

No. 040/10

The Permanent Mission of the United States of America presents its compliments to the Office of the High Commissioner for Human Rights (OHCHR) and has the honor to refer to OHCHR's letters dated August 3 and October 15, 2010, requesting that Member States share their "experiences with regard to implementing the prohibition of incitement to hatred through national legislation, judicial practices, and different types of policies" as part of your preparations for a series of regional expert workshops you are hosting on this topic. The Government of the United States hereby presents its response to the request for contributions.

The Permanent Mission of the United States of America avails itself of this opportunity to renew to the Secretariat of the United Nations Office for Disarmament Affairs Geneva Branch the assurance of its highest consideration.

Enclosures



The Permanent Mission of the
United States of America,

Geneva, November 3, 2010.

DIPLOMATIC NOTE

**UNITED STATES GOVERNMENT RESPONSE
TO THE
UNITED NATIONS OFFICE OF THE HIGH COMMISSIONER FOR HUMAN RIGHTS
CONCERNING EXPERT WORKSHOPS
ON INCITEMENT TO NATIONAL, RACIAL OR RELIGIOUS HATRED**

We are writing in response to your letter dated August 3, 2010, in which you requested that Member States share their “experiences with regard to implementing the prohibition of incitement to hatred through national legislation, judicial practices, and different types of policies” as part of your preparations for a series of regional expert workshops you are hosting on this topic.

The United States stands firmly against intolerance and discrimination. We believe, however, that banning and punishing offensive and hateful speech is neither an effective approach to combating such intolerance, nor an appropriate role for government in seeking to promote respect for diversity. As President Obama stated in Cairo, suppressing ideas never succeeds in making them go away. In fact, to do so can be counter-productive and even raise the profile of such ideas. We believe the best antidote to offensive and hateful speech is constructive dialogue, that counters and responds to such speech by refuting it through principled arguments, causing the hateful speech to fall under its own weight. In addition, we believe governments should speak out against such offensive speech, and employ tools to address intolerance that include a combination of robust legal protections against discrimination and hate crimes, proactive government outreach, inter-religious and similar efforts, education, and the vigorous defense of both freedom of religion and expression.

We are attaching an Action Plan that we proposed in the context of the Human Rights Council Ad Hoc Committee on the Elaboration of Complementary Standards in October 2009

that lists in more detail the types of initiatives we believe are more effective and appropriate in the fight against discrimination and intolerance. We encourage you to focus on such practical and effective initiatives rather than on prohibitions on speech.

The United States is a State Party to the International Covenant on Civil and Political Rights (ICCPR). Article 19 of the ICCPR provides, *inter alia*, that everyone shall have the right to hold opinions without interference as well as the right to freedom of expression. Article 20 of the ICCPR states that “[a]ny advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law.”ⁱ The United States has entered a reservation to Article 20, according to which the Article “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.” We took this reservation because our Constitution provides broader protections for freedom of expression than those provided for in Article 20. While the United States does not, therefore, implement Article 20 prohibitions, in the spirit of open dialogue, we would like to take this opportunity to share our experiences and views on this matter.

Overview of the Evolution of Freedom of Speech in the United States

Our own history has taught us that curtailing freedom of expression by banning offensive and hateful speech is both a misguided and dangerous enterprise. The better course is to ensure that avenues of expression remain open - in order to expose, contradict, and drown out hateful speech in a marketplace of ideas. As Thomas Jefferson, the third President of the United States, wrote, “[w]e have nothing to fear from the demoralizing reasonings of some, if others are left free to demonstrate their errors and especially when the law stands ready to punish the first

criminal acts produced by the false reasonings” Offensive speech, in other words, will wither in the face of public scrutiny.

Shortly after the birth of our nation, Congress passed the Sedition Act, which made it a crime to publish “false, scandalous, and malicious writing” against the government with the intent to “excite against them . . . the hatred” of the people. The Sedition Act was used as a political tool to prosecute Americans for speaking out against their government. The Act quickly became unpopular and eventually expired, as we recognized that our young democracy needed dissent, not dictates, in order to survive.

In the first half of the nineteenth century, many states passed laws that made it illegal to criticize slavery. Those who spoke out against slavery in public or in their writing were punished as criminals, often severely. It was only through the efforts of abolitionists who courageously spread their message—and a bloody civil war—that we ended the horror of American slavery. In so doing, we reaffirmed our commitment to freedom of expression and the right to speak out against injustice.

During the First World War, a group of Americans was sentenced to long prison terms for publishing leaflets which undermined the war effort. In a famous decision, the Supreme Court affirmed their convictions.ⁱⁱ Yet Justice Oliver Wendell Holmes, one of the great American jurists, wrote a lucid and eloquent dissent. In words that still resonate today, he cautioned that “we should be eternally vigilant against attempts to check the expression of opinions that we loathe.” “[T]he best test of truth,” he wrote, “is the power of the thought to get itself accepted in the competition of the market.”ⁱⁱⁱ

Holmes’ support of freedom of expression, even unpopular or repugnant expression, presaged what the Supreme Court would hold half a century later. In 1974, the Supreme Court,

echoing Holmes, wrote: “[h]owever pernicious an opinion may seem, we depend for its correction not on the conscience of judges and juries but on the competition of other ideas.”^{iv} The 1974 opinion recognized as “common ground” the major point of Holmes’ dissent, and, for over 40 years, our courts have repeatedly held that offensive and repulsive speech is protected under the constitution.

Freedom of Speech in the United States Today

Developed over time, our strong belief in freedom of expression does not come without cost. It demands that we allow views we find offensive, or even hateful, to be expressed. For example, U.S. courts have upheld the rights of Neo-Nazis, holocaust deniers, and white supremacist groups to march in public, distribute literature, and attempt to rally others to their cause. The Supreme Court has even ruled that burning an American flag—an act that repulses Americans of all political stripes—is protected under the First Amendment.^v

We do not agree with these expressions of hate. Yet we protect freedom of expression because our democracy depends on the free exchange of ideas and the ability to dissent. And we protect freedom of expression because the cost of stripping away individual rights is far greater than the cost of tolerating hateful words. We also have grave concerns about empowering governments to ban offensive speech and how such power could easily be misused to undermine democratic principles.

That is not to say that freedom of speech is absolute in the United States; it is not. For example, we do not permit speech that incites *imminent* violence. But this is a limited exception to freedom of expression and is only unlawful where it “is directed to inciting or producing imminent lawless action and is likely to incite or produce such action.”^{vi} Mere advocacy or

teaching of violence is not unlawful. We also do not permit speech that falls within the narrow class of true threats of violence. These and other exceptions to freedom of speech have been drawn narrowly in order to preserve the public space for democratic discourse.

Our strong belief in freedom of expression does not mean that we sit idly by as individuals and groups seek to spread toxic expressions of hatred. Rather than ban such expression, however, we employ a robust array of policies on the local, state, and national level to reach out to affected communities, provide conflict resolution services and training, enhance dialogue, and assist communities in avoiding conflict based on race, religion, or nationality. We have found that working towards tolerance and understanding in this way, though by no means easy, is more sustainable and effective than prohibiting expression.

And we do not sit idly by when hateful expression transforms into discrimination or violence. Our Justice Department vigorously prosecutes instances of discrimination based on race, religion, national origin, and other grounds. We forcefully prosecute hate crimes, motivated by racial, religious, and other bias. Our network of civil rights laws—forged through our own painful civil rights struggle—deters and punishes those who would violate the ability of others to live free of discrimination and violence.

This combination of proactive outreach to communities and enforcement of anti-discrimination and hate crimes laws is our response to hateful speech. The alternative option—prohibiting speech for its offensive content—not only sacrifices freedom of expression and its attendant benefits, but forces hateful ideology to fester and find new fora in which to manifest itself and is often counterproductive as it often highlights and magnifies the offensive ideas.

Our history has shown us that, in order to create a society that is ever more tolerant and inclusive, we must protect the rights of individuals to express their views—however distasteful

or hateful. Freedom of expression is a fundamental freedom. It is fundamental to our vibrant democracy, and is an important means by which we respect human dignity and promote diversity.

We hope that sharing our experience on this topic will be of use to you.

ⁱ While your letter states that your office is seeking to ground the debate in international human rights law, we note that it repeatedly mis-states Article 20 of the ICCPR. Your letter says there is a “prohibition on incitement to national, racial, or religious hatred,” discusses the “prohibiting of incitement to national, racial, or religious hatred”, and asks for views on the implementation of the “prohibition of incitement to hatred.” The language of Article 20 does not prohibit such incitement. Rather it prohibits “any *advocacy* of national, racial or religious hatred that *constitutes* incitement to discrimination, hostility or violence.” We hope that you will correct such mis-statements consistent with your goal of grounding this discussion in existing international law.

ⁱⁱ *Abrams v. United States*, 250 U.S. 616 (1919)

ⁱⁱⁱ *Id.* at 630 (Holmes, J., dissenting).

^{iv} *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 339-40 (1974).

^v *United States v. Eichman*, 496 U.S. 110 (1990)

^{vi} *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969).

Action Plan to Combat Racial and Religious Discrimination and Intolerance

Recalling that the International Convention on the Elimination of All Forms of Racial Discrimination provides, inter alia, that States Parties undertake to pursue by all appropriate means and without delay a policy of eliminating racial discrimination in all its forms and promoting understanding among all races, and, to this end each State Party undertakes to engage in no act or practice of racial discrimination against persons, groups of persons or institutions and to ensure that all public authorities and public institutions, national and local, shall act in conformity with this obligation,

Recalling also that the International Covenant on Civil and Political Rights provides, inter alia, that everyone shall have the right to freedom of thought, conscience and religion, which shall include freedom to have or to adopt a religion or belief of his choice, and freedom, either individually or in community with others and in public or private, to manifest his religion or belief in worship, observance, practice and teaching,

Deeply concerned about incidents of intolerance, discrimination and violence against persons based on their race or religion in all regions of the world,

Determined to enhance the capability of the international community to address and combat such incidents and reverse such disturbing trends,

Believing that working together to enhance and strengthen existing legal regimes to protect against discrimination and hate crimes, increase inter-faith efforts, and to expand human rights education are important first steps in combating incidents of intolerance, discrimination and violence based on race and religion,

Determined, therefore, to implement the following Action Plan in order to pursue concrete actions aimed at eliminating racial and religious intolerance, discrimination and violence and fostering societies committed to respecting racial and religious diversity,

I. Comprehensive anti-discrimination legislation

• *Action:* Members States are called upon to:

- 1) Compile a comprehensive list of current laws prohibiting racial and religious discrimination;

- 2) Review existing national laws to ensure that protections against racial and religious discrimination comply with their obligations under international human rights law; and
- 3) Facilitate an international meeting of national experts to assess this legislation and evaluate its effectiveness in practice.

• *Action:* Member States are called upon to:

- 1) Assess whether their current domestic institutions robustly enforce anti-discrimination laws, and determine actions necessary to fill any gaps in enforcement;
- 2) Assess whether domestic institutions appropriately enforce such anti-discrimination laws equally among members of all racial and religious groups within the State; and
- 3) Establish, if one does not already exist, a national body or bodies responsible for ensuring the implementation of anti-discrimination laws, investigation of cases, maintenance of relevant statistics, reviewing allegations of failed or improper enforcement, and for bringing cases against individuals who violate the law.

• *Action:* Members States are called upon to

- 1) Take effective measures to ensure equal access to governmental programs or activities, irrespective of an individual's race or religion;
- 2) Take effective measures to ensure that government officials in the conduct of their public duties do not discriminate based on an individual's race or religion;
- 3) Take effective measures to ensure that members of racial or religious minority groups have equal access to housing, education, and employment;
- 4) Foster religious freedom and pluralism by promoting the ability of members of all religious communities to manifest their religion, and to contribute openly and on an equal footing to the public realm;
- 5) Encourage representation and meaningful participation of individuals, irrespective of their race or religion, in all sectors of society, especially in government; and
- 6) Undertake strong efforts to counter racial or religious profiling, which is understood to be the invidious use of race, religion or ethnicity as a criterion in conducting stops, searches, and other law enforcement investigative procedures.

II. Hate Crimes

• *Action:* Member States are called upon to strengthen their legislative frameworks against acts of violence or intimidation motivated in whole or in part by an offender's bias against , *inter alia*, race or religion, i.e., hate crimes by:

- 1) Enacting, where they do not already exist, laws that expressly address such hate crimes;
 - 2) Effectively tracking relevant crime statistics to determine whether new laws are needed in this regard; and
 - 3) Undertaking legislative, inter-agency or other special inquiries into the problem of hate crimes.
- *Action:* Member States are called upon to enhance enforcement of such hate crimes laws and policies by:
 - 1) Monitoring hate crimes incidents to determine whether hate crimes laws are being implemented;
 - 2) Taking effective measures to ensure that institutions created to counter hate crimes have adequate resources;
 - 3) Taking effective measures to ensure robust enforcement of hate crimes laws; and
 - 4) Providing proper hate crimes training to prosecutors, judges, and law enforcement officials.
 - *Action:* Member States are called upon to pursue proactive outreach to relevant communities and concerned groups to:
 - 1) Acknowledge and condemn hate crimes based on race or religion and speak out against official racial or religious intolerance and bigotry;
 - 2) Educate the public about hate crimes, including legal redress mechanisms; and
 - 3) Create forums for working on confidence-building measures after instances of hate crimes.

III. Advocacy and Incitement

- *Action:* Member states are called upon to:
 - 1) Speak out against intolerance, including advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility, or violence;
 - 2) Adopt measures to criminalize the incitement to imminent violence based on race or religion;
 - 3) Censure, as appropriate, government officials who in their official capacity advocate for racial, ethnic, and religious hatred that constitutes incitement to discrimination, hostility, or violence; and
 - 4) Present in their periodic reports to the Human Rights Committee and the Committee on the Elimination of all Forms of Racial Discrimination, and include

in their Universal Periodic Review report to the Human Rights Council, a full account of the measures that they have taken consistent with their obligations under international law, including equal protection of the law, to address and combat advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility, or violence.

IV. Interfaith Efforts

- *Action:* Member States are called upon to:
 - 1) Encourage the creation of collaborative networks of faith leaders, civil society leaders, and policy makers to build mutual understanding, promote dialogue, and inspire constructive action toward shared policy goals;
 - 2) Help facilitate domestic interfaith meetings including representatives of all religious communities within their societies to pursue tangible outcomes, such as service projects in the fields of education, health, conflict resolution, employment, integration, and media education;
 - 3) Create a faith-based Advisory Council within the government to, inter alia, identify and address potential areas of tension between different racial and religious communities and assist with conflict resolution and mediation;
 - 4) Encourage training of government officials on effective outreach strategies; and
 - 5) Encourage efforts of community leaders to discuss within their communities causes of discrimination and practices to counter them.

V. Human Rights Education

Action: Member States are called upon to engage in a multi-faceted approach to human rights training:

- 1) Institute and expand training programs to inform and sensitize governmental authorities about actions, perceptions and biases that may contribute to racial and religious discrimination and intolerance;
- 2) Make widely accessible information about victims' rights and remedies in situations of racial and religious discrimination and violence; and
- 3) Conduct a public awareness campaign and widely disseminate relevant international human rights instruments, such as the UDHR, the Declaration on Religious Minorities, the ICERD, and the ICCPR; create forums to bring together leaders from different religious and racial communities, the media, and educators to discuss these instruments and the causes and consequences of discrimination and intolerance and to develop strategies to counter these phenomena.

- *Action:* Members States are called upon to engage in the following outreach to youth:
 - 1) Provide systematic support for grassroots organizations working actively with youth to promote tolerance, diversity and non-discrimination;
 - 2) Create networks for youth NGOs and education experts dealing with intolerance and discrimination; and
 - 3) Build public-private partnerships to support and fund public education efforts, arts performances, film festivals, educational tours, and academic conferences that disseminate information on the richness of diverse cultures and on the importance of cultural interaction.

VI. Reporting Requirements

- Members States are called upon to report to the OHCHR on their efforts with regard to each action point within a 1 year timeframe;
- OHCHR is invited to post reports of Member States on a website maintained by the Anti-Discrimination Unit;
- Civil Society is invited to provide independent reports on implementation of the Action Plan, which should also be posted the website; and
- The Special Rapporteurs on Racism, Freedom of Religion and Belief, Freedom of Opinion and Expression, and the Independent Expert on Minority Issues are encouraged to consider the reporting on this website in the work they are undertaking.

VII. Next Steps:

Member States are called upon to convene in the Spring of 2011 to assess progress on the ground in implementation of this Action Plan to combat intolerance, discrimination, and violence against persons on the basis of their race or religion and to determine next steps.