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“So Made That I Cannot Believe”: The ICCPR and the Protection of Non-Religious Expression in Predominately Religious Countries

Devin Carpenter*

Abstract

The International Covenant on Civil and Political Rights (ICCPR) protects minorities’ rights of conscience and expression. The related jurisprudence, however, has yet to fully develop protections for the expression of non-religious minorities in predominately religious countries. Especially in the context of a violent reaction to non-religious expression and the reaction’s relation to the ICCPR’s prohibition of incitement, the jurisprudence needs clarification. This Comment provides a framework to do just that, while strengthening protections for non-religious minorities and staying faithful to the ICCPR’s text and Human Rights Committee (HRC) precedent. It focuses on Articles 18 and 19, which guarantee the freedom of religion or belief and freedom of expression, respectively, and Article 20, which prohibits the advocacy of religious hatred that constitutes incitement to discrimination, hostility, or violence. Specifically, it argues that the HRC’s jurisprudence related to these articles, read harmoniously with other articles, contains a nascent anti-heckler’s veto doctrine that should be made explicit in order to ensure the protection of non-religious minorities.

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I. INTRODUCTION

Even in countries steeped in religion, there are still those who, as Pascal once wrote, are “so made that [they] cannot believe.”¹ And, like Pascal, many of their neighbors and governing officials would rather they “behave[] just as if they did believe” so that they eventually succumb to belief or are made “more docile.”² When, inevitably, some do neither, a non-religious person in a predominately religious country may face stigma, ostracism, vigilante violence, or stiff pecuniary and prison penalties.³

Mohamed Cheikh Ould Mkheitir, a 28-year-old Mauritanian blogger, for example, was sentenced to death for apostasy after publishing an article deemed religiously offensive.⁴ Protestors, religious authorities, and scholars called for his execution; one religious scholar even offered a bounty for anyone who killed him.⁵ After the sentencing, the president said, “[W]e will apply God’s law on whoever insults the prophet, and whoever publishes such an insult,”⁶ and a leader of a prominent political party said that Mkheitir got “the fate he deserves.”⁷

This is despite the fact that international law, including the International Covenant on Civil and Political Rights (“ICCPR”), protects minorities’ rights of conscience and expression.⁸ The Human Rights Committee (“HRC”)—which has the authority to adjudicate individual complaints based on the ICCPR for individuals from countries who are also parties to the First Optional Protocol⁹—however, has yet to fully develop a jurisprudence that would best protect the

¹ BLAISE PASCAL, *PENSÉES* 124 (A.J. Krailsheimer trans., Penguin Books rev. ed. 1995) (1669).

² *Id.* at 125.

³ *See generally* International Humanist and Ethical Union, *The Freedom of Thought Report 2015: A Global Report on the Rights, Legal Status and Discrimination Against Humanists, Atheists and the Non-Religious* (2015), available at <https://perma.cc/6SR9-REJE> [hereinafter *Freedom of Thought Report*].

⁴ REUTERS, *Death Sentence in Mauritania for Islam ‘Insult’*, N.Y. TIMES (Dec. 25, 2014), https://www.nytimes.com/2014/12/26/world/asia/death-sentence-in-mauritania-for-islam-insult.html?_r=2; *Freedom of Thought Report*, *supra* note 3, at 142.

⁵ Elsa Buchanan, *Who is Mohamed Cheikh Ould M’kheitir, The Mauritanian Blogger on Death Row for ‘Apostasy’?*, INT’L BUS. TIMES (Feb. 1, 2017, 11:13 AM), <https://perma.cc/JP4D-YVLB>.

⁶ Conor Gaffey, *Mauritania: Muslim Leaders Call for Blogger’s Death Sentence to Be Upheld*, NEWSWEEK (Nov. 14, 2016, 12:32 PM), <https://perma.cc/8MMZ-9CWM>.

⁷ *Freedom of Thought Report*, *supra* note 3, at 142.

⁸ International Covenant on Civil and Political Rights, arts. 6, 18, 19, 26 & 27, Dec. 16, 1966, 999 U.N.T.S. 171 [hereinafter *ICCPR*].

⁹ Optional Protocol to the International Covenant on Civil and Political Rights, Mar. 23, 1976, 999 U.N.T.S. 302, [hereinafter *First Optional Protocol*]; A.H. Robertson, *The Implementation System: International Measures*, in *THE INTERNATIONAL BILL OF RIGHTS: THE COVENANT ON CIVIL AND POLITICAL RIGHTS* 332–69, 359–60 (Louis Henkin ed., 1981).

expression of non-religious minorities in predominately religious countries. Especially in the context of violent reactions to non-religious expression and those events' relation to the ICCPR's prohibition of incitement, the HRC needs to clarify its jurisprudence and reaffirm its commitment to protecting controversial minority expression. This Comment outlines how it can do that while staying faithful to the ICCPR's text and HRC precedent.

Section II of this Comment briefly summarizes the paradigmatic cases of limitations on expression in countries that are party to the ICCPR or the First Optional Protocol. Section III analyzes the HRC's relevant decisions under the First Optional Protocol, the ICCPR's text, and, when helpful in resolving ambiguities, the ICCPR's drafting history. Section IV synthesizes that analysis and provides a framework for the HRC to further develop its jurisprudence on the right of non-religious minorities to manifest their beliefs and to express themselves.

II. LIMITATIONS ON NON-RELIGIOUS EXPRESSION IN STATES PARTY TO THE ICCPR

In many States Party to the ICCPR, non-religious minorities face severe limits on their ability to manifest their beliefs and to freely express controversial non-religious ideas. In Egypt, for example, government officials have publicly called the presence of a mere 866 atheists in a country of over 80 million people a “dangerous development,” and, over the past two years, the Egyptian government has conducted a national campaign to combat its proliferation that includes convicting atheists of blasphemy.¹⁰ For example, Mustafa Abdel-Nabi was sentenced to three years in prison for Facebook posts about atheism in 2016,¹¹ Sherif Gaber was sentenced to one year in prison for discussing his atheist views on Facebook in 2015,¹² and Karim Al-Banna was sentenced to three years in prison for “belittle[ing] the divine” on Facebook in 2015.¹³ Gaber was arrested in a “dramatic raid, with armoured cars surrounding his house in the middle of the night.”¹⁴ This government oppression, moreover, is often coupled with parallel

¹⁰ United States Commission on International Religious Freedom, 2016 Annual Report 94 (2016), <https://perma.cc/PF3K-8FRP> [hereinafter Religious Freedom Report].

¹¹ Maggie Michael, *Blasphemy Cases Rise in Egypt and Christians Bear the Brunt*, THE SAN DIEGO UNION-TRIB. (Mar. 24, 2016), <https://perma.cc/KAC4-QMXB>; Religious Freedom Report, *supra* note 10, at 94.

¹² Emir Nader, *Egyptian Student Given Prison Sentence for Atheist Facebook Posts*, DAILY NEWS EGYPT (Feb. 17, 2015), <https://perma.cc/8C5P-JZ8W>; Religious Freedom Report, *supra* note 10, at 94–95.

¹³ Roy Greenslade, *Egyptian Student Jailed for Proclaiming That He Is an Atheist*, THE GUARDIAN (Jan. 13, 2015, 4:45 AM), <https://perma.cc/JVJ7-9WPM>; Religious Freedom Report, *supra* note 10, at 95.

¹⁴ Freedom of Thought Report, *supra* note 3, at 93.

familial and societal pressures. Al-Banna, for example, who had earlier been listed as a “known atheist” by a local newspaper, endured his own father testifying against him at trial because he owned provocative books and “was embracing extremist ideas against Islam.”¹⁵ In 2014, Ahmad Harqan, an atheist activist, and his pregnant wife were attacked in their home, only to be assaulted again at the police station and then imprisoned in connection to a complaint stemming from his criticisms of Mohamed on television.¹⁶ Similar incidents have recently occurred in Morocco,¹⁷ Nigeria,¹⁸ Indonesia,¹⁹ Bangladesh,²⁰ Iran,²¹ Pakistan,²² Bahrain,²³ Iraq,²⁴ and Kuwait.²⁵

Some states party to the ICCPR are also states party to the ICCPR’s First Optional Protocol, which allows individuals to bring complaints based on the

¹⁵ *Id.* at 93–94 (citing AFP, *Egypt Student Gets 3-year Jail Term for Atheism*, YAHOO NEWS (Jan. 11, 2015), <https://perma.cc/K76G-EGDD>).

¹⁶ Freedom of Thought Report, *supra* note 3, at 94; David D. Kirkpatrick, *Raising Questions Within Islam After France Shooting*, N.Y. TIMES (Jan. 8, 2015), https://www.nytimes.com/2015/01/09/world/europe/raising-questions-within-islam-after-france-shooting.html?_r=0.

¹⁷ James Kirchick, *Blogger Wants More Freedoms in Morocco*, SPIEGEL ONLINE (Mar. 29, 2013, 5:10 PM), <https://perma.cc/7YDE-PN7E>; Freedom of Thought Report, *supra* note 3, at 105.

¹⁸ *Nigeria Atheist Bala Freed from Kano Psychiatric Hospital*, BBC (July 4, 2014), <https://perma.cc/DJV2-958U>; Freedom of Thought Report, *supra* note 3, at 147.

¹⁹ Joe Cochrane, *Embrace of Atheism Put an Indonesian in Prison*, N.Y. TIMES (May 3, 2014), <https://www.nytimes.com/2014/05/04/world/asia/indonesian-who-embraced-atheism-landed-in-prison.html> (relaying the story of Alexander Aan, who was arrested and sentenced to two-and-a-half years in jail after being attacked by a mob that was reacting to his posts on Facebook that criticized Islam and declared he was an atheist); Freedom of Thought Report, *supra* note 3, at 261.

²⁰ *Blogger Asif Placed on 3-day Remand*, THE DAILY STAR (Apr. 5, 2013, 1:49 PM), <https://perma.cc/2KM7-VL5D>; Freedom of Thought Report, *supra* note 3, at 294–95 (relaying the stories of numerous free-thinkers who were murdered in gun and machete attacks, a schoolboy whose family was forced to hide after criticizing Islam on Facebook, and an atheist blogger who survived an attack only to be arrested for “offending Islam and its Prophet.”).

²¹ Saeed Kamali Dehghan, *Iranian Death Sentence Commuted to Two Years’ Theology Study*, THE GUARDIAN (Sept. 30, 2015, 11:13 AM), <https://perma.cc/GZ4S-PXTU>.

²² Ali Sethi, *Pakistan’s Tyranny of Blasphemy*, N.Y. TIMES (May 20, 2014), https://www.nytimes.com/2014/05/21/opinion/pakistans-tyranny-of-blasphemy.html?_r=0; Freedom of Thought Report, *supra* note 3, at 321.

²³ Freedom of Thought Report, *supra* note 3, at 333 (relaying the story of the Lebanese poet Joumana Haddad, who was “banned from taking part in a cultural event in Bahrain, due to accusations that she would promote atheism and target Islamic values.”).

²⁴ Rozh Ahmad, *Interview with Persecuted Young Atheist in Erbil*, YOUR MIDDLE EAST (May 28, 2014), <https://perma.cc/T3DC-N42V>; Freedom of Thought Report, *supra* note 3, at 340.

²⁵ *An Atheist in Kuwait: Interview with Ben Baz Aziz*, THE HUMANIST (Apr. 24, 2014), <https://perma.cc/L4R3-93DG>; Freedom of Thought Report, *supra* note 3, at 353.

ICCPR after exhausting domestic remedies.²⁶ Regardless, states party to the First Optional Protocol have shown similar restrictions on non-religious minorities. In Kazakhstan, for example, atheist Aleksandr Kharlamov was arrested for “inciting religious hatred” in 2013 and was forced to undergo psychiatric evaluation.²⁷ The indictment claimed that his articles “put his personal opinions above the opinions and faith of the majority of the public and thus incited religious animosity.”²⁸ He faced up to seven years in prison.²⁹ In the Maldives, Mohamed Nazim was forced to undergo “‘religious counseling’ before determining if he should be executed for apostasy” after he told a Muslim preacher at a public event about his struggles to accept religious beliefs.³⁰ He was spared after converting.³¹ Many other states party to the First Optional Protocol—including Cameroon,³² Tunisia,³³ the Philippines,³⁴ Turkey,³⁵ Poland,³⁶ and Greece³⁷—also showed signs of similar restrictions on non-religious minorities.

²⁶ First Optional Protocol, *supra* note 9, at art. 2.

²⁷ Freedom of Thought Report, *supra* note 3, at 233; Joanna Lillis, *Kazakhstan: Atheist Faces Seven Years for Stoking Religious Tension*, EURASIANET (May 15, 2014, 1:40 PM), <https://perma.cc/Z7Y3-DDMJ>.

²⁸ Freedom of Thought Report, *supra* note 3, at 233.

²⁹ *Id.*

³⁰ Freedom of Thought Report, *supra* note 3, at 313; Barry Duke, *Death Threats Against a Man Who Renounced Islam at a Naik Lecture in the Maldives*, THE FREETHINKER (June 1, 2010), <https://perma.cc/8C68-2Y8Y>. See also Charles Haviland, *Maldives Atheist Who Felt Persecuted ‘Hangs Himself’*, BBC (July 10, 2015), <https://perma.cc/7FR3-Z8RQ>.

³¹ Freedom of Thought Report, *supra* note 3, at 313.

³² *Id.* at 73.

³³ ASSOCIATED PRESS, *Tunisia: TV Chief Fined Over a Film*, N.Y. TIMES (May 4, 2012), <http://www.nytimes.com/2012/05/04/world/africa/tunisia-nabil-karoui-fined-over-controversial-film.html>; Freedom of Thought Report, *supra* note 3, at 112 (relaying the story of Nabil Karoui, who “was convicted for disrupting public order and violating moral values by airing Persepolis, an animated film that some religious leaders say insults Islam.”)

³⁴ Thomas Maresca, *Filipino Faces Jail Time for ‘Offending Religious Feelings’*, TIME (Feb. 7, 2013), <https://perma.cc/3899-KXDS>; Freedom of Thought Report, *supra* note 3, at 274.

³⁵ Sebnem Arsu & Daniel J. Wakin, *Turkish Pianist Is Accused of Insulting Islam*, N.Y. TIMES (June 1, 2012), <http://www.nytimes.com/2012/06/02/world/europe/turkey-charges-pianist-fazil-say-over-twitter-posts.html>; Freedom of Thought Report, *supra* note 3, at 379–80.

³⁶ *Prosecutors Investigating Mayor for Removing Papal Picture*, RADIO POLAND (June 24, 2015, 9:54 AM), <https://perma.cc/TEE6-2QDR>; Freedom of Thought Report, *supra* note 3, at 410.

³⁷ Nikolia Apostolou, *Blasphemy in Democracy’s Birthplace? Greece Arrests Facebook User*, CHRISTIAN SCIENCE MONITOR (Oct. 2, 2012), <https://perma.cc/QQL3-HA4T>; Freedom of Thought Report, *supra* note 3, at 471.

III. FREEDOM OF RELIGION OR BELIEF, FREEDOM OF EXPRESSION, AND THE PROHIBITION OF INCITEMENT IN THE ICCPR

A. The Approach of the European Court of Human Rights

Mashood A. Baderin, among others, has argued that the ICCPR is consistent with similar limitations of non-religious expression for the aim of “protecting the sensibilities and beliefs of the Muslim community in particular and that of other faiths in general.”³⁸ He has cited, for example, “the upheavals in many parts of the world that followed the publication of Salman Rushdie’s *Satanic Verses*” to justify blasphemy laws for the purpose of maintaining public order.³⁹ The approach of the European Court of Human Rights and its decision in *Otto-Preminger-Institut v. Austria*,⁴⁰ Baderin has argued, should be adopted by the HRC in order to appropriately balance respect for religious beliefs and the right to freedom of expression.⁴¹ In that case, the court found that the seizure of a film that was supposedly blasphemous in its ridicule of God, Jesus Christ, and the Virgin Mary was not a prohibited limitation on freedom of expression. Because the “Roman Catholic religion [was] the religion of the overwhelming majority” of the country, the court reasoned, the limitation was justified because it facilitated religious peace and prevented “unwarranted and offensive” attacks on religious beliefs.⁴²

The HRC should reject this approach. The text and purpose of the ICCPR, the HRC’s General Comments, and its decisions under the First Optional Protocol show that there is a compelling framework for them to do so.

B. Interpreting the ICCPR

Before explaining that framework, which will be discussed in Section IV, it is necessary to discuss the relevant conventions, ICCPR articles, and generally accepted rules for interpretation.

1. The Vienna Convention governs treaty interpretation.

The Vienna Convention, which governs the interpretation of all international treaties, provides that the ICCPR “shall be interpreted in good faith and in accordance with the ordinary meaning to be given to terms of the treaty in

³⁸ MASHOOD A. BADERIN, INTERNATIONAL HUMAN RIGHTS AND ISLAMIC LAW 128 (2003).

³⁹ *Id.*

⁴⁰ *Otto-Preminger-Institut v. Austria*, 295 Eur. Ct. H.R. (ser. A) (1994).

⁴¹ BADERIN, *supra* note 38, at 129.

⁴² *Id.*

their context and in light of its object and purpose.”⁴³ Additionally, “the preparatory work of the treaty and the circumstances of its conclusion” may be used to confirm that meaning or to determine the meaning if the text “[l]eaves the meaning ambiguous or obscure” or “[l]eads to a result which is manifestly absurd or unreasonable.”⁴⁴

2. ICCPR Article 5 and other general rules are important for interpreting the ICCPR.

Article 5 of the ICCPR contains additional rules for interpreting the ICCPR,⁴⁵ including that “[n]othing in the present Covenant may be interpreted as implying for any State, group or person any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms recognized herein or at their limitation to a greater extent than is provided for in the present Covenant.”⁴⁶ This implies that the articles of the ICCPR must be read harmoniously,⁴⁷ and the reference to “persons and groups” is a limitation on the use of “certain rights, such as political rights and freedoms under Arts. 18, 19, 21, 22 and 25 . . . to destroy democratic structures and the human rights of others ensured by those structures.”⁴⁸

Beyond the specific interpretive rules in the ICCPR, it is understood that its rights and freedoms should be interpreted broadly and its restrictions narrowly.⁴⁹ This general rule stems from both the purpose and text of the ICCPR and communications under the First Optional Protocol. The ICCPR is “designed to help protect and ensure individual rights everywhere, and to establish a legal, political, and economic climate in which individual freedom and dignity can

⁴³ Vienna Convention on the Law of Treaties, art. 31, *opened for signature* May 23, 1969, 1155 U.N.T.S. 331.

⁴⁴ *Id.* at art. 32.

⁴⁵ MANFRED NOWAK, U.N. ICCPR ON CIVIL AND POLITICAL RIGHTS: CCPR COMMENTARY 94–95 (1st ed. 1993).

⁴⁶ ICCPR, *supra* note 8, at art. 5.

⁴⁷ Karl Josef Partsch, *Freedom of Conscience and Expression, and Political Freedoms*, in THE INTERNATIONAL BILL OF RIGHTS: THE COVENANT ON CIVIL AND POLITICAL RIGHTS, *supra* note 9, at 209–45, 230. “Harmoniously,” here, means that the articles of the ICCPR must be interpreted so as to be consistent with each other and not as vitiating rights or freedoms protected by other articles. *See also*, Lovelace v. Canada, U.N. GAOR, Hum. Rts. Comm., 13th Sess., at 166 ¶ 16, U.N. Doc. Supp. No. 40 (A/36/40) (1981) (“Article 27 must be construed and applied in the light of the other provisions mentioned above, such as articles 12, 17, and 23 in so far as they may be relevant to the particular case, and also the provisions against discrimination, such as articles 2, 3 and 26, as the case may be.”).

⁴⁸ NOWAK, *supra* note 45, at 95.

⁴⁹ *Id.* at XXIV.

flourish.”⁵⁰ Therefore, it is interpreted as “an instrument of constitutional dimension which elevates the protection of the individual against the power of the state to a fundamental principle of international public policy.”⁵¹ The HRC has recognized this interpretive method, moreover, in *Van Duşen v. Canada*,⁵² in which it acknowledged that how “narrowly or widely” it interprets terms and concepts in the ICCPR depends in part on considerations of object and purpose.⁵³ The ICCPR’s text also recognizes this principle when, for example, it emphasizes that derogations are only allowed to the extent “strictly required,” “necessary,” or “strictly necessary,” in Articles 4, 12, and 13, respectively.⁵⁴

C. Article 18

Some argue that non-religious expression may be limited for the reasons listed in Article 19, which governs the scope of freedom of expression and opinion (Article 19 is discussed in more detail later in this Section).⁵⁵ But these arguments often ignore that those expressions might qualify as manifestations of belief under Article 18, which establishes an absolute right of “freedom of thought, conscience and religion”⁵⁶ and a limitable freedom to “manifest one’s religion or beliefs.”⁵⁷ “This right,” the Article continues, “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.”⁵⁸

1. The text of Article 18 suggests that non-religious beliefs are protected.

Interpreted in accordance with the above rules, the manifestation of non-religious beliefs is protected by the ICCPR. Not only is religion protected, after

⁵⁰ Louis Henkin, *Introduction*, in *THE INTERNATIONAL BILL OF RIGHTS: THE COVENANT ON CIVIL AND POLITICAL RIGHTS*, *supra* note 9, at 1–31, 24.

⁵¹ Thomas Buergenthal, *To Respect and to Ensure: State Obligations and Permissible Derogations*, in *THE INTERNATIONAL BILL OF RIGHTS: THE COVENANT ON CIVIL AND POLITICAL RIGHTS*, *supra* note 9, at 72–91, 90.

⁵² *Van Duşen v. Canada*, U.N. GAOR, Hum. Rts. Comm., 15th Sess., U.N. Doc. CCPR/C/15/D/50/1979 (1982).

⁵³ *Id.* at ¶ 10.2.

⁵⁴ Henkin, *supra* note 50, at 26–27.

⁵⁵ See, for example, Mohamed Saeed M. Eltayeb, *The Limitations on Critical Thinking on Religious Issues under Article 20 of ICCPR and its Relation to Freedom of Expression*, 5 RELIGION & HUM. RTS. 119, 119 (2010).

⁵⁶ ICCPR, *supra* note 8, at art. 18 ¶ 1.

⁵⁷ *Id.* at ¶ 3.

⁵⁸ *Id.* at ¶ 1.

all, but also freedom of conscience and thought as well.⁵⁹ In fact, Article 18 always uses the disjunction “religion or belief” to denote the freedom to be protected, which means any narrow interpretation that restricted the article’s scope to protecting solely religious beliefs would make “or belief” mere surplusage. If this strictly textualist argument is inconclusive, moreover, an interpretation that grants freedom to manifest both religious and non-religious beliefs should be favored because it grants a broader right and because it is consonant with the object and purpose of the ICCPR, which is the “protection of the individual against government excesses.”⁶⁰

2. HRC communications on the scope of “religion or belief” confirm that non-religious beliefs are protected.

Subsequent communications from the HRC have affirmed that non-religious beliefs are covered by Article 18. For example, in *Leirvag v. Norway*,⁶¹ Unn and Ben Leirvag—who are described as having a “non-religious humanist life stance”—objected to their daughter’s mandatory participation in religious instruction, which they argued was in violation of their Article 18 rights.⁶² The HRC agreed and held that the “scope of article 18 covers not only protection of traditional religions, but also philosophies of life, such as those held by the authors.”⁶³

In contrast, the HRC did not find the religious beliefs in *M.A.B. v. Canada*⁶⁴ to be within the scope of Article 18. The alleged victims were members of the “‘Assembly of the Church of the Universe’, whose beliefs and practices . . . necessarily involve the care, cultivation, possession, distribution, maintenance, integrity and worship” of marijuana.⁶⁵ The HRC held that “a belief consisting primarily or exclusively in the worship and distribution of a narcotic drug cannot conceivably be brought within the scope of” the ICCPR.⁶⁶ No reason was given, but the scare quotes around “belief” suggest that the HRC was skeptical that such a belief was genuine and instead was “no more than a device for legitimising

⁵⁹ Partsch, *supra* note 47, at 210.

⁶⁰ Henkin, *supra* note 50, at 26.

⁶¹ *Leirvag v. Norway*, U.N. GAOR, Hum. Rts. Comm., 58th Sess., U.N. Doc. CCPR/C/82/D/1155/2003 (2004).

⁶² *Id.* at ¶ 3.1.

⁶³ *Id.* at ¶ 14.2 (citation omitted).

⁶⁴ *M.A.B. v. Canada*, U.N. GAOR, Hum. Rts. Comm., 50th Sess., U.N. Doc. CCPR/C/50/D/570/1993 (1994).

⁶⁵ *Id.* at ¶ 2.1.

⁶⁶ *Id.* at ¶ 4.2.

criminal activity.”⁶⁷ This conclusion is further supported by the fact that the HRC has not hesitated to recognize more malevolent beliefs as within the scope of Article 18’s protections; fascist, anti-Semitic, and “enemy-benefiting” beliefs are all protected, for example.⁶⁸ In *Yoon v. Republic of Korea*,⁶⁹ moreover, the HRC repeatedly used the phrase “genuinely-held” to describe the alleged victims’ religious beliefs.⁷⁰

3. HRC comments and reports on the scope of “religion or belief” confirm that non-religious beliefs are protected.

The General Comments of the HRC—treated by some scholars as “authoritative interpretations”⁷¹—and individual reports also support a broad interpretation of Article 18. General Comment 22 states that “Article 18 protects theistic, non-theistic and atheistic beliefs, as well as the right not to profess any religion or belief.”⁷² Furthermore, General Comment 34 says that it is “impermissible” for any law to “discriminate in favour of or against . . . religious believers over non-believers.”⁷³ Other reports include “freethinkers, agnostics and atheists” among those protected by Article 18;⁷⁴ comment on specific instances of discrimination against the non-religious;⁷⁵ and detail the history of protections for atheists and non-theists.⁷⁶

⁶⁷ PAUL M. TAYLOR, FREEDOM OF RELIGION: UN AND EUROPEAN HUMAN RIGHTS LAW AND PRACTICE 209 (2005).

⁶⁸ *Id.* at 209–10.

⁶⁹ *Yoon v. Republic of Korea*, U.N. GAOR, Hum. Rts. Comm., 88th Sess., U.N. Doc. CCPR/C/88/D/1321-1322/2004 (2006).

⁷⁰ *Id.* at ¶¶ 2.4, 8.2, & 8.3.

⁷¹ NOWAK, *supra* note 45, at XXIV.

⁷² Hum. Rts. Comm., General Comment No. 22 on Article 18 from its 48th Sess., ¶ 2, U.N. Doc. CCPR/C/21/Rev.1/Add.4 (July 20, 1993) [hereinafter CCPR General Comment No. 22].

⁷³ Hum. Rts. Comm., General Comment No. 34 on Article 19 from its 102nd Sess., ¶ 48, U.N. Doc. CCPR/C/GC/34 (Sept. 12, 2011) [hereinafter CCPR General Comment No. 34].

⁷⁴ Comm. On Hum. Rts., Rep. on the Implementation of the Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief, U.N. Doc. E/CN.4/1990/46, ¶ 113 (Jan. 22, 1990); *see also*, Comm. on Hum. Rts., Rep. on Civil and Political Rights, Including the Question of Religious Intolerance, ¶¶ 45–47 U.N. Doc. E/CN.4/2005/61 (Dec. 20, 2004).

⁷⁵ *See, for example*, Comm. On Hum. Rts., Rep. on the Implementation of the Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief, U.N. Doc. E/CN.4/1989/44, ¶¶ 45–48 (Dec. 30, 1988) (commenting on discrimination against the non-religious in Ireland); *see also*, Rep. of the Hum. Rts. Comm., U.N. Doc. A/46/40, ¶ 130 (1991) (asking why the prohibition in Finland against engaging in anti-religious propaganda was applicable only to atheists).

⁷⁶ Interim Rep. of the Special Rapporteur on Freedom of Religion or Belief on the Elimination of All Forms of Religious Intolerance, U.N. Doc. A/62/280, ¶¶ 64–79 (Aug. 20, 2007).

4. The drafting history of Article 18 suggests that non-religious beliefs are protected.

The drafting history of the ICCPR is further evidence that the manifestation of non-religious belief is protected. During the drafting of Article 18, there was significant disagreement about the scope of the phrase “religion or belief,”⁷⁷ but the evidence suggests that it was understood to cover non-religious belief and its manifestation. Many countries—including many communist countries, as well as France and Japan⁷⁸—objected to initial drafts that lacked the “or belief” language ultimately adopted because it did not equally cover non-religious convictions.⁷⁹ The fact that this language covered non-religious beliefs, moreover, would not have come as a surprise, because the same phrase was used in an influential study that preceded the drafting debates, which interpreted the language as including both religious beliefs and “such other beliefs as agnosticism, free thought, atheism and rationalism.”⁸⁰ In fact, when a representative of the Secretary General was asked if the phrase was meant to include secular beliefs, he referred to that very study.⁸¹

It is no wonder then that there is a broad scholarly consensus that Article 18 protects manifestations of non-religious beliefs.⁸² Nevertheless, many states party to the ICCPR and the First Optional Protocol tightly restrict non-believers’ freedom to manifest their beliefs and often harshly punish them for doing so.⁸³

5. Limitations to Article 18 must be necessary and proportional.

Article 18 does allow limitations on the manifestation of beliefs if such limitations are “prescribed by law and are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others.”⁸⁴ The term

⁷⁷ OLDRIK ANDRYSEK, *THE POSITION OF NON-BELIEVERS IN NATIONAL AND INTERNATIONAL LAW WITH SPECIAL REFERENCE TO THE EUROPEAN CONVENTION ON HUMAN RIGHTS* 37–38 (1989).

⁷⁸ *Id.* at 37.

⁷⁹ NATAN LERNER, *RELIGION, SECULAR BELIEFS AND HUMAN RIGHTS* 3 (2012).

⁸⁰ Arcot Krishnaswami, *Study of Discrimination in the Matter of Religious Rights and Practices*, U.N. Doc. E/CN.4/Sub.2/200/Rev.1, at 1 & n.1 (1960).

⁸¹ ANDRYSEK, *supra* note 77, at 37–38.

⁸² *Id.* at 38 (“While no explicit consensus as to the meaning of the terms ‘religion and belief’ was reached, legal and scholarly opinion considers it doubtless that also non-religious life stances are covered.”); NOWAK, *supra* note 45, at 316; Partsch, *supra* note 47, at 213; BAHIIYIH G. TAHZIB, *FREEDOM OF RELIGION OR BELIEF: ENSURING EFFECTIVE INTERNATIONAL LEGAL PROTECTION* 3 (1996). Scholars such as Baderin do not necessarily disagree that non-religious manifestations of belief are not protected under Article 18, but Baderin is more amenable to their abrogation when the response is violent.

⁸³ *See generally* Freedom of Thought Report, *supra* note 3.

⁸⁴ ICCPR, *supra* note 8, at art. 18, ¶ 3.

“necessary” means that the state has a high burden and must consider alternative options before restricting manifestations of belief; it also “implies that the restriction must be *proportional* in severity and intensity to the purpose being sought and may not become the rule.”⁸⁵ In fact, the HRC has made it clear that limitations on Article 18’s freedoms are especially suspect, and that the language is to be “strictly interpreted.”⁸⁶ This means that the limitations may not be “applied in a manner that would vitiate the rights” of freedom of conscience, and the reasons given for limitations in Article 18 are exhaustive. Therefore, any other reason for limitation of Article 18 freedoms are unjustifiable, “even if they would be allowed as restrictions to other rights protected in the [ICCPR], such as national security.”⁸⁷ The permissible reasons for limitations, moreover, must be read narrowly, in good faith, and should not be interpreted in order to justify the “destruction of any of the rights and freedoms” of the ICCPR.⁸⁸ Finally, any limitation for morals “must be based on principles not deriving exclusively from a single tradition.”⁸⁹

The HRC has endorsed a broad conception of “manifestation” in its decisions and has not countenanced the protection of a majority religion as a reason to limit the manifestation of belief. In *Sister Immaculate Joseph v. Sri Lanka*,⁹⁰ for example, a Catholic Order brought a claim when it was denied incorporation because, according to the government, the propagation of Christianity would “impair the very existence of Buddhism or the *Buddha Sasana*.”⁹¹ The HRC observed that “for numerous religions, . . . it is a central tenet to spread knowledge, to propagate their beliefs to others and to provide assistance to others” and that “[t]hese aspects are part of an individual’s manifestation of religion and free expression.”⁹² Because Sri Lanka provided no “evidentiary or factual foundation” for its assessment that the order’s activities would “coercively or improperly propagate religion” or injure Buddhism, the HRC held that the limitation was not necessary and therefore a violation of Article 18.⁹³

⁸⁵ NOWAK, *supra* note 45, at 325.

⁸⁶ CCPR General Comment No. 22, *supra* note 72, at ¶ 8.

⁸⁷ *Id.* Article 19 allows limitations for both “national security” and “public order,” implying that the two categories are distinct.

⁸⁸ ICCPR, *supra* note 8, at art. 5, ¶ 1.

⁸⁹ CCPR General Comment No. 22, *supra* note 72, at ¶ 8.

⁹⁰ *Sister Immaculate Joseph v. Sri Lanka*, U.N. GAOR, Hum. Rts. Comm., 85th Sess., U.N. Doc. CCPR/C/85/D/1249/2004 (2005).

⁹¹ *Id.* at ¶ 2.3.

⁹² *Id.* at ¶ 7.2.

⁹³ *Id.* at ¶ 7.3.

The HRC has found instances of permissible limitations on the manifestation of belief, however, when the manifestation interferes with the rights of others. In *Ross v. Canada*,⁹⁴ a teacher was demoted to a non-teaching position after—on his own time and never as a part of his teaching—making anti-Semitic statements in pamphlets and television interviews.⁹⁵ He considered his statements religious opinions and “[h]is books concerned abortion, conflicts between Judaism and Christianity, and the defence of the Christian religion.”⁹⁶ The HRC focused on the fundamental right of others to be “protected from religious hatred,” and found that the statements “denigrated the faith and beliefs of Jews and called upon true Christians to not merely question the validity of Jewish beliefs and teachings but to hold those of the Jewish faith and ancestry in contempt as undermining freedom, democracy and Christian beliefs and values.”⁹⁷ Moreover, the HRC noted that the restriction was necessary given that it was “reasonable to anticipate that there was a causal link between the expressions of the author and the ‘poisoned school environment’ experienced by Jewish children,” and it was proportional because it “did not go any further than that which was necessary to achieve its protective functions.”⁹⁸

The HRC has also found permissible limitations to ensure workplace safety. In *Bhinder v. Canada*,⁹⁹ for example, a Sikh was fired after refusing to wear safety headgear during his inspection and maintenance work on trains.¹⁰⁰ The alleged victim argued that the limitation was not necessary for public safety because “any safety risk ensuing from his refusal to wear safety headgear was confined to himself.”¹⁰¹ The HRC rejected this argument, plainly stating that the requirement was justified, presumably for public safety.¹⁰²

Limitations are also permissible if they endanger the public health, and the limitation is applied equally and is consistent with protections for minorities. In

⁹⁴ *Ross v. Canada*, U.N. GAOR, Hum. Rts. Comm., 77th Sess., U.N. Doc. CCPR/C/70/D/736/1997 (2000).

⁹⁵ *Id.* at ¶¶ 2.1, 2.3.

⁹⁶ *Id.* at ¶ 2.1.

⁹⁷ *Id.* at ¶ 11.5. Note that the bulk of the HRC’s discussion is on Article 19, but it later states that “[t]he freedom to manifest religious beliefs may be subject to limitations which are prescribed by law and are necessary to protect the fundamental rights and freedoms of others, and in the present case the issues under paragraph 3 of article 18 are therefore substantially the same as under article 19. Consequently, the [HRC] holds that article 18 has not been violated.” *Id.* at ¶ 11.8.

⁹⁸ *Id.* at ¶ 11.6.

⁹⁹ *Bhinder v. Canada*, U.N. GAOR, Hum. Rts. Comm., 37th Sess., U.N. Doc. CCPR/C/37/D/208/1986 (1989).

¹⁰⁰ *Id.* at ¶ 1.

¹⁰¹ *Id.* at ¶ 3.

¹⁰² *Id.* at ¶ 6.2.

Prince v. South Africa,¹⁰³ a Rastafari attorney's registration application was refused after he "disclosed that he had two previous convictions for possessing cannabis, and expressed his intention, in light of his religious dictates, to continue using cannabis."¹⁰⁴ Unlike in *M.A.B. v. Canada*,¹⁰⁵ where the HRC held that a belief consisting "primarily or exclusively in the worship and distribution of a narcotic drug" was not in the scope of Article 18,¹⁰⁶ the HRC did not doubt that Rastafarianism was within its scope and accepted that the "use of cannabis is inherent to the manifestation of the Rastafari religion."¹⁰⁷ Nevertheless, that limitation, according to the HRC, was necessary because of the "harmful effects of cannabis" and because "an exemption allowing a system of importation, transportation and distribution to Rastafarians may constitute a threat to the public at large, were any of the cannabis enter [sic] into general circulation."¹⁰⁸ Nor did the limitation violate Article 26, which entitles all persons to equality before the law, because the "prohibition of the possession and use of cannabis affects all individuals equally, including members of other religious movements who may also believe in the beneficial nature of drugs" and the prohibition is "based on objective and reasonable grounds."¹⁰⁹ And while the HRC acknowledged that the legislation interfered "with the author's right, as a member of a religious minority, to practice his own religion," it held that "[c]ertain limitations on the right to practice one's religion through the use of drugs are compatible" with the ICCPR's protection of minority rights.¹¹⁰

6. Not all beliefs are protected by Article 18.

To be sure, the beliefs manifested must have certain characteristics to be within the scope of Article 18. For example, the conviction must be genuine, subjectively important, and provide guidance on how to live.¹¹¹ Because some non-religious expression may be better characterized as criticism of religious beliefs rather than a manifestation of a belief, and because the articles of the

¹⁰³ *Prince v. South Africa*, U.N. GAOR, Hum. Rts. Comm., 91st Sess., U.N. Doc. CCPR/C/91/D/1474/2006 (2007).

¹⁰⁴ *Id.* at ¶ 2.4.

¹⁰⁵ *M.A.B.*, *supra* note 64.

¹⁰⁶ *Id.* at ¶ 4.2.

¹⁰⁷ *Prince*, *supra* note 103, at ¶ 7.2.

¹⁰⁸ *Id.* at ¶ 7.3.

¹⁰⁹ *Id.* at ¶ 7.5.

¹¹⁰ *Id.* at ¶ 7.4.

¹¹¹ CORNELIS D. DE JONG, THE FREEDOM OF THOUGHT, CONSCIENCE AND RELIGION OR BELIEF IN THE UNITED NATIONS (1946–1992) 21–22 (2000).

ICCPR must be read harmoniously, it is necessary to analyze the relevant articles governing freedom of expression.

D. Article 19

Article 19 of the ICCPR states that the right to freedom of expression includes “freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.”¹¹² While this language establishes a robust conception of freedom of expression, Article 19 includes similar limitations to Article 18, and it is the only article that contains a limiting preamble,¹¹³ noting that these rights carry with them “special duties and responsibilities.”¹¹⁴ Like Article 18, the permissible reasons for limiting expression include public order and morals, but additionally include national security and respect of the rights or reputations of others.¹¹⁵

1. Limitations to Article 19 must be the least intrusive possible.

The decisions by the HRC on Article 19 suggest that limitations on freedom of expression are not justified even in fraught contexts. For example, the HRC has repeatedly ruled against limitations on expression in South Korea that is perceived to be “enemy-benefiting” in that it supports North Korea. In *Park v. Republic of Korea*,¹¹⁶ for example, the alleged victim was convicted for his participation in Young Koreans United, which advocated for unification of Korea and the cessation of U.S. intervention in the conflict.¹¹⁷ Because the only threat to national security was a “reference to the general situation in the country and the threat posed by ‘North Korean communists,’ the HRC held that the reason given was insufficiently precise and failed to pass the ‘strict test of justification.’”¹¹⁸

Even when the HRC has assumed that a restriction was for a legitimate aim, it has often held that the restriction was not necessary or proportional, and it has clarified that necessity requires the least intrusive means to achieve the legitimate

¹¹² ICCPR, *supra* note 8, at art. 19, ¶ 2.

¹¹³ Partsch, *supra* note 47, at 219.

¹¹⁴ ICCPR, *supra* note 8, at art. 19, ¶ 3.

¹¹⁵ *Id.*

¹¹⁶ *Park v. Republic of Korea*, U.N. GAOR, Hum. Rts. Comm., 64th Sess., U.N. Doc. CCPR/C/64/D/628/1995 (1998).

¹¹⁷ *Id.* at ¶¶ 2.2–2.4.

¹¹⁸ *Id.* at ¶ 10.3. For another case in which the HRC came to a similar result, see *Mukong v. Cameroon*, U.N. GAOR, 51st Sess., U.N. Doc. CCPR/C/51/D/458/1991 (1994).

aim identified. In *Toregozhina v. Kazakhstan*,¹¹⁹ for example, the alleged victim's organization "held an art-mob event at the monument of Mahatma Ghandi . . . to draw the attention of the public to the issue of moral leadership" and "to demonstrate such qualities as humanism, democracy, social justice and morality."¹²⁰ A few days later, she was arrested and detained for 48 hours.¹²¹ Before finding a violation of Article 19,¹²² the HRC noted that the restriction "must be the least intrusive among the measures that might achieve the relevant protective function and proportionate to the interest whose protection is sought."¹²³

The HRC has also found violations due to chilling effects or attacks on the person who is engaging in the expression. In *Kankanamge v. Sri Lanka*,¹²⁴ repeated issuing and withdrawals of indictments against a journalist for defamation were found to violate Article 19 because of the "uncertainty and intimidation" they caused, which resulted in "a chilling effect which unduly restricted the author's exercise of his right to freedom of expression."¹²⁵ Similarly, in *Njaru v. Cameroon*,¹²⁶ a journalist was repeatedly harassed by police officers because his articles alleged corruption;¹²⁷ the harassment included an assault that left him unconscious.¹²⁸ The HRC held that no legitimate restriction could justify threats to the journalist's life, so the question of necessity did not even arise.¹²⁹

When assessing if a limitation appropriately balances free expression and "public order," the HRC has analyzed the content of the speech, its likely effect on public order, the actual limitations that occur, and the actions of authorities. In *Coleman v. Australia*,¹³⁰ for example, a man was fined \$300 for delivering an address at a mall without a permit. For fifteen to twenty minutes, the man had "loudly spoke[n] . . . on a range of subjects including bills of rights, freedom of

¹¹⁹ *Toregozhina v. Kaz.*, U.N. GAOR, Hum. Rts. Comm., 112th Sess., U.N. Doc. CCPR/C/112/D/2137/2012 (2014).

¹²⁰ *Id.* at ¶ 2.1.

¹²¹ *Id.*

¹²² *Id.* at ¶ 7.5.

¹²³ *Id.* at ¶ 7.4. For another case in which the HRC came to a similar result, see *Morais v. Angl.*, U.N. GAOR, Hum. Rts. Comm., 83rd Sess., U.N. Doc. CCPR/C/83/D/1128/2002 (2005).

¹²⁴ *Kankanamge v. Sri Lanka*, U.N. GAOR, Hum. Rts. Comm., 81st Sess., U.N. Doc. CCPR/C/81/D/909/2000 (2004).

¹²⁵ *Id.* at ¶ 9.4.

¹²⁶ *Njaru v. Cameroon*, U.N. GAOR, Hum. Rts. Comm., 89th Sess., U.N. Doc. CCPR/C89/D/1353/2005 (2007).

¹²⁷ *Id.* at ¶ 2.1.

¹²⁸ *Id.* at ¶ 2.4.

¹²⁹ *Id.* at ¶ 6.4.

¹³⁰ *Coleman v. Austrl.*, U.N. GAOR, Hum. Rts. Comm., 87th Sess., U.N. Doc. CCPR/C/87/D/1157/2003 (2006).

speech and mining and land rights.”¹³¹ During his address, the police did not attempt to stop him, but “simply videotaped him.”¹³² In finding a violation of Article 19, the HRC held that “a permit system aiming to strike a balance between an individual’s freedom of speech and the general interest in maintaining public order in a certain area . . . must not operate in a way that is incompatible with” freedom of expression.¹³³ Furthermore, it noted that the address was “on issues of public interest,” and because the police did not attempt to stop him “there was no suggestion that the author’s address was either threatening, unduly disruptive or otherwise likely to jeopardise public order in the mall.”¹³⁴

The HRC, however, has allowed limitations for the “rights and reputations of others” if the expression is likely to increase an atmosphere of fear for a particular community. In *Faurisson v. France*,¹³⁵ the alleged victim was a professor who argued that the Nazis did not use extermination gas chambers.¹³⁶ Specifically, he referred sarcastically to the “magic gas chamber[s],” stated that he “wish[ed] to see that 100 per cent of all French citizens realize the myth . . . as a dishonest fabrication,”¹³⁷ and falsely designated a Chief Rabbi as the author of the law prohibiting holocaust denial.¹³⁸ Because, the HRC reasoned, the statements “were of a nature as to raise or strengthen anti-Semitic feelings, the restriction served the respect of the Jewish community to live free from fear of an atmosphere of anti-Semitism.”¹³⁹ And such a restriction was necessary because “the denial of the existence of the Holocaust [is] the principal vehicle for anti-Semitism.”¹⁴⁰

2. HRC General Comments confirm that even criticism of religion that is subjectively deeply offensive is protected by Article 19.

The HRC’s General Comments also affirm a robust right to freedom of expression. For example, “[p]rohibitions of displays of lack of respect for a religion or other belief system, including blasphemy laws, are incompatible with

¹³¹ *Id.* at ¶ 2.1.

¹³² *Id.* at ¶ 3.2.

¹³³ *Id.* at ¶ 7.3.

¹³⁴ *Id.* For other cases in which the HRC came to a similar result, see *Zalesskaya v. Belr.*, U.N. GAOR, Hum. Rts. Comm., 101st Sess., U.N. Doc. CCPR/C/101/D/1604/2007 (2011); *Komarovsky v. Belr.*, U.N. GAOR, Hum. Rts. Comm., 109th Sess., U.N. Doc. CCPR/C/109/D/1839/2008 (2014).

¹³⁵ *Faurisson v. Fr.*, U.N. GAOR, Hum. Rts. Comm., 58th Sess., U.N. Doc. CCPR/C/58/D/550/1993 (1996).

¹³⁶ *Id.* at ¶ 2.1.

¹³⁷ *Id.* at ¶ 2.6.

¹³⁸ *Id.* at ¶ 7.6.

¹³⁹ *Id.* at ¶ 9.6.

¹⁴⁰ *Id.* at ¶ 9.7.

the [ICCPR]” unless such prohibitions are necessary under Article 20.¹⁴¹ But even if such restrictions were supposedly necessary under Article 20, such restrictions may not favor religious believers over non-believers or “be used to prevent or punish criticism of religious leaders or commentary on religious doctrine and tenets of faith.”¹⁴² This is true even if the expression is regarded as “deeply offensive”¹⁴³ or if the restriction is “enshrined in traditional, religious or other such customary law.”¹⁴⁴ And states are not granted a “margin of appreciation,”¹⁴⁵ meaning that their judgments that the restrictions were legal are not granted more weight than the HRC’s.

E. Article 20

The limitations and jurisprudence discussed above, however, are not exhaustive. Article 20—which mandates the prohibition of “[a]ny advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence”¹⁴⁶—must also be considered.¹⁴⁷ Because non-religious expression in religious countries has in the past resulted in violence and because the HRC’s jurisprudence in this area is underdeveloped, Article 20 is especially important.

1. The text of Article 20 suggests that hate speech absent incitement is not prohibitable.

Some scholars have categorized Article 20 as prohibiting “hate speech,”¹⁴⁸ but this ignores important elements in the text. After all, the article requires that hateful advocacy “constitutes incitement” of an additional behavior or effect as well. This reading is bolstered by the larger context of the article’s prohibition of any “propaganda for war”¹⁴⁹ and the article’s nature of a requirement, rather than a permission.¹⁵⁰ Furthermore, individual reports have explicitly stated that “disturbing and shocking” speech that is “inflammatory, hateful or offensive”

¹⁴¹ CCPR General Comment No. 34, *supra* note 73, at ¶ 48.

¹⁴² *Id.*

¹⁴³ *Id.* at ¶ 11.

¹⁴⁴ *Id.* at ¶ 24.

¹⁴⁵ *Id.* at ¶ 36.

¹⁴⁶ ICCPR, *supra* note 8, at art. 20, ¶ 2.

¹⁴⁷ Partsch, *supra* note 47, at 227.

¹⁴⁸ Agnès Callamard, *Combating Discrimination and Intolerance with a Free Speech Framework*, 5 RELIGION & HUM. RTS. 153, 158 (2010).

¹⁴⁹ ICCPR, *supra* note 8, at art. 20, ¶ 1. *See also* Nazila Ghanea, *Expression and Hate Speech in the ICCPR: Compatible or Clashing?*, 5 RELIGION & HUM. RTS. 171, 173–74 (2010).

¹⁵⁰ Ghanea, *supra* note 149, at 173.

should not be conflated with speech that amounts to incitement,¹⁵¹ and that the freedom of religion or belief does not include the right to be protected from “criticism or ridicule,” even if the criticism is “offen[sive], shock[ing] and disturb[ing].”¹⁵² Finally, a joint statement by UN Special Rapporteurs states that “no one should be penalized for the dissemination of ‘hate speech’ unless it has been shown that they did so with the intention of inciting discrimination, hostility or violence.”¹⁵³ Because of this, it is generally acknowledged that Article 20 does not require countries to prohibit all hate speech, but only a certain qualified subset that additionally constitutes incitement to discrimination, hostility, or violence.¹⁵⁴

2. HRC communications on Article 20 suggest that the HRC has become less open to restricting speech on Article 20 grounds.

While it is true that some concepts in Article 20(2) have received “scant attention” in the HRC’s jurisprudence,¹⁵⁵ there are telling patterns in the decisions that suggest it considers the content of the advocacy, the status of the targeted group, and the advocacy’s actual or likely consequences for that targeted group.

The HRC has allowed states to use Article 20 as a defense of limitations on expression when hateful religious or racial expression is targeted at a vulnerable group and is likely to harm that group’s rights. In *J.R.T. and the W.G. Party v. Canada*,¹⁵⁶ the HRC upheld the curtailment of a telephone message by the alleged victim’s political party that warned callers ““of the dangers of international finance and international Jewry leading the world into wars, unemployment and inflation and the collapse of world values and principles.””¹⁵⁷ It stated that the messages “clearly constitute[d] the advocacy of racial or religious hatred.”¹⁵⁸ The perfunctory nature of this decision—it contains no discussion of why the telephone message clearly constitutes advocacy of racial or religious hatred, nor

¹⁵¹ Rep. of the Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression, U.N. Doc. A/67/357, at ¶ 49 (Sept. 7, 2012) [hereinafter Report of the Special Rapporteur].

¹⁵² *Id.* at ¶ 53.

¹⁵³ Joint Statement on Racism and the Media, UN Special Rapporteur on Freedom of Opinion and Expression, the OSCE Representative on Freedom of the Media and the OAS Special Rapporteur on Freedom of Expression, at 2 (Feb. 27, 2001).

¹⁵⁴ JEROEN TEMPERMAN, RELIGIOUS HATRED AND INTERNATIONAL LAW: THE PROHIBITION OF INCITEMENT TO VIOLENCE OR DISCRIMINATION 164 (2016).

¹⁵⁵ Report of the Special Rapporteur, *supra* note 151, at ¶ 44(e).

¹⁵⁶ *J.R.T. and the W.G. Party v. Can.*, U.N. GAOR, Hum. Rts. Comm., 18th Sess., U.N. Doc. CCPR/C/OP/2 (1984).

¹⁵⁷ *Id.* at ¶ 2.1.

¹⁵⁸ *Id.* at ¶ 8(b).

does it consider necessity or proportionality requirements, for example—should limit its precedential and persuasive value, however.¹⁵⁹

The HRC has subsequently set a high bar for standing when an individual complaint is based on Article 20. In *Anderson v. Denmark*,¹⁶⁰ for example, the HRC clarified that an alleged victim must establish actual or imminent harm to themselves or a community resulting from the inciting statements.¹⁶¹ The alleged victim in the case, a Muslim who viewed headscarves as religiously mandated, argued that statements by members of the Danish parliament that compared Muslim headscarves to Nazi swastikas created a hostile environment for her.¹⁶² The HRC, however, held that “no person may, in theoretical terms and by *actio popularis*, object to a law or practice which he holds to be at variance with the Covenant,” and while an alleged victim could “demonstrate that the threat of enforcement and the pervasive impact of the continued existence of the incriminated facts on administrative practices and public opinion had affected him . . . personally,” here the author failed to demonstrate that.¹⁶³ Therefore, the communication was deemed inadmissible.¹⁶⁴

3. The drafting history of Article 20 suggests that it was meant to limit only the most egregious hateful expression.

The drafting history suggests that Article 20 was aimed at “the most abominable acts of dehumanizing or demonizing the other, affecting the latter’s dignity, equality and integrity by way of actually inciting violence, hostility or discrimination against that ‘otherness.’”¹⁶⁵ Delegates, for example, cited apartheid—“a crime against humanity as great as the crimes of the Hitlerite fascists”¹⁶⁶—and the fascism and racial hatred that caused a world war and the Holocaust.¹⁶⁷

¹⁵⁹ *Id.* at ¶ 9. Recall that the HRC engaged in a more nuanced analysis in a similar case, *Ross v. Canada*, and claimed that the restrictions on anti-Semitic speech “derive[d] support from the principles reflected” in Article 20. *Ross*, *supra* note 94, at ¶ 11.5.

¹⁶⁰ *Anderson v. Denmark*, U.N. GAOR, Hum. Rts. Comm., 99th Sess., U.N. Doc. CCPR/C/99/D/1868/2009 (2010).

¹⁶¹ *Id.* at ¶ 6.4.

¹⁶² *Id.* at ¶ 2.1.

¹⁶³ *Id.* at ¶ 6.4.

¹⁶⁴ *Id.* at ¶ 6.5. For other cases in which the HRC came to a similar result, see *A.W.P. v. Denmark*, U.N. GAOR, Hum. Rts. Comm., 109th Sess., U.N. Doc. CCPR/C/109/D/1879/2009 (2013); *Vasillari v. Greece*, U.N. GAOR, Hum. Rts. Comm., Comm. No. 1570/2007.

¹⁶⁵ TEMPERMAN, *supra* note 154, at 33.

¹⁶⁶ *Id.* at 44.

¹⁶⁷ U.N. ECOSOC, 2nd Sess., 28th mtg., at 3, U.N. Doc. E/CN.4/AC.1/SR.28 (May 18, 1948) (U.S.S.R. stating that the purpose of Article 20 was to “restrict the dissemination of Nazi-Fascist

It is true that the language of Article 20(2) was broadened both by separating it from the provision on propaganda for war¹⁶⁸ and by changing the conjunction “discrimination, hostility, *and* violence” to “discrimination, hostility, *or* violence.”¹⁶⁹ But it was broadened from an extremely narrow standard of having an objective of causing armed conflict.¹⁷⁰ As one participant in the debate said, what was prohibited by the original wording “was the repeated and insistent expression of an opinion for the purpose of creating a climate of hatred and lack of understanding between the people of two or more countries, in order to bring them eventually to armed conflict.”¹⁷¹

Many states—including all Western industrialized states and Japan—did not support Article 20.¹⁷² When considering the reasons why, however, it is clear that the countries’ interpretations are consistent with a reading of Article 20 that still allows a sufficiently broad protection of free expression to disallow the examples of prohibition given in Section II of this Comment. The countries who objected to Article 20 were worried, for example, about states using the provision in bad faith to curb free expression by citing the limitation on incitement as a pretense.¹⁷³ As the U.S. delegate warned, “It would be extremely dangerous to encourage Governments to issue prohibitions in that field, since any criticism of public or religious authorities might all too easily be described as incitement to hatred and consequently prohibited.”¹⁷⁴ But this concern about bad faith interpretive abuse does not mean that a good faith reading of the provision sustains strict limits on non-religious expression.

IV. FRAMEWORK PROTECTING NON-RELIGIOUS EXPRESSION IN PREDOMINATELY RELIGIOUS COUNTRIES

The above discussion suggests a nascent framework that the HRC should adopt when considering limitations on controversial non-religious expression in predominately religious countries.

propaganda” that had resulted “in a terrible destruction of lives and in the elimination of human rights in Germany”); U.N. ECOSOC, 6th Sess., 174th mtg., at 9 ¶ 41, U.N. Doc. E/CN.4/SR.174 (May 8, 1950) (Yugoslavia equating “incitement to hatred” with the fascism that cost them millions of lives in WWII).

¹⁶⁸ TEMPERMAN, *supra* note 154, at 45. One could argue, for example, that this separation broadens the prohibition by unlinking it from the extreme subset of expression that causes armed conflict.

¹⁶⁹ *Id.* at 46 (emphasis added).

¹⁷⁰ *Id.* at 45.

¹⁷¹ U.N. GAOR, 16th Sess., 1079th mtg., at 97 ¶ 2, U.N. Doc. A/C.3/SR.1079 (Oct. 20, 1961).

¹⁷² TEMPERMAN, *supra* note 154, at 47.

¹⁷³ U.N. GAOR, 16th Sess., 1083rd mtg., at 116 ¶¶ 14–17 U.N. Doc. A/C.3/SR.1083 (Oct. 25, 1961) (U.S. criticisms); *id.* at ¶¶ 6–13 (French criticism); *id.* at ¶ 20 (Uruguayan criticism); *id.* at 117 ¶ 27 (Belgian criticism).

¹⁷⁴ TEMPERMAN, *supra* note 154, at 53.

A. Article 18

1. Is the expression an Article 18 manifestation or belief?

The HRC should, first, consider if the expression constitutes a manifestation of belief under Article 18. To do so, it should look at the genuineness of the belief, its subjective importance, if it provides guidance on how to live, and if the specific manifestation under consideration is inherent to the belief. The HRC's previous decisions provide a strong foundation for doing so. It recognized that certain non-religious beliefs are equally protected in *Leirvag v. Norway*, emphasized the genuine nature of belief in *Yoon v. Republic of Korea*, and included manifestations inherent to a belief in *Prince v. South Africa*. For example, if a secular humanist, genuinely finding guidance from that philosophy and perceiving it as important to him or herself, attempts to persuade people of that philosophy's worth, that should qualify as a manifestation of belief. After all, the HRC has already held that spreading knowledge and propagating beliefs qualify as a manifestation of belief in *Sister Immaculate Joseph v. Sri Lanka*.

2. Is the limitation narrowly tailored?

When considering permissible limitations on Article 18, the HRC should interpret the language narrowly. This is not only because of the general rule favoring a narrow reading of limitations, but because of the HRC's previous decisions. In *Bhinder v. Canada*, for example, the limitation was justified for practical safety reasons for which there was no alternative solution that would allow the worker to both fulfill his duties and remain safe. Similarly, in *Prince v. South Africa*, the HRC held that there was no way to allow an exemption for marijuana use that could also ensure that marijuana would not be more readily available to those who had no religious reason for its consumption. Nor should the HRC be persuaded that the protection of a dominant religion would justify a limitation for public morals given that, in *Sister Immaculate Joseph v. Sri Lanka*, it was unconvinced that the freedom of Catholics would injure the predominant Buddhist religion.

Bhinder v. Canada, *Prince v. South Africa*, and *Malcolm v. Ross* are also distinguishable from the examples of limitations on non-religious expression in Section II of this Comment because they dealt with a narrower limitation. Specifically, they dealt with professional detriments. Bhinder could not continue as a railway worker, Prince could not continue being an attorney, and Ross could not continue as a teacher.¹⁷⁵ But many of the examples in this Comment show limitations on manifestations of belief even in personal settings. Therefore, the HRC should acknowledge that such a limitation will be scrutinized more closely,

¹⁷⁵ Bhinder, *supra* note 99, at ¶ 2.7; Prince, *supra* note 103, at ¶ 2.4; Ross, *supra* note 94, at ¶ 4.4.

because it increases the worry that it will trigger Article 5's prohibition on aiming to destroy the very right protected by Article 18.

3. Is the limitation necessary and proportionate?

The HRC could also find a violation of Article 18 for necessity and proportionality reasons. From *Malcolm v. Ross*, the HRC should adopt the causal test of "reasonable anticipation" of harm to the targeted group. This would necessitate an analysis of both the content of the expression, the status of the targeted group, and the power the person manifesting his or her beliefs has over the environment of the targeted group. None of the examples given in Section II of this Comment could reasonably be said to show contempt that would likely cause a poisonous environment for a vulnerable group, for example.¹⁷⁶

B. Article 19

Regardless of the HRC's decision under Article 18, it must also consider claims under Article 19. Given that Article 19 protects the freedom to "impart information and ideas of all kinds, regardless of frontiers,"¹⁷⁷ non-religious ideas are, of course, protected; therefore, it is important to focus on the limitations.

1. Is the limitation defended merely by a general description of a fraught political, religious, or historical context?

The HRC should reject any justification of a limitation on expression that points generally to a fraught political, religious, or historical context. If actively voicing support for another country who has threatened one's own country with nuclear annihilation, as in *Park v. Republic of Korea*, or lessening the cohesion of an already fractured and divided nation, as in *Mukong v. Cameroon*, do not qualify as justifying limitations on expression, surely similar reasons would not justify limiting non-religious expression in countries even if such countries have tense religious divisions.

2. Would the limitation result in substantial chilling effects?

When deciding if a limitation is justified for public order, moreover, the HRC should consider the possible chilling effects and if the disorder is manifested as attacks on the person because of what he or she has expressed. Many of the examples cited in Section II of this Comment, for example, show that the actions of both citizens and state officials result in uncertainty and intimidation that causes non-religious expression to be unduly restrained and cautious, directly recalling *Kankanamge v. Sri Lanka*. And much of the disorder created by non-religious

¹⁷⁶ Considerations of necessity and proportionality should also be considered in any Article 19 analysis. Such an analysis is largely identical to the analysis above.

¹⁷⁷ ICCPR, *supra* note 8, at art. 19.

expression is caused by the violent reaction and attempt to silence that expression, which the HRC has held to be incompatible with Article 19 in *Mpaka-Nsusu v. Zaire*. (It is true that those cases dealt with intimidation by public officials, but the drafting history of Article 19—the suggestion that it should only bar interference “by public authority” was rejected¹⁷⁸—and the text of Article 5—which references “group[s] and person[s]”¹⁷⁹—make clear that interference by fellow citizens is meant to be covered as well.)

3. What actions did authorities take to ensure public order?

Even if the HRC decides that the limitation was for the legitimate aim of public order, it should analyze the state officials’ actions when considering if such a limitation was necessary. For example, did the authorities attempt to calm or stop the responses to non-religious expression that constituted the disorder? If not, the HRC should reject any necessity argument as it did in *Coleman v. Australia*. And if a state attempts to limit non-religious expression because of worries of the disorder it will cause by denying permits for events critical of religion, the HRC should reject such a system as operating not as a common-sense balance of order and free expression, but as a de facto prohibition on non-religious expression similar to those considered in *Zaleskaya v. Belarus* and *Komarovsky v. Belarus*.

C. Article 20

Finally, the HRC should not allow a state to defend limitations on non-religious expression like those described in Section II by citing Article 20’s mandate to prohibit hatred that constitutes incitement. Because the Special Rapporteur has suggested that the publication of cartoons featuring Prophet Muhammad in Denmark and the release of a film critical of Islam in the Netherlands were obvious cases of incitement to hatred,¹⁸⁰ and because the HRC’s jurisprudence in this area is underdeveloped, it is especially important to establish a framework to reject such arguments when they inevitably arise.

1. Was there an intent to incite?

The HRC should clarify that an intention is necessary for Article 20 to be a plausible defense for a limitation.¹⁸¹ This is the ordinary reading of the phrase “advocacy of . . . hatred,” and is implied by *Ross v. Canada*, which notes that the

¹⁷⁸ U.N. ECOSOC, 6th Sess., 200th mtg., at 3, U.N. Doc. E/CN.4/SR.200 (Jun. 5, 1950).

¹⁷⁹ ICCPR, *supra* note 8, at art. 5.

¹⁸⁰ Report of the Special Rapporteur, *supra* note 151, at ¶ 26.

¹⁸¹ See Article 19, The Camden Principles on Freedom of Expression and Equality 10 (2009) [hereinafter Camden Principles]; Article 19, Prohibiting Incitement to Discrimination, Hostility or Violence 22 (2012) [hereinafter Prohibiting Incitement]; Report of the Special Rapporteur, *supra* note 151, at ¶ 44(b).

author did not only express contempt for Jews, but called upon all other Christians to do so, too. It would be difficult to argue that people who were sanctioned for their non-religious expression detailed in Section II of this Comment had the intention of inciting discrimination, hostility, or violence; after all, they were often on the receiving end of the harmful results of their speech.

2. Was the expression characterized by intense and irrational emotions?

Moreover, the HRC should clarify that “hatred” is not characterized by mere criticism, even if harsh or unreasonable, but is instead characterized by “intense and irrational emotions of opprobrium, enmity and detestation towards the target group.”¹⁸² Unlike the advocacy in *Ross v. Canada*, which replaced historical truth with irrational conspiracy theories that bred contempt for a vulnerable minority, the examples of non-religious expression in Section II of this Comment are examples of, at most, provocative criticisms of religions that cannot be said to be irrational or hateful. Those examples do not show, for example, people engaging in conspiratorial thinking that recklessly invents “facts” and denies history in order to create a narrative about a targeted group for the purpose of inspiring others to similarly detest that group. In fact, much of the expression—simply stating one’s lack of religion, for example—is not even directed at one specific group.

3. Did the expression target a vulnerable group?

And even if the HRC disagrees and allows “the religious” to qualify as a targeted group and the expression of controversial non-religious expression as advocacy of hatred, the status of the targeted group is important in considering if that advocacy constituted incitement to discrimination, hostility, or violence. If the HRC accepts that discrimination must have “the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in [any] field of public life,”¹⁸³ the implausibility of a non-religious minority with little support from fellow citizens or public institutions realizing such an impairment for a powerful religious majority becomes clear.¹⁸⁴ This aligns with precedent, moreover, because the

¹⁸² Camden Principles, *supra* note 181, at 10; Report of the Special Rapporteur, *supra* note 151, at ¶ 44(a).

¹⁸³ Prohibiting Incitement, *supra* note 181, at 19.

¹⁸⁴ See Jeroen Temperman, *Freedom of Expression and Religious Sensitivities in Pluralist Societies: Facing the Challenge of Extreme Speech*, 2011 BYU L. REV. 729, 735 (2011) (criticizing the European Human Rights Court for its minority jurisprudence); Nazila Ghanea, *Minorities and Hatred: Protections and Implications*, 17 INT’L J. MINORITY & GROUP RTS. 423, 432–36 (2010) (arguing that the Article 20 “threshold will rarely be reached in the absence of a pattern, if not long history, of gross human rights violations against a particular minority group”).

targeted group in both *J.R.T and the W.G. Party v. Canada* and *Ross v. Canada* was a vulnerable minority that did in fact lose the ability to enjoy fundamental rights and freedoms because of advocacy of hatred. It is true that the alleged victims in *Anderson v. Denmark*, *A.W.P v. Denmark*, and *Vasillari v. Greece*—cases where the HRC did not find a violation of Article 20—were vulnerable minorities, but the HRC’s decisions in those cases are best explained by a hesitation to allow individual complaints under Article 20. In *Vasillari v. Greece*, for example, the HRC conspicuously mentioned it was not “determining whether Article 20 may be invoked under the Optional Protocol.”¹⁸⁵

4. Is the limitation a heckler’s veto?

Finally, assuming the HRC disagrees and finds that the type of non-religious expression by a minority in a predominately religious country that causes violent protest is advocacy of hatred, it should qualify the violence as a heckler’s veto and reject such violence as qualifying as one of the prohibited incitements.¹⁸⁶ The HRC has a strong foundation—textually and precedentially—to do so. Textually, the HRC should point to Articles 2, 5, 26, and 27, which must be read harmoniously with Article 20. If violence directed at someone expressing controversial non-religious beliefs was read to trigger Article 20’s incitement to violence element, thereby justifying the limitation of that expression, this would result in an unacceptable contradiction with these articles.

Article 2 mandates that each state party “ensure” to all individuals the ICCPR rights regardless of religion or opinion and adopt laws or other measures necessary to give effect to those rights.¹⁸⁷ And Article 5 prohibits any interpretation of the ICCPR that implies any “group or person” has “any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms” in the ICCPR.¹⁸⁸ But if the HRC finds limitations on non-religious expression permissible because a religious majority reacts violently, non-religious minorities’ rights would not be ensured. This is because limiting a minority’s speech is both easier and less costly—both in resources and political capital—than calming or restraining those who are reacting violently against it. In fact, such violence and the placating response by the government results in the destruction of the non-religious minorities’ freedom of expression on issues of immense public and philosophical importance.

¹⁸⁵ Vasillari, Comm. No. 1570/2007, *supra* note 164, at ¶ 6.5.

¹⁸⁶ Allison G. Belnap, *Defamation of Religions: A Vague and Overbroad Theory that Threatens Basic Human Rights*, 2010 BYU L. REV. 635, 651–52 (2010).

¹⁸⁷ ICCPR, *supra* note 8, art. 2, ¶¶ 1–2.

¹⁸⁸ ICCPR, *supra* note 8, art. 5, ¶ 1.

Article 27, moreover, prohibits a state from denying minority groups the ability “to profess and practise their own religion,”¹⁸⁹ and Article 26 mandates that the law “guarantee to all persons equal and effective protection against discrimination on any ground,” including non-religious expression.¹⁹⁰ These too are inconsistent with allowing a heckler’s veto, because such a reason for limiting controversial religious speech by the majority would rarely, if ever, apply to minority non-religious speech, which results in unequal and ineffective protection of non-religious minorities relative to the religious majority. And the threat of intimidation and violence, allowed by the state’s choices concerning police protection and the like, would have the effect of disallowing a non-religious minority to manifest its beliefs.

Precedentially, the HRC should read Article 20 in the light of its Article 19 jurisprudence concerning attacks and intimidation. If a heckler’s veto were allowed as a permissible reason for stifling non-religious minority expression, violent reactions would be incentivized because of their protean ability to both repress expression distasteful to the majority and increase the majority group’s cohesive identity by emotionally rallying against a common enemy. This is why, in a different but analogous context, the US federal government thought it necessary to post “an army on the campus at the University of Mississippi to insure that one man, James Meredith, was granted his rights to enter and to remain at that institution,” and why the “reverse was equally clear in Little Rock Arkansas, when Governor Orval Faubus let it be known...that the state’s police power could not cope with those who wished to block the entry of Negro children to Central High School.”¹⁹¹ The resulting increase in violence should trigger the same worries of chilling effects in *Kankanamge v. Sri Lanka* and the outright rejection of any violence in connection with the silencing of expression in *Mpaka-Nsusu v. Zaire*. After all, this chilling effect has even occurred internationally, as when a publisher in the U.K. declined to publish a book on one of Mohammed’s wives after his home was firebombed, to name one of many examples.¹⁹²

The HRC will also find support to read in an anti-heckler’s veto jurisprudence into the ICCPR in its General Comment 34. It states that countries “should put in place effective measures to protect against attacks aimed at silencing those exercising their right to freedom of expression,” and that “under

¹⁸⁹ ICCPR, *supra* note 8, at art. 27.

¹⁹⁰ *Id.* at art. 26.

¹⁹¹ Franklyn S. Haiman, *The Rhetoric of the Streets: Some Legal and Ethical Considerations*, 53 Q. J. SPEECH 99, 108 (1967).

¹⁹² Belnap, *supra* note 186, at 652 & n.86.

[no] circumstance, can an attack on a person, because of the exercise of his or her freedom of opinion or expression . . . be compatible with [A]rticle 19.”¹⁹³

V. CONCLUSION

It is fitting to end where this Comment began: with Pascal. “Begin by pitying unbelievers; their condition makes them unhappy enough,” he wrote.¹⁹⁴ “Man without faith can know neither true good nor justice.”¹⁹⁵ These same ugly attitudes, which lead to the subjugation of non-religious minorities around the world, persist today. But the HRC does not rank individuals by their conscience’s worth, nor does it bend to intense majoritarian will. Instead, it recognizes the “inherent dignity and . . . equal and inalienable rights of all members of the human family.”¹⁹⁶ The proposal above would be a small but important step in ensuring that religious minorities are treated as just that: equal members of the human family.

¹⁹³ CCPR General Comment No. 34, *supra* note 73, at ¶ 23.

¹⁹⁴ PASCAL, *supra* note 1, at 52.

¹⁹⁵ *Id.* at 45.

¹⁹⁶ ICCPR, *supra* note 8, at pmb1.