



December 13, 2011

The Honorable Hillary Rodham Clinton
Secretary of State
U.S. Department of State
2201 C. Street NW
Washington, DC 20520

Dear Madam Secretary:

I. Introduction

The American Center for Law and Justice (ACLJ) is an organization dedicated to defending constitutional liberties secured by law. ACLJ attorneys have argued numerous free speech and religious freedom cases before the Supreme Court of the United States.¹

This letter is written in anticipation of the upcoming meeting of representatives of the United States Department of State with representatives of the Organisation of Islamic Cooperation (OIC) to establish a framework on how to implement the United Nations Human Rights Council (HRC) Resolution 16/18, entitled, “Combating intolerance, negative stereotyping and stigmatization of, and discrimination, incitement to violence and violence against, persons based on religion or belief.”² This resolution is the latest in a series of similar resolutions involving the concept of “defamation of religions.”

Although Resolution 16/18 appears to be a significant improvement over Resolution 62/154, entitled, “Combating defamation of religions,”³ which sought to protect Islam at the

¹*See, e.g.*, *Pleasant Grove City v. Summum*, 129 S. Ct. 1125 (2009) (unanimously holding that the Free Speech Clause does not require the government to accept other monuments merely because it has a Ten Commandments monument on its property); *McConnell v. FEC*, 540 U.S. 93 (2003) (unanimously holding that minors enjoy the protection of the First Amendment); *Lamb’s Chapel v. Center Moriches Sch. Dist.*, 508 U.S. 384 (1993) (unanimously holding that denying a church access to public school premises to show a film series on parenting violated the First Amendment); *Bd. of Educ. v. Mergens*, 496 U.S. 226 (1990) (holding by an 8-1 vote that allowing a student Bible club to meet on a public school’s campus did not violate the Establishment Clause); *Bd. of Airport Comm’rs v. Jews for Jesus*, 482 U.S. 569 (1987) (unanimously striking down a public airport’s ban on First Amendment activities).

²G.A. Res. 16/18, U.N. Doc. A/HRC/RES/16/18 (Apr. 12, 2011).

³G.A. Res. 62/154, U.N. Doc. A/RES/62/154 (Mar. 6, 2008).

expense of other religions, the ACLJ has serious lingering concerns about certain language in the new Resolution.

II. Resolution 16/18's Broad and Restrictive Language

Whereas Resolution 16/18 correctly protects all “persons,” instead of “religions,” particularly Islam,⁴ nonetheless, Resolution 16/18's broad prohibitions on freedom of speech will likely be used to delegitimize expression that may offend an individual or group belonging to a certain religion.

For instance, Resolution 16/18's preamble expresses “*deep concern*” regarding the “negative projection of the followers of religions,” and paragraph 1 expresses “*deep concern*” over “derogatory stereotyping,” “stigmatization of persons based on their religion,” and “negative stereotypes about religious groups.”⁵ Yet, mere *negative projection* or *stereotyping* of persons or groups based on their religion, without more, is not actionable under international legal norms, except in specific cases of slander or libel.

Furthermore, paragraphs 2, 3, and 5(e) and (g) of Resolution 16/18 also “*condemn*” mere “advocacy of religious hatred that constitutes incitement to *discrimination or hostility*,” even if no violent action or threat of violence occurs.⁶ Such language would enable countries with anti-blasphemy laws to proscribe the right to freely express one's ideas and criticisms of religions, or disagreements with people belonging to certain religions. International legal norms, however, protect individuals' right to express their views about the tenets and application of another's faith with which they disagree.

III. Critical Religious Expression, However Offensive, Is Protected Under International Law

Mere negative projection or stereotyping, *without imminent threat of violence*, must not be criminally or civilly actionable; otherwise, free expression would ultimately be censored. International law protects unfavorable and offensive expressions as much as favorable ones. In *Handyside v. United Kingdom*, the European Court of Human Rights emphasized that freedom of expression applies “not only to ‘information’ or ‘ideas’ that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb the State or any sector of the population.”⁷

For instance, saying Christianity is a false religion negatively projects that all Christians follow a false religion, while saying Islam teaches Christians and Jews are pigs and apes negatively stereotypes practicing Muslims, even those who do not hold that view. Additionally,

⁴G.A. Res. 16/18, *supra* note 2.

⁵*Id.* (emphasis added).

⁶*Id.* ¶¶ 2, 3, 5(e), 5(g).

⁷*Handyside v. United Kingdom*, ECHR No. 5493/72, Dec. 7, 1976, § 49.

numerous television programs, books, articles, cartoons, etc., also include derogatory stereotypes of religious groups. Such expressions—*provided that they do not advocate imminent violence*—constitute protected expression under both U.S. as well as international free speech laws that recognize the individual’s right to express his opinions, even offensive ones about a certain religious group.

Furthermore, Resolution 16/18’s language in paragraphs 2, 3, and 5 condemning “any advocacy of religious hatred that constitutes incitement to discrimination, hostility or violence” is a limitation on the freedom of expression and must be carefully and correctly applied in very limited circumstances. Commenting on the limitations on free speech, the former United Nations Special Rapporteur on freedom of expression, Ambeyi Ligabo, stated that limitations on freedom of expression were “not intended to suppress the expression of critical views, controversial opinion or politically incorrect statements.”⁸ She stated further that “the constant confrontation of ideas, even controversial ones, is a stepping stone to vibrant democratic society.”⁹ This interpretation of the international covenants’ free speech right and the limitations thereto is consistent with the United States’ understanding of the right to freedom of expression.

IV. United States’ Understanding of the Limitations on Freedom of Expression

The United States has never accepted similar restrictions on freedom of speech under international law. When ratifying the International Covenant on Civil and Political Rights (ICCPR),¹⁰ for example, the United States made a reservation to Article 20 stating that “article 20 does not authorize or require legislation or other action by the United States that would restrict the right of free speech and association protected by *the Constitution and laws of the United States*.”¹¹ The United States made this reservation primarily because Article 20(2)’s language prohibiting *advocacy that constitutes incitement to religious hatred* is inconsistent with the freedom of speech guaranteed by the First Amendment to the United States Constitution.

While discussing the regulation of free speech in *Cantwell v. Connecticut*,¹² the Supreme Court of the United States held that the State may only prevent speech when it appears that there is a “clear and present danger of riot, disorder, interference with traffic upon the public streets, or other immediate threat to public safety, peace, or order” The Court aptly noted that,

[i]n the realm of religious faith, and in that of political belief, sharp differences arise. In both fields the tenets of one man may seem the rankest error to his neighbor. To persuade others to his own point of view, the pleader, as we know,

⁸Human Rights Council, Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, Ambeyi Ligabo, to the Human Rights Council, U.N. Doc. A/HRC/14, ¶ 85 (Feb. 28, 2008).

⁹*Id.*

¹⁰International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 U.N.T.S. 171.

¹¹*Status of Treaties, Ch. IV Human Rights, 4. ICCPR Status*, United Nations Treaty Collection, (6 Dec. 2011) (emphasis added), http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-4&chapter=4&lang=en.

¹²310 U.S. 296 (1940).

at times, resorts to exaggeration, to vilification of men who have been, or are, prominent in church or state, and even to false statement. But the people of this nation have ordained in the light of history, that, in spite of the probability of excesses and abuses, these liberties are, in the long view, essential to enlightened opinion and right conduct on the part of the citizens of a democracy.¹³

Later, in *Brandenberg v. Ohio*,¹⁴ the Supreme Court established the imminent lawlessness test for determining whether incitement may be prohibited.¹⁵ The Court noted that the “constitutional guarantees of free speech and free press do not permit a State to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is *directed to inciting or producing imminent lawless action and is likely to incite or produce such action.*”¹⁶

V. Discussion and Recommendations

As the Supreme Court of the United States noted in *Cantwell*, “the tenets of one man may seem the rankest error to his neighbor.”¹⁷ Furthermore, one’s viewpoints may be offensive to another because of his sincerely held religious belief or practice and may, in fact, constitute advocacy of religious hatred. To protect the right to freedom of expression, however, such advocacy must not be proscribed without a clear and present danger to public safety, peace, and order or imminent lawless action.

Because most of the Islamic world often acts violently in response to critical speech about Islam and Muslims, the United States and the international community must understand that Resolution 16/18, although a huge step in the right direction, does not completely address the concerns and problems that were raised under the previous resolutions. The Western world allows criticism of religions. People in the West make critical comments about their own religions as well as other religions. Such comments may be derogatory and offensive. The Islamic world, however, does not allow similar expression about Islam, and Muslims take offense at such expression and often act violently. Because the Islamic world adheres to a different understanding of freedom of speech than the rest of the world, it is important that the OIC give assurance that Resolution 16/18 will not be used to justify domestic laws that oppress religious minorities and restrict their right to express their views and opinions, no matter how controversial to the Muslim majority. The OIC must also commit to a mutual understanding of the resolution and mutual tolerance of religious criticism.

In consideration of such vital issues surrounding Resolution 16/18, the ACLJ reminds State Department personnel that they are bound to abide by the Constitution of the United States

¹³*Cantwell*, 310 U.S. at 310.

¹⁴395 U.S. 444 (1969).

¹⁵*Id.*

¹⁶*Brandenberg*, 395 U.S. at 447.

¹⁷*Cantwell*, 310 U.S. at 310.

at all times and are prohibited from agreeing to any treaty or resolution that violates the U.S. Constitution and American law.

The ACLJ, therefore, strongly recommends that United States representatives:

1. Endeavor to make the Resolution's language consistent with international norms, protecting the freedom of expression;
2. Clarify the meaning, definition, and interpretation of any broad or ambiguous language in Resolution 16/18, so that it is not used to stifle disfavored, private expression;
3. While developing the framework, obtain assurance from OIC nations that their understanding of the resolution and their commitment to adhere to its proper application is consistent with international norms protecting freedom of expression; and
4. Obtain the OIC's assurance that OIC nations will not use the resolution to justify anti-blasphemy or anti-conversion laws.

Sincerely yours,



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