, the cult of violence, hostility among peoples and false slanderous propaganda.”<sup>81</sup> And just as during the negotiations in the UN system, the Soviets used the need to fight racism and fascism as a means to justify authoritarian censorship.

However, despite all these objections, the Soviet bloc swallowed the concessions to human rights and signed the Helsinki agreement. The prevailing view in Moscow was that the human rights language was little more than empty rhetoric that could be satisfied with mere lip service. Gromyko reassured the worried hardliners in the Politburo by pointing to the document’s commitment to the principle of state sovereignty and non-intervention in internal affairs. As he proclaimed: “We are masters in our own house.”<sup>82</sup>

In some circles, the impression was that the Soviet bloc had once again outsmarted the West. A 1975 *New York Times* editorial lamented that “nothing signed in Helsinki will in any way save courageous free thinkers in the Soviet empire from the prospect of incarceration in forced labor camps, or in insane asylums, or from being subjected to involuntary exile.”<sup>83</sup> The Soviet dissident Vladimir Bukovsky

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<sup>79</sup> MORGAN, *supra* note 75, at 171–72.

<sup>80</sup> *Id.* at 179.

<sup>81</sup> *Id.*

<sup>82</sup> *Id.* at 201; THOMAS, *supra* note 68, at 93.

<sup>83</sup> *Brezhnev at Helsinki*, N.Y. TIMES (Aug. 1, 1975), at 19; THOMAS, *supra* note 68, at 97.

agreed. In disgust, he wrote that the West's "friendly relations" with the Soviet Union was "built on our bones."<sup>84</sup> On the other hand, newspapers like *Pravda* had wall-to-wall coverage of the Helsinki Final Act and portrayed it as a huge victory for General Secretary Leonid Brezhnev and the USSR. But the measures on human rights made the Communist regimes hesitant about sharing the actual content of the Act with their own citizens.

Despite this, Eastern Europeans quickly learned about the Helsinki agreement—and the new rights which their governments had just solemnly promised to respect—through word-of-mouth, underground *samizdat* publishers, and Western radio broadcasts.<sup>85</sup> Despite the government's cautiousness, the Helsinki Act was published in full in Czechoslovak newspapers in 1976, and many Czechs cut the text out and hung it on their refrigerators or elsewhere.<sup>86</sup> Dissident groups throughout the Soviet bloc were emboldened to act as if their governments had actually committed themselves to basic human rights in good faith, rather than as a calculated and strategic maneuver in order to obtain other, more important diplomatic results.<sup>87</sup>

In 1975, Soviet nuclear physicist Andrei Sakharov had been awarded the Nobel Peace Prize for his human rights work. But the government barred him from flying to Oslo and accepting it and subjected him to a relentless campaign of smears and surveillance when he refused to refuse this Western honor. As early as the 1960s, Sakharov had become increasingly critical of the oppressive nature of the Soviet Union, and in 1968, he wrote the famous essay entitled *Thoughts on Progress, Peaceful Coexistence and Intellectual Freedom*:

[I]ntellectual freedom is essential to human society—freedom to obtain and distribute information, freedom for open-minded and unfearing debate and freedom from pressure by officialdom and prejudices. Such a trinity of freedom of thought is the only guarantee against an infection of people by mass myths, which, in the hands of

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<sup>84</sup> VLADIMIR BUKOVSKY, *TO BUILD A CASTLE: MY LIFE AS A DISSENTER* 437 (Michael Scammell trans., 1978); MORGAN, *supra* note 75, at 219.

<sup>85</sup> Daniel C. Thomas, *The Helsinki Accords and Political Change in Eastern Europe*, in *THE POWER OF HUMAN RIGHTS: INTERNATIONAL NORMS AND DOMESTIC CHANGE* 205–33 (Thomas Risse, Stephen C. Ropp & Kathryn Sikkink eds., 1999).

<sup>86</sup> *Chipping Away at Czechoslovak Communism: The Helsinki Final Act and Charter 77*, ASS'N FOR DIPLOMATIC STUD. & TRAINING (Dec. 7, 2016), <https://perma.cc/3A5V-FZH2>.

<sup>87</sup> ERIC POSNER, *THE TWILIGHT OF HUMAN RIGHTS LAW* 18 (2014).

treacherous hypocrites and demagogues, can be transformed into bloody dictatorship.<sup>88</sup>

Sakharov's eloquent essay was rewarded with the loss of his security clearance.<sup>89</sup> Given the negative attention surrounding Sakharov, it was a pretty bold move when a group of Russian dissidents, including Natan Sharansky and Yuri Orlov, held a press conference in Sakharov's apartment in May 1976. Here, they announced the establishment of the Moscow Helsinki Group. The new group's main ambition was to monitor the implementation of the Helsinki Agreement in the USSR. In the following years, the Moscow Helsinki Group and other human rights organizations reported human rights violations to Western journalists or circulated them within the USSR through an underground network, the so-called *samizdat*.<sup>90</sup> Western NGOs and politicians provided much-needed backing to these groups of dissidents who had no official or public channels of communications, including the Republican congresswoman Millicent Fenwick of New Jersey<sup>91</sup> and the US Helsinki Watch Group—now Human Rights Watch—which was established in New York in 1978 to give “moral support for the activities of the beleaguered Helsinki monitors in the Soviet bloc.”<sup>92</sup> Other examples are the reports of Amnesty International from the late 1970s and ARTICLE 19, which was established by barrister and human rights activist Kevin Boyle.

During the first couple of years after the Final Act, the Soviet regime met the Helsinki Watch Groups and the wave of dissident activity with surprising tolerance. Comparing the period 1968–1974 to the period 1975–1978, the average number of dissidents arrested per year dropped by half.<sup>93</sup> It all seemed very promising. However, as many dissidents probably sensed, the apparent thaw was too good to last.

At this moment, an obscure underground indie rock band entered the political stage and was about to become one of the most influential indie bands in history.

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<sup>88</sup> Andrei Sakharov, *Thoughts on Progress, Coexistence, and Intellectual Freedom*, N.Y. TIMES, July 22, 1968, at 14.

<sup>89</sup> David K. Shipler, *Sakharov Denied Visa to Get Prize*, N.Y. TIMES, Nov. 13, 1975, at 1.

<sup>90</sup> THOMAS, *supra* note 68, at 160–61.

<sup>91</sup> *Id.* at 125.

<sup>92</sup> U.S. HELSINKI WATCH COMMITTEE, *THE FIRST FIFTEEN MONTHS: A SUMMARY OF THE ACTIVITIES OF THE U.S. HELSINKI WATCH COMMITTEE FROM ITS FOUNDING IN FEBRUARY 1979 THROUGH APRIL 1980*, at 3–4; THOMAS, *supra* note 68, at 151.

<sup>93</sup> THOMAS, *supra* note 68, at 165.

The Plastic People of the Universe was crucial for the establishment of one of the most iconic dissident movements of the Cold War: Charter 77. The Plastic People wrote provocative lyrics that satirized the Communist rule and took aim at the harsh repression after the Soviet invasion that crushed the so-called Prague Spring of 1968, a series of liberalizing political reforms sustained by mass demonstrations. In 1976, rock 'n' roll was put on trial when members of the band were arrested for “organizing disturbance of the peace” with their “anti-social” behavior that was corrupting the Czech youth.<sup>94</sup> The arrests inspired a motley crew of intellectuals, writers, and artists—including the playwright Václav Havel—to draft a charter that documented how the Czechoslovakian government systematically violated the very rights it had promised to respect in the recently ratified international human rights covenants, including the ICCPR, as well as the Helsinki Final Act. And freedom of expression was the first right emphasized in the charter:

The right to freedom of expression, for example, guaranteed by Article 19 . . . is in our case purely illusory. Tens of thousands of our citizens are prevented from working in their own fields for the sole reason that they hold views differing from official ones, and are discriminated against and harassed in all kinds of ways by the authorities and public organizations.<sup>95</sup>

Crucially, Charter 77 professed ideological neutrality and a non-partisan approach to politics, and when the manifesto was published in January 1977, it had 242 signatories—from liberals to socialists—with many more signing on in the following weeks. Furthermore, the manifesto was tacitly supported by the Evangelical Church of Czech Brethren.<sup>96</sup> The signatories were united by the Charter’s commitment to “the respect of civic and human rights in our own country and throughout the world—rights accorded to all men by the two mentioned international covenants, by the Final Act of the Helsinki conference and . . . the United Nations Universal Declaration of Human Rights.”<sup>97</sup>

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<sup>94</sup> Mihaela Teodor, *Plastic People of the Universe: Rock and Roll, Human Rights and the Velvet Revolution*, *VALAHIAN J. HIST. STUD.* 12, 29–39 (2009).

<sup>95</sup> CHARTER 77 (1977), reprinted in H. GORDON SKILLING, *CHARTER 77 AND HUMAN RIGHTS IN CZECHOSLOVAKIA* 209–12 (H. Gordon Skilling trans., 1981).

<sup>96</sup> THOMAS, *supra* note 68, at 178–79.

<sup>97</sup> CHARTER 77, *supra* note 95.

The Charter went viral and was published in influential Western newspapers like *Le Monde*, *The Times*, and *The New York Times*, and the Czechoslovakian government launched propaganda and smear tactics against Charter 77. The campaign gradually escalated into arrests, crackdowns, and sanctions against signatories,<sup>98</sup> but the government refrained from simply destroying the movement and its leaders—a decision Daniel Thomas partly credits to the so-called “Helsinki Effect.”<sup>99</sup>

The Helsinki Effect also spread to Poland, where fifty-nine people signed the so-called “Letter of 59” in December 1975 to demand the rights and freedoms their leaders had promised to respect when they had signed the Helsinki Final Act.<sup>100</sup> The letter inspired a group of influential Polish intellectuals to establish the Workers’ Defense Committee (also known as KOR) to help workers who were fired and imprisoned for striking. The young electrical engineer Lech Wałęsa joined KOR after he was fired from the Lenin Shipyards in Gdańsk for demonstrating and engaging in “anti-government activity.” Wałęsa and his associates from KOR united Poles from all walks of life. Crucially for mobilization of ordinary Poles, the Catholic Church became more and more involved in the Polish human rights movement. The election of a Polish pope, John Paul II, in October 1978 and his triumphant visit to Poland in 1979<sup>101</sup> was a huge inspiration for many Polish dissidents, as he spoke of “human dignity, individual rights, human rights and the rights of nations.”<sup>102</sup> According to one historian, “[T]he growing involvement of the Church with the human rights movement . . . helped revive the ‘politically dormant’ sections of the more traditionalistic Catholic public opinion.”<sup>103</sup> The resistance became too big and too broad for the government to crush through brute force and repression. In August 1980, the Polish leader Mieczysław Jagielski caved in and signed an agreement which allowed the Poles to organize themselves freely and independently. Later that month, Wałęsa announced the formation of *Solidarność*,

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<sup>98</sup> THOMAS, *supra* note 68, at 180.

<sup>99</sup> *Id.* at 214–25.

<sup>100</sup> JAN ECKEL & SAMUEL MOYN, *THE BREAKTHROUGH: HUMAN RIGHTS IN THE 1970S*, at 177 (2014).

<sup>101</sup> THOMAS, *supra* note 68, at 201.

<sup>102</sup> *Notable & Quotable*, WALL ST. J., Nov. 9, 1978, at 30; THOMAS, *supra* note 68, at 105.

<sup>103</sup> Jacques Rupnik, *Dissent in Poland, 1968–78: The End of Revisionism and the Rebirth of the Civil Society*, in *OPPOSITION IN EASTERN EUROPE* 90 (Rudolph L. Tokes ed., 1979).

or Solidarity, the first independent trade union in the Communist world.<sup>104</sup> Within one year, the union had attracted ten million members across all sectors of Polish society—nearly a third of Poland’s population.<sup>105</sup>

As noted, the Moscow Helsinki Group was initially treated leniently. But then, in July 1978, the regime was done playing nice, and the group’s members were arrested.<sup>106</sup> Yuri Orlov and Natan Sharansky were sentenced to seven and thirteen years in prison respectively.<sup>107</sup> In 1980, Sakharov was exiled to Gorky, where he lived under tight surveillance. Between 1980 and 1983, more than five hundred people were arrested for Helsinki-related activities. Some were forcibly committed to psychiatric institutions. In 1981, the First Deputy Chairman of the KGB thought that things were under control:

As a result of measures taken by the KGB, implemented in strict accordance with the law and under the leadership of Party organs, the anti-social elements, despite the West’s considerable material and moral support, did not succeed in achieving organized cohesion on the platform of anti-Sovietism.<sup>108</sup>

The following year, Sakharov’s wife Yelena Bonner officially disbanded the Moscow Helsinki Group, although others sprung up to continue the fight.

In Czechoslovakia, several members of Charter 77 were arrested throughout 1977. The majority of Czechoslovakian cases taken up by Amnesty International in 1978 concerned members or affiliates of Charter 77, who were imprisoned for writing, distributing, or possessing texts which criticized the Government’s abuse of human rights. Most were sentenced under three articles from the penal code criminalizing “subversion,” “breach of public peace,” and “incitement”: the very crime which the Soviet bloc—including Czechoslovakia—had fought successfully to include in Article 20 of the ICCPR and which Eleanor Roosevelt had warned could be abused to render all rights “null and void” unless limited to incitement to violence. True, the Czechoslovakian penal code prohibited incitement against the socialist system and the state system of the Republic motivated by hostility towards these

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<sup>104</sup> JOHN LEWIS GADDIS, *THE COLD WAR 196–97* (2005).

<sup>105</sup> THOMAS, *supra* note 68, at 204.

<sup>106</sup> *Id.*

<sup>107</sup> *Id.* at 209.

<sup>108</sup> *Id.* at 195.

bodies, rather than against specific groups.<sup>109</sup> But this “mutation” of incitement norms had also been foretold by Roosevelt. A good example of the “catch-all” character of incitement was the prosecution of Charter 77 affiliate František Pitor, who was sentenced to three years in prison after tape recording and distributing the Charter 77 manifesto. Others received similar punishments for distributing political leaflets.<sup>110</sup> Václav Havel was initially lucky and only got a suspended sentence of fourteen months for “attempting to harm the interests of the republic abroad.”<sup>111</sup> But the crackdown prompted members of Charter 77 to set up the Committee for the Defense of the Unjustly Prosecuted, which documented the actions taken against their fellow dissidents. This activity cost Havel a sentence of four and half years in prison in 1979, whereas Jiří Gans was given a stiff sentence of fifteen years for listening to Voice of America Broadcasts and founding the “Club of Friends of American Music.”<sup>112</sup>

Czechoslovakia was not the only Communist state illustrating the dangers of applying hate speech norms in order to oppress dissent and stifle free thought. State authorities were also responding with brute force in Hungary, Yugoslavia, and Poland, and they were explicitly applying laws banning incitement to hatred against the constitutional order as well as laws against incitement to national, racial, or religious “hatred.”<sup>113</sup> The Yugoslavian criminal code of 1977 (adopted six years after the country’s ratification of the ICCPR and the year after the ICCPR entered into force) punished so-called “hostile propaganda” and “incitement to national, racial or religious hatred, discord or intolerance” with up to ten years in prison. Chapter 16 of the criminal code was concerned with “Criminal Acts against Humanity and International law.” Article 154(i) stated that “Whoever on the basis of distinction of race, colour, nationality or ethnic background violates basic human rights and freedoms recognized by the international community, shall be punished by imprisonment for a term exceeding six months but not exceeding five years,” whereas Article 154(iii) punished, with up to three years in prison, “[w]hoever spreads ideas

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<sup>109</sup> AMNESTY INT’L, CZECHOSLOVAKIA: AMNESTY INTERNATIONAL BRIEFING 6 (1981).

<sup>110</sup> AMNESTY INT’L, AMNESTY INTERNATIONAL REPORT 1978, at 206–10 (1979).

<sup>111</sup> *Id.* at 207.

<sup>112</sup> COMM’N ON SEC. & COOP. IN EUR., IMPLEMENTATION OF THE FINAL ACT OF THE CONFERENCE ON SECURITY AND COOPERATION IN EUROPE 62 (1980).

<sup>113</sup> AMNESTY INT’L, *supra* note 110, at 198–201, 218–19, 223–25, 244–48.

on the superiority of one race over another, or advocates racial hatred, or instigates racial discrimination.”<sup>114</sup> But Yugoslavia’s detailed laws against hate speech were mostly used to curb political criticism as well as the religious and nationalist sentiments of the country’s different ethnic groups. In 1981, a number of Muslims, including an imam, were sentenced to four years’ imprisonment for provoking national and religious hatred after criticizing the authorities and urging parents to raise their children as Muslims. An Orthodox priest and three other men were given sentences of four to six years for singing nationalist songs at a christening. The liberal Croatian writer and dissident Vladimir “Vlado” Gotovac—sometimes called the Croat Václav Havel—was sentenced to two years of prison and banned from writing and speaking in public for four years for spreading “hostile propaganda” and “inciting national hatred” in interviews with foreign journalists.<sup>115</sup>

However, these crackdowns were not enough to shore up the crumbling Communist monopoly on power and the public sphere. In the early 1970s, the leader of the KGB, Yuri Andropov, had warned that “[w]ith all the innovations in the domain of information transmission the frontiers of this country will never be watertight again.”<sup>116</sup> When Mikhail Gorbachev became Secretary General in 1985, things moved fast. Gorbachev’s *glasnost* reform of 1986 took inspiration from the Final Act despite protesting hardliners in the Politburo and the KGB. Censorship was relaxed, Sakharov was allowed to return to Moscow, and hundreds of political prisoners were released, including the aforementioned Sharansky and Orlov.<sup>117</sup> The government also called off the jamming of Western radio signals. As a Soviet official stated, “[T]he level of *glasnost* is now so high in the Soviet Union that we can afford to hear three more voices or 20 more languages.”<sup>118</sup> And in 1989, a follow-up conference to the Helsinki Act resulted in an outcome in which the Soviet bloc basically abandoned the Marxist-Leninist interpretation of human rights.<sup>119</sup>

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<sup>114</sup> Criminal Code of the Socialist Republic of Yugoslavia, arts. 133, 134 & 154 (adopted July 1, 1977).

<sup>115</sup> Charles E. M. Kolb, *The Criminal Trial of Yugoslav Poet Vlado Gotovac: An Eyewitness Account*, 4 HUM. RTS. Q. 184 (1982); AMNESTY INT’L, YUGOSLAVIA: PRISONERS OF CONSCIENCE 16–18 (1981).

<sup>116</sup> MORGAN, *supra* note 75, at 205.

<sup>117</sup> *Id.* at 242.

<sup>118</sup> *Id.* at 244.

<sup>119</sup> *Id.*

In Czechoslovakia, the civic movement around Charter 77 played a major role in the so-called Velvet Revolution that toppled the Communist dictatorship in 1989 and paved the way for Václav Havel to become the first democratically elected president of Czechoslovakia in 1990. In Poland, 1989 also saw Jaruzelski and the Polish government cave in after a number of large-scale strikes. Solidarity was allowed to run in the semi-free election for parliament in June 1989 and won by a landslide; much like Václav Havel, Lech Wałęsa became the first freely elected president of the new independent Poland. According to Wałęsa, “[O]ne of the central freedoms at stake was freedom of expression,”<sup>120</sup> and when Václav Havel held a speech in the US Congress in 1990, he said:

When they arrested me on Oct. 27, I was living in a country ruled by the most conservative communist government in Europe, and our society slumbered beneath the pall of a totalitarian system. Today, less than four months later, I’m speaking to you as the representative of a country that has set out on the road to democracy, a country where there is complete freedom of speech.<sup>121</sup>

Needless to say, this account omits other crucial developments that contributed to the fall of communism and the end of the Cold War. And how influential the Helsinki Effect really was is disputed among historians. But it cannot be denied that human rights in general—and the right to freedom of expression in particular—became an effective central platform and a unifying language for a movement of dissidents backed by Western governments and NGOs. Evaluating the free-speech debates in the postwar period within the UN system as well as the Helsinki process, one recurring issue keeps emerging, namely the question concerning the nature, the scope, and the practical implementation of legal categories such as “hate speech” and “incitement.” During the UN negotiations in the 1950s, Eleanor Roosevelt warned that embedding hate speech prohibitions in human rights law was “likely to be exploited by totalitarian States for the purpose of rendering the other articles null and void.”<sup>122</sup> This dark prediction turned out to be true in terms of the Soviet bloc, as the hundreds of dissidents punished for incitement found out.

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<sup>120</sup> LECH WAŁĘSA, *A PATH OF HOPE* 98 (1988).

<sup>121</sup> Václav Havel, *Speech to the U.S. Congress*, WASH. POST (Feb. 22, 1990).

<sup>122</sup> Draft International Covenant on Human Rights, U.N. ESCOR, Comm’n on Hum. Rts., 6th Sess., 174th mtg. at 7, U.N. Doc. E/CN.4/SR.174 (May 8, 1950).

This article does not claim that international prohibitions against incitement to hatred, hostility, and violence are to blame for authoritarian censorship. Such censorship predates the passage of hate speech bans in the ICCPR, and would have occurred even without the thin veneer of legality under international human rights law. However, we do claim that broad international free speech restrictions came in handy for authoritarian regimes, and that the vague language of these paragraphs was used to justify oppressive censorship norms.

#### IV. THE OIC AND ROOSEVELT'S PROPHECY: HOW HATE SPEECH LAWS CAN JUSTIFY RELIGIOUS CENSORSHIP

Another issue which concerned Eleanor Roosevelt back in the 1950s was the criminalization of "incitement to hatred" as spelled out under Article 20 in the IC-CPR. Roosevelt warned that "any criticism of public or religious authorities might all too easily be described as incitement to hatred and consequently prohibited."<sup>123</sup> Thirty years later, in 1989 as the Cold War drew to a close, this warning once again proved prescient.

That very year, the Supreme Leader of Iran, Ayatollah Khomeini, issued a fatwa against the British-Indian author Salman Rushdie. The fatwa ordered all Muslims to execute the author and everyone involved in publishing his blasphemous novel *The Satanic Verses*. The author went into hiding and managed to escape all attacks while translators and publishers were attacked and even assassinated from Italy and Turkey to Norway and Japan. However, almost 35 years after the fatwa was issued, a 24 year-old man from New Jersey with alleged sympathies for Shiite extremism and Iran's Revolutionary Guard, Hadi Matar, attacked Rushdie on stage during a small book-lecture event in New York State in August 2022.<sup>124</sup> The novelist was stabbed several times in his neck and torso, and the attack drew praise in some quarters of state-controlled Iranian media.<sup>125</sup>

Back in 1989, and in the wake of mass demonstrations both in the Muslim world and in Europe, the issue surfaced in UN's General Assembly. After the Ira-

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<sup>123</sup> *Id.* at 6.

<sup>124</sup> Bevan Hurley, *Who Is the New Jersey Man Charged with Attempted Murder of Salman Rushdie?*, INDEP. (Aug. 17, 2022).

<sup>125</sup> Martin Chulov, *Salman Rushdie Attack: Iranians React with Mixture of Praise and Concern*, GUARDIAN (Aug. 13, 2022).

nian delegate had defended the death sentence from the UN pulpit, the Libyan delegate entered the stage on behalf of the Organisation of Islamic Cooperation, or OIC, an intergovernmental umbrella organization for the Muslim world comprising fifty-seven member states. In condemning Rushdie's novel, the Libyan delegate invoked the hate speech prohibition in the ICCPR Article 20, exactly as predicted by Roosevelt:

Some people had invoked the right to freedom of thought and expression with respect to the publication of the "Satanic Verses" but without taking into account the feelings of millions of Muslims. Freedom of opinion and expression was not an absolute freedom existing in a vacuum . . . [A]rticle 20, paragraph 2 of the [ICCPR] stated that "any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law."<sup>126</sup>

In other words, the Libyan representative justified the OIC's pledge to ban *The Satanic Verses* by referring to hate speech prohibitions in secular international human rights law. The real criminal was Rushdie, not those who sought to kill him.

Founded in 1969, the OIC adopted its own human rights declaration, the Cairo Declaration on Human Rights in Islam, in 1990. The declaration is a clear-cut example of a theocentric approach to human rights, where individual rights are subordinated to a certain religious-political order. Shari'ah law is mentioned fifteen times throughout the twenty-five articles, and the final article concludes that "[t]he Islamic Shari'ah is the only source of reference for the explanation or clarification of any of the articles of this Declaration."<sup>127</sup>

On freedom of expression, the OIC's Article 22 says that "[e]veryone shall have the right to express his opinion freely in such manner as would not be contrary to the principles of the Shari'ah." Quickly following are specific injunctions against "violat[ing] sanctities and the dignity of Prophets, undermin[ing] moral and ethical values or disintegrat[ing], corrupt[ing] or harm[ing] society or weaken[ing] its

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<sup>126</sup> Implementation of the Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief, U.N. ESCOR, Comm'n on Hum. Rts., 45th Sess., 41st mtg. at 5-6, U.N. Doc. E/CN.4/1989/SR.41 (1989).

<sup>127</sup> Organization of the Islamic Conference, *Cairo Declaration on Human Rights in Islam*, art. 25 (adopted Aug. 5, 1990), *reprinted in* U.N. GAOR, World Conf. on Hum. Rts., 4th Sess. at 10, U.N. Doc. A/CONF.157/PC/62/Add.18 (June 9, 1993).

faith.” It is also prohibited to “arouse nationalistic or doctrinal hatred or to do anything that may be an incitement to any form of racial discrimination.”<sup>128</sup>

In other words, the Cairo Declaration entirely inverts the normal relationship between free speech and religious doctrine, by relegating free speech to a value subordinated to Shari‘ah law. In 2021, the OIC adopted a new and updated version of the Cairo Declaration which contains fewer references to Shari‘ah law and whose language is more in line with mainstream international law. However, with regard to freedom of expression, the new declaration says that “freedom of expression should not be used for denigration of religions and prophets or to violate the sanctities of religious symbols or to undermine the moral and ethical values of society.”<sup>129</sup>

Despite profound internal frictions and proxy warfare between Sunni and Shia states, the OIC has formed a homogenous group in the human rights machinery within the UN system, seeking to advance an understanding of free speech more in line with the blasphemy prohibitions in the old and revised versions of the Cairo Declaration. Throughout the nineties, many leading OIC member states like Pakistan, Saudi Arabia, Sudan, Iran, and Egypt were under heavy public criticism in the UN system and from human rights organization like Amnesty International and Human Rights Watch, due to gross human rights violations including religious discrimination and censorship.<sup>130</sup> As a response to the mounting criticism, the OIC’s diplomats went on the offensive, claiming that “the noble issue of human rights has been manipulated to wage war against Islam.”<sup>131</sup>

With the globalization of information through cable TV and the emergence of the Internet, there was also a feeling that Islam and Muslims were subject to a negative campaign in Western media comparable to historical outbursts of anti-Semitism. All these developments shaped the background when in 1999, Pakistan launched a controversial resolution against “defamation of religions” in the UN Human Rights Council—then called the Commission on Human Rights—on behalf of the OIC. The resolution urged all member states to combat “defamation of

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<sup>128</sup> *Id.* at art. 22.

<sup>129</sup> *Id.* at art. 21(c).

<sup>130</sup> Gáspár Bíró (Special Rapporteur for the Commission on Human Rights), *Rep. on the Situation of Human Rights in the Sudan*, at 18–26, U.N. Doc. E/CN.4/1994/48 (1994).

<sup>131</sup> U.N. ESCOR, Comm’n on Hum. Rts., 50th Sess. at 5, U.N. Doc. E/CN.4/1994/122 (1994).

religions,” which was intended to serve the same purpose as blasphemy laws throughout the Muslim-majority world, namely to shield religion from criticism, defamation, or denigration.<sup>132</sup> It is no coincidence that Pakistan led the initiative, as Pakistan enforces one of the world’s most oppressive laws against blasphemy, which may trigger the death penalty. However, it should also be emphasized that the Pakistani blasphemy ban has its genesis in British colonial-era laws. When the Pakistani representative introduced the resolution, he highlighted that “Islam was being portrayed as a threat to the international system, with many negative images which incited to hatred of Muslims.”<sup>133</sup> From the very outset, the OIC’s diplomats in the UN system were conflating blasphemy and hate speech. Once more, we see “hate speech” being used to promote international censorship norms just as they were during the Cold War and the drafting history of UN declarations and conventions.

The UN resolution against defamation of religions was adopted every year from 1999 to 2010, often with comfortable majorities that included non-Muslim countries such as Russia, China, and Cuba.<sup>134</sup> The defamation agenda was strengthened by events such as 9/11 and subsequent Al-Qaeda attacks in London and Madrid as well as the Danish cartoon affair, all of which deeply polarized public opinion on Islam and gave voice to genuine anti-Muslim hatred and anti-Islamic political parties and movements in many Western countries.

Instead of arguing on the basis of religion, theology, and Islamic doctrine, the OIC’s diplomats skillfully framed the issue as a matter of protecting and promoting international human rights standards, although their interpretations freely mixed blasphemy and hate speech. According to the OIC’s public discourse within the UN system, defamation of religions is a manifestation of hate speech and racism which undermines tolerance, pluralism, intercultural harmony, and peaceful coexistence. And once again, Article 20 of the ICCPR has been frequently used by the OIC to justify this agenda. A typical example of a resolution on defamation of religion would urge “states to take actions to prohibit the dissemination, including through political institutions and organizations, of racist and xenophobic ideas and material

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<sup>132</sup> SKORINI, *supra* note 5, at 8–9.

<sup>133</sup> U.N. ESCOR, Comm’n on Hum. Rts., 55th Sess., 61st mtg. at 3, U.N. Doc. E/CN.4/1999/SR.61 (1999).

<sup>134</sup> Peter S. Henne, *The Domestic Politics of International Religious Defamation*, 6 POL. & RELIGION 512, 512 (2013).

aimed at any religion or its followers that constitute incitement to racial and religious hatred, hostility or violence.”<sup>135</sup>

Accordingly, the OIC’s diplomats applied a two-pronged approach. On the one hand, they argued that defamation of religions is already criminalized in the ICCPR as a manifestation of hatred and incitement to discrimination, hostility, and violence. However, they were simultaneously arguing that the world needs new legal measures which explicitly outlaw blasphemous expressions, because the hate speech provisions set out in the ICCPR are too vague and not sufficient to protect religious ideas, feelings, symbols, and doctrines.

The Danish cartoon affair was probably the most critical incident in shaping the OIC’s agenda to criminalize “defamation of religions” in international human rights law. On September 30, 2005, the Danish newspaper *Jyllands-Posten* published twelve cartoons of the Prophet Muhammad. A few months later, the Middle East was on fire. Almost twenty years after the Rushdie affair, the world witnessed mass demonstrations, violent street riots, and the burning of Danish embassies in Beirut, Teheran, and Damascus, as well as a collective boycott of Danish goods. Cartoonists and editors had to go underground, and unprecedented security measures were implemented on a national level, preventing a raft of terrorist attacks including an attempt to break into *Jyllands-Posten*, decapitate journalists in the newsroom, and then lob the severed heads onto the square below.<sup>136</sup>

In 2009, Professor Jytte Klausen published the book *The Cartoons That Shook the World*. According to the book’s main argument, the cartoon affair was not the result of spontaneous protests, but rather of an orchestrated campaign from the highest political level, not least the Egyptian Ministry of Foreign Affairs.<sup>137</sup> One key meeting prior to the escalation of the affair took place in December 2005, when the OIC’s heads of states arranged an extraordinary meeting in Jeddah, Saudi Arabia, where the cartoons figured prominently on the agenda.<sup>138</sup> In the summit’s final

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<sup>135</sup> Hum. Rts. Council Res. 7/19, Combating Defamation of Religions, U.N. Doc. A/HRC/RES/7/19, at art. 8 (2008).

<sup>136</sup> Morten Skjoldager, *Terrorists Lack Imagination When Choosing Targets in Denmark*, in UNDERSTANDING TERRORISM INNOVATION AND LEARNING: AL-QAEDA AND BEYOND 232, 247 (Magnus Ranstorp & Magnus Normark eds., 2015).

<sup>137</sup> JYTTE KLAUSEN, *THE CARTOONS THAT SHOOK THE WORLD* 74 (2009).

<sup>138</sup> *Id.*; LORENZ LANGER, *RELIGIOUS OFFENCE AND HUMAN RIGHTS: THE IMPLICATIONS OF DEFAMATION OF RELIGIONS* 178 (2014).

communiqué, the OIC's heads of state underlined the need to "counter Islamophobia, defamation of Islam and its values and desecration of Islamic holy sites, and to effectively coordinate with States as well as regional and international institutions and organizations to urge them to criminalize this phenomenon as a form of racism."<sup>139</sup>

Hence, the OIC was justifying its censorship campaign in the name of fighting racism. The OIC could even rely on human rights organizations to blur the line between blasphemy and hate speech. In a response to the Danish cartoon affair in 2006, Amnesty International released a statement entitled "Freedom of speech carries responsibilities for all." The statement failed to support the Danish newspaper against calls for censorship and instead emphasized the need to respect the hate speech provisions set out in Article 20 in the ICCPR.<sup>140</sup> The statement could certainly be interpreted as a clear deviation from Amnesty's support for victims of blasphemy laws around the world. Perhaps even more surprisingly, the US State Department also sided with the OIC. In February 2006, a spokesperson said that "we all fully recognize and respect freedom of the press and expression but it must be coupled with press responsibility. Inciting religious or ethnic hatreds in this manner is not acceptable."<sup>141</sup> The statement was a very far cry from Eleanor Roosevelt's position in 1950, not to mention the liberal approach codified in the aforementioned Supreme Court case *Brandenburg v. Ohio*.

Furthermore, the OIC can also use another trump card by accusing the European Union of speaking with two tongues and adopting a somewhat hypocritical position. Several European democracies retain blasphemy laws, and even more importantly, the European Court of Human Rights has rubber-stamped the enforcement of European blasphemy laws in a number of controversial decisions. For instance, the Court has found that freedom of expression does not protect artistic films mocking Christianity, books attributing controversial sexual desires to the prophet Muhammad, or accusing the latter of pedophilia for having married a

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<sup>139</sup> Third Extraordinary Session of the Islamic Summit Conference, Final Communiqué (Dec. 8, 2005).

<sup>140</sup> *Freedom of Speech Carries Responsibilities for All*, AMNESTY INT'L (Feb. 7, 2006), <https://perma.cc/5MUX-KN5L>.

<sup>141</sup> Edward Michael Lenert, *Are Free Expression and Fundamentalism Two Colliding Principles?*, in *FUNDAMENTALISMS AND THE MEDIA* 39, 46 (Stewart M. Hoover & Nadia Kaneva eds., 2009).

young girl.<sup>142</sup> Such decisions by a court with jurisdiction over forty-seven states, including all the Western European democracies, have reinforced the OIC's censorship agenda. Although the ECHR would never accept the kinds of blasphemy bans and punishments doled out in OIC countries, OIC diplomats have copy-and-pasted phrases and arguments from leading court cases that upheld blasphemy bans in, for instance, Austria and the UK. This is yet another example of how vague and nebulous "hate speech" concepts can be abused by authoritarian states.<sup>143</sup>

#### V. AMERICA ENTERS THE PICTURE: THE END OF THE OIC'S CAMPAIGN TO CRIMINALIZE "DEFAMATION OF RELIGIONS"

The OIC's explicit goal was to move from non-binding resolutions in the UN Human Rights Council in Geneva to a new and binding legal instrument in international law. With a raft of successfully passed resolutions, and Western unease about defending free speech in light of anti-immigration sentiments and hostility towards Islam, things were looking good for the OIC agenda. The EU group in Geneva was unable to defeat the OIC juggernaut, and in 2006, the US ambassador to the UN, John Bolton, persuaded President George W. Bush to leave the Council altogether, a move mirrored by the Trump Administration when it jumped ship in June 2018.

However, when the Obama Administration took power in 2009, it decided to re-enter the Human Rights Council. This decision proved to be a game-changer with profound implications for the debate on freedom of expression. With a combination of stick and carrot, the State Department—aided by European democracies—launched a multilateral global offensive in order to undermine the OIC's resolution against "defamation of religions."<sup>144</sup> The main diplomatic strategy was to pick off states outside the Muslim world and challenge their support for the OIC's agenda. American diplomats jetted to meetings in all corners of the world, from Latin America to Africa and East Asia. This multilateral diplomatic offensive proved successful. Within a very short period of time, the OIC's diplomats in the UN machinery observed their majorities for the annual defamation resolutions

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<sup>142</sup> *Otto-Preminger-Institut v. Austria*, 295 Eur. Ct. H.R. (ser. A) (1994); *Wingrove v. UK*, 1996-V Eur. Ct. H.R. (1996); *İ.A. v. Turkey*, 2005-VIII Eur. Ct. H.R. 235 (2005); *E.S. v. Austria*, App. no. 38450/12 (Oct. 25, 2018).

<sup>143</sup> SKORINI, *supra* note 5.

<sup>144</sup> *Id.* at 177–200.

shrink, as states with no vested interest in the conflict switched sides or voted against instead of merely abstaining. In 2010, the defamation resolution passed with twenty votes against seventeen in the Human Rights Council, a loss of three votes for the OIC and a gain of six votes for the US-led opposition from the previous year. This was a far cry from the days when the OIC could muster more than thirty votes in the same institution.<sup>145</sup> In 2011, the majority was gone and the OIC was forced to abandon its resolution. Instead, the US ensured a majority for a new resolution called Resolution 16/18. The new resolution repudiated the concept and logic of defamation of religions.

According to the new text, human rights law protects people, not religions or ideologies. While the resolution “condemn[ed]” advocacy of incitement to hatred, it only called on the criminalization of “incitement to imminent violence based on religion or belief,”<sup>146</sup> a formulation inspired by the Supreme Court decision of *Brandenburg v. Ohio* mentioned earlier. This test not only protects blasphemous speech, it is also much more speech-protective than mainstream European hate speech laws or the hate speech provision in Article 20 of the ICCPR.

It would be ahistorical hyperbole to compare how democracies defeated the defamation campaign at the UN with the importance of the Helsinki Final Act. Unlike the Final Act, the defeat of a global blasphemy ban at the UN has done little to soften blasphemy laws within OIC countries, as Raif Badawi’s case highlights. In fact, eleven OIC states formally retain the death penalty for blasphemy and/or apostasy.<sup>147</sup> As late as December 27, 2019, the Pakistani University lecturer Junaid Hafeez was sentenced to death for alleged blasphemous statements on Facebook and during lectures. His conviction follows more than five years in solitary confinement since his trial began in 2014.<sup>148</sup> Hafeez is unlikely to be executed but will likely spend many years on death row.

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<sup>145</sup> *Id.*

<sup>146</sup> Human Rights Council Res. 16/18, at 3 (Apr. 12, 2011).

<sup>147</sup> THE FREEDOM OF THOUGHT REPORT 2020, at 13 (Emma Wadsworth-Jones ed., 2020). The eleven states are Afghanistan, Iran, Malaysia, Maldives, Mauritania, Nigeria, Qatar, Saudi Arabia, United Arab Emirates, Yemen, and Pakistan.

<sup>148</sup> *Pakistan Blasphemy Death Sentence ‘Travesty of Justice’, Say UN Experts*, UN NEWS (Dec. 27, 2019).

But even though Resolution 16/18 is unlikely to result in the abolishment of blasphemy laws or the ushering in of basic civil liberties in OIC states, the defeat of the defamation agenda has weakened the ability of Muslim-majority states—as well as Christian-majority states like Russia and Poland—to exploit human rights law in order to promote and justify laws restricting criticism and satire of religious dogma. Moreover, as a result of Resolution 16/18, the UN initiated the Rabat Plan of Action, aimed at narrowing the interpretation of Article 20(2) in order to prevent future attempts of abuse by authoritarian states and others who wish to crush dissent.

#### CONCLUSION

As this article has demonstrated, the right to freedom of expression and its limits has been a constant source of conflict and fierce political power struggles since the adoption of the UDHR in 1948. Applying both the UN arena as well as the Helsinki Process as institutional frameworks, the article has examined how prohibitions against “hate speech,” “incitement to hatred,” and related legal-political categories have constituted a focal point in the conflict on the meaning and the scope of freedom of expression as codified in international human rights law.

Already during the drafting history of the UDHR, the Soviet Union sought to implement broad limitations on the right to freedom of expression. On the ashes of the Holocaust and World War II, European countries were sympathetic to the very idea of banning hateful speech and adopted domestic laws against hate speech. Across the Atlantic, US diplomats perceived any attempt at criminalizing hateful speech as an attempt to justify authoritarian censorship norms. During the drafting history of the UDHR, the US stance prevailed and the declaration was adopted without any obligation to prohibit hate speech. However, the Soviet Union and its allies proved more successful during the drafting process of the International Covenant on Civil and Political Rights (ICCPR) adopted in 1966. As noted, the convention was adopted with an obligation to criminalize “any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence.” Having failed to criminalize “defamation of religions” as a separate concept in the UN system, the Organization of Islamic Cooperation (OIC) is now applying this very paragraph in the ICCPR to claim that blasphemy, religious defamation, and related expressions constitute incitement, and are therefore illegal under secular international human rights law. Hence, we have seen a gradual fusion between

hate speech and blasphemy, where laws against hate speech serve as de facto blasphemy laws.<sup>149</sup>

The Helsinki Process was to a certain extent shaped by negotiations on the meaning and the scope of human rights and freedom of expression within the UN system. And the Helsinki Process illustrates that the right to freedom of expression was a focal point in the clash between dissidents and authoritarian states. For dissidents opposing communist rule, the free speech guarantees spelled out in the Helsinki Final Act served as a unifying language for the opposition and its foreign allies, and it became a powerful instrument in the struggle against communist rule. Furthermore, the authoritarian use of legal prohibitions against “incitement” and related crimes illustrates the elasticity of such norms and how legal measures limiting freedom of expression can be exploited by oppressive regimes to justify existing or new methods of repression. This is not to claim that international free speech restrictions are *causing* oppressive censorship norms, as non-democratic regimes would enforce authoritarian censorship with or without international law. However, this article has nevertheless sought to illustrate how international free speech restrictions are being cynically instrumentalized by state authorities who do not tolerate dissent and criticism. Criticizing the application of blasphemy laws, US Supreme Court Justice Felix Frankfurter once said that “blasphemy was the chameleon phrase which meant the criticism of whatever the ruling authority of the moment established as orthodox religious doctrine.”<sup>150</sup> Indeed, the same could be said about laws against hate speech, where “hate speech” becomes a chameleon phrase used to target whatever expressions ruling authorities find convenient to criminalize.

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<sup>149</sup> SKORINI, *supra* note 5.

<sup>150</sup> *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 529 (1952).