HUMAN RIGHTS WATCH

A Shrinking Realm: Freedom of Expression since 9/11

By Dinah PoKempner

When one speaks of the danger to the norm against torture since 9/11, it is fairly obvious what that means. Torture, after all, draws up rather specific images of the individual under assault, despite the Bush administration's attempts to muddy the issue. But the same is not true for freedom of expression, a norm that applies to an expansive range of human activity.

The right to free expression protects everyone from the man on the public soapbox to the anonymous blogger; from the woman who prefers hijab to the cross-dresser; from the persecuted defender of human rights to the repellant genocide denier. The erosion of the norm against torture is alarming precisely because the norm is absolute: under the law, there are no other interests to balance. But the right to free expression can be qualified in light of public safety, national security, public order, morality, and the rights of others. The communities concerned with these many aspects are often fragmented, and the precise contours of the right are more fluid. It is easy to lose track of the whole picture.

This is why some five years after 9/11 it is especially important to try to take stock of the scope of free expression. The view is not reassuring. Responses to terrorism combined with dynamics that long predate 9/11 have produced an array of threats to free expression.

From Iraq to Russia to the Philippines, journalists are being treated as partisans, even combatants, and are now more frequently targeted for attack than at any time in recent memory. Global migration (witness the tensions surrounding the integration of Muslim immigrants in Europe) and the steady growth of civil society in many formerly closed countries (witness conditions in Russia and China) are fueling governmental urges to restrict expression. Counterterrorism has given new vigor to some old forms of

censorship, and created new ones. Crimes of "glorification" of terrorism, once rare, are proliferating, and hate speech is increasingly becoming the rationale for imposing criminal or administrative sanctions against those thought to be extremists. Despite (or because of) the continuing cyber-revolution, states are also moving quickly to fence and filter the internet, and new technologies are fueling an explosion of state surveillance, often justified in the name of counterterrorism.

Cataloguing the new rents in the fabric of the right to free expression is important in itself but then we need to step back to understand better how these affect the cloth as a whole. When communications are subjected to unwarranted surveillance, or when new speech-based crimes are created, the entire context for deciding whether an article can be published, a sermon preached, or a certain garment worn is changed. Moreover, the effect of new restrictions in states with long records of protecting free expression is global; restrictive precedents give fresh cover and encouragement to states with a history of trammeling this right. The effect of these developments is greater than the sum of discrete instances.

With this in mind, it is plain that mending the fabric will require more than just a patch here and there. This essay sketches some of the damage and suggests ways to respond. We must overcome the tendency to look at each restriction in isolation from others and only in local context. And we must be vigilant in responding to each assault on this freedom, systematically and repeatedly, if we are to protect all other rights.

Frederick Douglass, the abolitionist and publisher, spoke to what is at stake:

> Liberty is meaningless where the right to utter one's thoughts and opinions has ceased to exist. That, of all rights, is the dread of tyrants. It is the right which they first of all strike down. They know its power.[1]

[1] Frederick Douglass, speaking in the Boston Music Hall after an anti-slavery meeting had been broken up. David J. Brewer, *World's Best Orations* (St. Louis: Ferd. P. Kaiser, 1899), vol. 5, pp.1906-1909. Also at http://douglassarchives.org/doug_a68.htm.

Journalists in the Crosshairs

The press has often been subject to attack, both physically and legally. But there is reason to believe that both contemporary armed conflicts and the so-called war on terror have rendered it more precarious than ever to be a journalist.

In Russia, it has become extremely dangerous to report on the conflict in Chechnya in any way. Most recently, the world was shocked by what seemed like the contract killing of investigative journalist Anna Politkovskaia on October 7, 2006, potentially in retaliation for her searching and critical writing on Chechnya. Earlier in the year, the government had convicted the director of the Russian-Chechen Friendship Society of "inciting racial hatred" through articles he published in the group's journal, and then shut down the nongovernmental organization itself for good measure.

Though war correspondents enjoy immunity under the laws of armed conflict, they work in precarious circumstances and are vulnerable. Even so, the toll on journalists in Iraq by any measure has been extraordinary, with 137 journalists and media assistants killed since March 2003, sometimes in attacks specifically directed at reporters and media organizations.[2] Also troubling is the frequency with which Iraqi and coalition forces have detained journalists without charge.[3]

In the larger view, it is undeniable that the overthrow of Saddam Hussein enabled independent journalism to become established in Iraq, despite general security conditions that make it a life-threatening enterprise. But even there the picture is mixed. During both coalition and subsequent Iraqi administrations, authorities have laid limits on reporting news that could in any way be seen as promoting the views of insurgents or adherents of Saddam Hussein.[4]

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[2] Reporters Without Borders, "War in Iraq," undated, http://www.rsf.org/special_iraq_en.php3.

[3] Ann Cooper, "Jailing Iraqi Journalists," *Dangerous Assignments,* October 4, 2005, http://www.cpj.org/Briefings/2005/DA_fall05/comment/comment_DA_fall05.html. Abdul Ameer Younis Hussein, a CBS cameraman, was held by US forces without charge for almost a year and his case ultimately dismissed in April 2006 for lack of evidence. Bilal Hussein, a photojournalist with Associated Press whose pictures of Fallujah won the Pulitzer Prize, is in his seventh month of detention by US forces at this writing.

[4] See, for example, Mariah Blake, "From All Sides: In the Deadly Cauldron of Iraq, Even the Arab Media are Being Pushed Off the Story," *Columbia Journalism Review* (2005), http://www.cjr.org/issues/2005/2/onthejob-blake.asp, and Committee to Protect Journalists, "Iraq: Government instructs media to promote leadership's positions," November 12, 2004, http://www.cpj.org/news/2004/Iraq12nov04na.html. Most recently, the authorities closed two television stations for broadcasting images of Iraqis protesting the sentencing of Saddam Hussein to death, adding to the media blackout caused by

For the purpose of taking stock, the practices of the US with regard to press freedom are important to examine, as historically the US has often been on the cutting edge of legal protection for speech, its constitutional standards often exceeding other countries' legal safeguards. Unfortunately, under the Bush administration, there have been significant steps backwards.

The Bush administration was notably more hostile to releasing information to the press than prior administrations, moving to reclassify information that had been in the public domain, to reverse the presumption toward disclosure under the Freedom of Information Act, and to greatly restrict public access to presidential papers, an important source of information on public policy.[5] The government also showed an unusual determination to force investigative reporters to disclose confidential sources, while Congress yet again failed to create a federal "shield law."[6] When scandals surfaced that could impugn the administration, its first reaction was to retaliate by announcing leak investigations against the press, as when the *Washington Post* revealed the existence of secret Central Intelligence Agency detention centers ("black sites"), and when the *New York Times* disclosed that the National Security Agency was illegally snooping on millions of domestic and international calls.

In the US, reporters on the receiving end of official leaks generally do not face prosecution, but there were signs that this may change. Figures in both the administration and the political right-wing press called for espionage prosecutions of newspapers in the wake of these scandals. In August 2005 the federal government indicted two former lobbyists for the American Israel Public Affairs Committee (AIPAC) for receiving leaked national defense information from a US official and then repeating it to foreign officials and reporters. The AIPAC case raised concern as a

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temporary official suspension of the major newspapers. Reporters Without Borders, "Two TV stations closed for showing Iraqis protesting against death sentence for Saddam," November 6, 2006, http://www.rsf.org/article.php3?id_article=19599.

[5] See Floyd Abrams, "The State of Free Speech," *New York Law Journal,* vol. 236 (2006).

[6] Although a majority of states have enacted "shield laws" to protect reporters from having to disclose their confidential sources, various bills to provide a federal privilege have been stuck in both houses of Congress. For an account of both legislative developments and various reporters who have been jailed for refusing to divulge their sources, see Reporters Committee for Freedom of the Press, "Special Report: Reporters and Federal Subpoenas," October 13, 2006 http://www.rcfp.org/shields_and_subpoenas.html#shield.

stepping stone to future prosecutions of journalists, as it involves a novel application of a 1917 law that has typically been interpreted as applying only to leakers, rather than recipient publishers, of national defense information.[7]

It is important to remember that apart from these particular fronts, the press remained in the crosshairs of rights-abusing governments the world over. Cuba in 2006 held some 25 journalists in prison for political crimes, and in Venezuela the Chavez administration further restrained critical reporting through "gag" laws and control of the courts.[8] In Sudan, security forces have been arresting and detaining journalists, banning newspaper editions and performing pre-print inspections—and this is apart from routine restrictions on media reporting on Darfur.[9] Burma, Turkmenistan, and North Korea continue to be black holes for press freedom (and many other freedoms besides) while Iran and Saudi Arabia have kept journalists on a tight leash even as online communications have taken off. The list of literal and legal attacks on the press goes on and on, with Reporters Without Borders listing, at this writing, 95 journalists and media assistants killed in 2006, an increase over the prior four years, and 135 imprisoned.[10] A rare bright spot was a decision by the UK House of Lords to restore a measure of balance to that country's notorious libel law by providing greater protections for information that is of public interest.[11]

New Offenses in the Age of Counterterrorism: "Glorification" or "Apologie" and "Indirect" Incitement

Incitement to commit a crime is an offense in many legal systems around the world, and specific laws prohibiting incitement to terrorist acts are increasingly common. Such conduct sometimes can be reached through accomplice liability and conspiracy laws as well. The crime of direct incitement generally requires that the

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[7] Adam Liptak, "In Leak Cases, New Pressure on Journalists," *New York Times*, April 30, 2006.

[8] "IAPA meeting ends with severe criticism of press freedom in the hemisphere," Inter American Press Association news release, March 14, 2005, http://www.sipiapa.org/pressreleases/chronologicaldetail.cfm?PressReleaseID=1336.

[9] "Sudan: Press Under Pressure," Human Rights Watch news release, November 6, 2006, http://hrw.org/english/docs/2006/11/06/darfur14514.htm.

[10] Reporters Without Borders, "Press Freedom Barometer," covering data from January to October 2006, http://www.rsf.org/rubrique.php3?id_rubrique=113. The Committee to Protect Journalists lists 46 confirmed cases of journalists killed in 2006 as of November 7, 2006, http://www.cpj.org/killed/killed06.html.

[11] *Jameel v. Wall Street Journal Europe*, UKHL 44 (October 11, 2006).

message directly encourage the commission of a crime, and that the speaker intend this, whether or not a criminal act results. In the United States, constitutional jurisprudence requires that the incitement present a risk of "imminent" criminal action; in Europe, the courts tend to allow somewhat more latitude with respect to the risk of proximate causation.

What is new on the scene is the proliferation of crimes of "indirect incitement," that is, criminalization of speech which is thought to have some potential to incite criminal action, but which may be less targeted in message or audience and less obviously a proximate cause of actual criminal acts. These laws are often ambiguous on whether the proscribed speech must merely portray terrorism or terrorists—variously or vaguely defined—in a favorable light to an outside observer, or whether it must be specifically intended to spur violent criminal acts and present a real risk of doing so under the circumstances.

In 2004 only three European countries had laws against "apologie" or "glorification" of terrorism, but by mid-November 2006 some 36 countries had signed the Council of Europe Convention on Terrorism which requires states to criminalize "provocation" of terrorism, a crime that could include indirect incitement.[12] The new crime is catching on in domestic law. Spain and France had apologie laws on the books prior to 2001; the United Kingdom and Denmark have more recently adopted laws on promotion or glorification of terrorist acts, while Turkey and Russia in 2006 amended terrorism legislation in ways that would punish speech characterized, respectively, as "propaganda" for terrorism or support of "extremism."

Australia has been considering following the model of the UK Terrorism Act of 2006, which outlaws "glorification" where it is reasonable to infer that the audience would understand the speech as encouraging emulation of terrorist conduct. There is no qualification in the

[12] The treaty was adopted in May 2005. At this writing only Bulgaria and Russia have ratified it; the treaty requires six ratifications to enter into force. Article 5.1 of the treaty defines "public provocation to commit a terrorist offence" as making a message available to the public, through either direct or indirect advocacy, with the intent to incite the commission of a terrorist offense and causing a danger that such an offense be committed. Council of Europe Convention on the Prevention of Terrorism, May 16, 2005, CETS No. 196, http://conventions.coe.int/Treaty/EN/Treaties/Html/196.htm. Security Council Resolution 1624 adopted on September 14, 2005, also calls on states to legally prohibit "incitement" to commit terrorist acts, but with explicit reference in its preamble to the boundaries created by the international right of free expression.

UK law, however, for either imminent danger that a terrorist act would be committed, or the speaker's intention to cause such a result. It is important to recognize that acts of glorification or apologie are the basis for more than penal consequences: they also may lead to blacklisting of organizations for the purpose of halting fundraising or freezing assets, as in the UK, or to deportation of aliens, as in France.

The crime of indirect incitement has to be seen as an effort to go beyond situations where the evidence shows that the speaker clearly intends to provoke the audience to criminal conduct. There are strong reasons to question whether there is, in fact, room for principled distinction between controversial but protected political speech and indirect incitement.[13] In the UK, some have sought to distinguish between those who carry placards praising the perpetrators of the London 7/7 attacks and those whose placards urge murder of critics of Islam. Others have worried that glorification laws could be used against Muslims who speak in favor of armed resistance against occupation, expression which is typically viewed as a form of protected, if controversial, political speech. Prime Minister Tony Blair's statement that juries would understand glorification "when they see it" underscored the fears of minorities that the definition would be subject to the popular prejudices of the moment.[14]

If counterterrorism has been the motive for new speech-restrictive laws in Europe, it also has become a pretext for repression of political dissent in places such as Uzbekistan. Treated as an ally in the aftermath of the 9/11 attacks by Washington and Moscow, Uzbekistan significantly intensified its persecution of independent reporters and human rights monitors, justifying this crackdown as a legitimate counterterrorism response. And it did so with particular energy against those who contradicted the government's claims that Islamist terrorists, rather than government agents, were responsible for massacring hundreds of unarmed civilians in Andijan in May 2005.[15]

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[13] See Opinion of the Commissioner for Human Rights, Alvaro Gil-Robles, on the draft Convention on the Prevention of Terrorism, Strasbourg, February 2, 2005, BCommDH(2005), para. 26 (Gil-Robles notes, "The question is where the boundary lies between indirect incitement to commit terrorist acts and the legitimate voicing of criticism.").

[14] Jon Silverman, "Glorification law passes 'first test,'" *BBC News Online,* February 16, 2006, http://news.bbc.co.uk/2/hi/uk_news/4720682.stm.

[15] Human Rights Watch, *Burying the Truth: Uzbekistan Rewrites the Story of the Andijan Massacre*, vol. 15, no. 6(D), September 2005, http://hrw.org/reports/2005/uzbekistan0905/ and "Uzbekistan: Journalist Assaulted after Reporting on Massacre," Human Rights Watch news release, November 11, 2005, http://hrw.org/english/docs/2005/11/11/uzbeki12007.htm.

Despite commitments to reform its laws, Jordan still prosecutes writers for criminal defamation of government leaders and officials or for material that endangers foreign relations. In June 2006 the state jailed four parliamentarians who paid a condolence call to the family of Abu Mus'ab al-Zarqawi; one of the four also allegedly called al-Zarqawi "a martyr and a fighter." The charge against the four was stirring up sectarian or racial tension or strife among different elements of the nation.[16]

But it is in Spain that one finds one of the stranger prosecutions for apologie, which ended in acquittal in November 2006. Impelled by the Association of Terrorism Victims, the government indicted a Basque punk rock band for allegedly praising separatist terrorism in the lyrics of its songs. The group denied supporting terrorists and explicitly disavowed supporting the armed ETA insurgency when it was alleged that their songs were hurtful to the ETA's victims. Under the European Court's jurisprudence, works of art and political speech are both to be given an extra degree of latitude. Even so, the prosecutor sought not only to imprison the band, but to bar them from working as musicians.[17]

New Twists on Old Offenses: Hate Speech and Blasphemy

As the examples above suggest, there is a good deal of blurring between the rationales of hate speech and of indirect incitement. The formulation of indirect incitement, praising terrorism as "just and necessary" or holding up for admiration known terrorists, is often intertwined with derision or denigration of victims or opponents. Although there are differences in the two types of proscriptions, both derive from an appreciation of the power of speech to facilitate mass violence.

The state has a legal option to limit speech to protect national security or other state interests. But prohibiting hate speech is obligatory under several major human rights treaties, including the International Covenant on Civil and Political Rights (ICCPR) and the later Convention on the Elimination of Racial Discrimination (CERD). The

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[16] "Jordan: Rise in Arrests Restricting Free Speech," Human Rights Watch news release, June 17, 2006, http://hrw.org/english/docs/2006/06/17/jordan13574.htm.

[17] "Band Sozidad Alkoholika denies lyrics aimed at praising terrorism," *EITB 24*, November 2, 2006, http://www.eitb24.com/portal/eitb24/noticia/en/politics/national-court-trial-band-soziedad-alkoholika-denies-lyrics-aimed?itemId=B24_18543&cl=%2Feitb24%2Fpolitica&idioma=en/.

ICCPR does not require states to punish hate speech as a crime, but many states interpret CERD as requiring criminal proscription of hate speech. Many states have entered reservations or interpretations to these provisions in consideration of protecting the right to free expression.[18]

Hate speech is indeed hateful. It can also be deeply harmful, even when it does not incite imminent violence or criminal acts, in that it can provoke public and self-denigration, and a great deal of psychological pain. The point of freedom of expression, however, is to preserve space for highly controversial or even deeply offensive speech, as socially acceptable messages seldom need protection. The hate speech provisions of the ICCPR were negotiated by parties with fresh memories of the Holocaust, and their concern was less to spare group sensibilities from insult than to establish that hate speech, even when not direct incitement, often played a key role in facilitating violence and state discrimination against minorities.[19]

In the decades following the Holocaust, however, the goal of social equality became a more prominent rationale for hate speech prohibitions, particularly in Europe. Laws and prosecutions for hate speech often seemed focused on limiting certain content no matter the context, and seemed unmoored from hard analysis of whether the speech in question, however repugnant, had any potential actually to incite violence or any other criminal action by third parties. The shift to this rationale could be seen in the controversial trial court judgment of the International Criminal Tribunal for Rwanda in the *Nahimana* case, where the court construed hate speech as a basis for "persecution" as a crime against humanity. It wrote:

> Hate speech is a discriminatory form of aggression that destroys the dignity of those in the group under attack. It creates a lesser status not only in the eyes of the group members themselves but also in the eyes of others who perceive and treat them as less than human. The denigration of persons on the basis of their ethnic identity or other

[18] International Criminal Tribunal for the former Yugoslavia, *Prosecutor v. Kordi◊ and Cerkez*, Case No. IT-95-14/2-T, Judgment (Trial Chamber) of 26 February 2001, sec. 209 n.272.

[19] See Manfred Nowak, *CCPR Commentary* (Kehl: N.P. Engel, 1993), p.366, para. 15.

> group membership in and of itself, as well as in its other consequences, can be an irreversible harm.[20]

The competition between two rationales—hate speech as a catalyst of criminal acts, versus hate speech as a harm to dignity in and of itself—has not always been obvious, nor have the problems of assessing harm to dignity in a democratic society or a world of global communications. The Danish cartoon scandal brought these tensions into vivid relief.

On September 30, 2005, the Danish newspaper *Jyllands-Posten* published twelve cartoon depictions of the Prophet Mohammed that it said were solicited in an effort to overcome self-censorship. The cartoons were highly offensive to Muslims, because Islam is frequently interpreted to prohibit depictions of the Prophet and some of the depictions were extremely derogatory, for example, by associating him, and by implication all Muslims, with terrorism. Denmark declined to take action against the publishers, citing its own obligations to protect free expression. Beyond this, it also declined to apologize for the cartoons. By February 2006, massive and often violent protests against the cartoons and against Denmark spread throughout the Muslim world.

The context for the protests included the invasions of Afghanistan and Iraq, tensions in Israel/Palestine, rising Western prejudice and suspicion against Muslims as "terrorists," and an associated sense of persecution and social alienation on the part of Muslim minorities in many parts of the world. Against the backdrop of travel restrictions, debates over the public acceptability of women in hijab, terrorism blacklists, deportations, and investigations of Muslim charities, the cartoons were felt as particularly denigrating, and to some Muslims may have conveyed a quality of threat.

Criticism of the cartoons, however, seldom focused on their directly provoking discrimination or violence against Muslim communities, but rather they focused on equality issues more generally. The unwillingness of Denmark to either take action against the newspaper or apologize was contrasted with the proliferation of

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[20] International Criminal Tribunal for Rwanda, *The Prosecutor v. Nahimana et al.*, Case No. ICTR-99-52-T, Judgment (Trial Chamber) of 3 December 2003, p.351, sec. 1072.

Holocaust-denial laws and blasphemy laws protecting Christianity in Europe. The discourse on whether the media had a right to publish the cartoons became confused with whether the media were right to do so. While the European emphasis on equality and non-discrimination as values prompted much soul-searching as to whether Denmark had taken the proper course, Muslim states by and large did not respond to retorts that they permit abusive depictions of and speech about religious minorities in their jurisdictions; indeed, Iran sponsored an anti-Semitic Holocaust denial cartoon contest in response.

The after-effects of the controversy have been significant. Governments with large Muslim populations, including Jordan, Yemen, Syria, India, and Algeria, pressed charges against editors and journalists who reproduced the cartoons, and newspapers were censored, suspended or closed in Malaysia, Saudi Arabia, Yemen, Belarus, South Africa, and Russia. The Organization of the Islamic Conference criticized Denmark and has sought a UN General Assembly statement banning attacks on religious beliefs. On September 8, 2006, the United Nations General Assembly adopted a global counterterrorism strategy that contained the phrase, "and to promote mutual respect for and prevent defamation of religions." In a speech before the UN General Assembly on September 20, 2006, Pakistan's President Pervez Musharraf called for a ban on the "defamation of Islam."[21]

This response, in essence an international endorsement of blasphemy laws as part of counterterrorism strategy, is exactly the wrong direction for any state that values robust discourse and democratic values. While critics are right to point to the selectivity of existing European blasphemy laws in protecting only Christianity, the key question here is why any religious system should be legally shielded from criticism or even ridicule when political beliefs, aesthetic views, or cultural opinions are not. Speech which targets religious believers for criminal acts should not be protected, but speech which derides only religious ideas should not be punished.

[21] Just as the original furor appeared to be quieting, a video came to light of activists from the far-right Danish People's Party at a summer camp drawing more derogatory images of the Prophet Muhammad. Iran and Indonesia summoned their Danish ambassadors to protest, and the Danish prime minister denounced the drawing of the cartoons, if not the airing of the video. Danish imams who had traveled abroad to rally support to protest the original cartoons, however, stated they would not let themselves be provoked this time. "Row over Danish cartoons escalates," BBC News Online, October 10, 2006, http://news.bbc.co.uk/2/hi/europe/6037597.stm. The action of Denmark in criticizing the cartoons was significant, and highlights the difference between the state moving to repress the publisher of offensive speech, and the state taking measures to repudiate the offensive and discriminatory message.

This approach avoids imposing criminal penalties for either blasphemous or hateful speech that threatens dignity but not crime. It is more consistent with the primary articulation of the ban on hate speech in article 20 of the ICCPR than an approach which places whole categories of speech outside protection. Article 20 requires states to prohibit "any *advocacy* of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence" (emphasis added). The term "advocacy" implies that there must be a conscious intent to spur hatred, rather than just approval of or inadvertent contribution to hatred. The fact that the advocacy of hatred must additionally constitute *incitement* points to provocation of an action, rather than merely fostering negative feelings (since that is already specified by "hatred"), and violence and discrimination are two species of criminal acts. But what has never been clear is exactly what "hostility" entails, although the construction implies something beyond hatred, involving overt manifestation of hatred against another. An argument can be made that the sort of hostility that calls for imprisonment for speech in a democratic society must amount at minimum to a criminal level of harassment, and not to expression of repugnant opinions or impugning of reputation.[22]

Genocide Denial: Incitement or Hate Speech?

The rationale for genocide denial laws has undergone a shift similar to that for hate speech. In the wake of World War II, Germany's strict laws prohibiting the use of Nazi symbols or the promotion of Nazi ideology were designed to stifle any revival of the movement or the passions of anti-Semitism. But rather than fading away with the passage of time, Holocaust denial laws proliferated in Europe right through the 1990s, more as political statements against anti-Semitism than as responses to

[22] Manfred Nowak has argued that article 20, while providing an additional basis for restricting free expression, cannot authorize restrictions beyond the terms of what article 19 allows, so that, for example, it would not permit punishing freedom of opinion, nor permit pre-censorship, nor would it allow for sanctions to attach without consideration of the interests enumerated in article 19.3 in respect of which speech may be restricted. Nowak, *CCPR Commentary*, pp. 368-369. This view finds support in the Human Rights Committee's General Comment 11 on article 20, which states, "In the opinion of the Committee, these required prohibitions are fully compatible with the right of freedom of expression as contained in article 19, the exercise of which carries with it special duties and responsibilities." UN Human Rights Committee, General Comment 11, Article 20 (Nineteenth session, 1983), Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, U.N. Doc. HRI\GEN\1\Rev.1 at 12 (1994). Although it is permissible under article 19 to enact laws against defamation, criminal penalties are strongly disfavored under international jurisprudence. Human Rights Watch's policy on hate speech treads a middle ground between US constitutional practice and article 20 of the ICCPR by accepting the criminalization of hate speech where there is a danger of inciting imminent violence, discrimination or hostility, with "hostility" understood to entail criminal harassment or intimidation.

some genuine prospect of incitement to genocide. Indeed, it may have been the increasing marginality of Holocaust deniers that made laws somewhat easier to propose and pass than in the immediate aftermath of WWII.

In 2006 France's legislature considered criminalizing denial of the Armenian genocide, but hardly because there was a live prospect of repetition, much less in France. Also in 2006, a Belgian cabinet minister proposed a denial law for the Rwandan genocide. It is safe to assume this was more likely a political gesture in view of Belgium's historical role in Rwanda than an admission that Belgium is a serious incubator of renewed violence against Tutsi.

Joel Simon, executive director of the Committee to Protect Journalists, describes a dynamic common to many African countries since the International Criminal Tribunal for Rwanda convicted individuals of inciting genocide over the radio. Political parties are often organized along ethnic or tribal lines; reporting on government failings ignites political protests; and the government then takes action against the media on the basis of "incitement to rebellion" or "incitement to hatred," citing the need to avert large-scale ethnic violence. This dynamic is particularly evident in Rwanda, where charges of "divisionism" or "negationism" (the latter, in essence, genocide-denial) are frequently launched against perceived government opponents and critics, including Rwanda's one independent newspaper, *Umuseso*.[23]

The potential of genocide denial laws for abuse should make us think hard about their rationale. In Rwanda the blood of genocide is barely dry and there would seem to be a more compelling case for outlawing genocide denial. And yet the government's use of genocide denial laws to stifle critics is cautionary. Prosecuting genocide denial to protect victims from insult or the genuine harm that denial of their suffering inflicts can easily be taken to extremes. And taken to extremes, such laws can create new means of persecution that could well stifle political and social debate and undermine pluralism. The criminalization of genocide denial seems more plausibly grounded in concerns over inciting violence or even genocide, and the evaluation of whether

[23] Joel Simon, "Hate Speech and Press Freedom in Africa" ("Simon Speech"), remarks at conference on "International Criminal Tribunals in the 21st Century," American University Washington College of Law, September 30, 2005, pp.1-2.

speech should be suppressed should take into account the likelihood of inciting criminal acts in the particular context.

Making genocide denial a crime of political correctness has rather obvious deleterious effects. It makes martyrs of cranks, as has been the case with Austria's conviction of David Irving, a Nazi apologist whose fade into obscurity was only halted by his trial in February 2006. It invites expansive interpretations of "denial" and "genocide" and the slide into new crimes of ideological deviance, as governments are often eager to rally support by tarring critics as threats to national security or human rights. And it cheapens the concept of genocide in the process, arguably making governments less willing to intervene or call the deliberate destruction of peoples by its true name.

That said, genocide denial, even when not amounting to incitement to a crime, is often a type of hate speech that inflicts serious harm, both to the group and to individual members. The state's duty regarding genocide denial does not begin and end with the criminal law. Above all, the state should recognize the crime of genocide where the evidence establishes it, and provide appropriate avenues of reparation and prevention, including positive acts of acknowledgment, education, and debate. Genocide deniers should be marginalized, and even subject to other forms of sanction where they cause real harm, but they should not be subject to incarceration except where their actions amount to incitement to violence. In this regard, it is notable that Australia allows those harmed by public expression of racial hatred to apply to the Human Rights and Equal Opportunity Commission for conciliation and relief, and generally reserves criminal sanction for acts of racial vilification that intentionally cause criminal menace or harassment.[24]

The state's duty to recognize genocide and similar mass crimes where they have been committed flows not only from the harm done to individual or group survivors through denial, but the harm done to humanity itself. Denial is a form of desecration of the dead, a violation of one of the most basic human norms. It brutalizes us, and facilitates repetition of atrocity. As a corollary to the duty to recognize and remember genocide and crimes against humanity, the state should not do so selectively, favoring

[24] Racial Vilification Law in Australia, Race Discrimination Unit, HREOC, October 2002, http://www.hreoc.gov.au/racial_discrimination/cyberracism/vilification.html#other.

some victims and ignoring or denying others. In this context, it is particularly reprehensible that some Turkish writers continue to be prosecuted for "insulting Turkishness" under article 301 of the criminal code when they probe into the mass killing of Armenians in 1915 or suggest that those actions might have been genocide.[25]

Technology as a Restraint: Internet Censorship and Surveillance

Access to information is integral to free expression: speech is an empty right if it means talking into a box rather than communicating and sharing information and ideas with others.[26] The internet, in this sense, is a powerful engine for free expression, creating global audiences and global sources of information, and it is understandable that states have sought to monitor and restrict it for both good reasons and bad. Privacy plays a less obvious, but equally important role in free expression in a democracy. The inability to choose one's audience or to seek ideas and information without monitoring, inhibits thought, speech, and association. And even for those not easily inhibited, surveillance is invasive. For that reason alone, privacy merits protection to ensure human dignity and integrity.[27]

The "war on terror" did not cause, but did exacerbate, the trend towards restriction of the internet and the proliferation of surveillance through modern technology. Governments that once invoked child pornographers as a good reason to censor internet publications shifted emphasis to terrorism as a rationale. Corporations became willing assistants in the fencing and filtering of access, even while justifying their cooperation with repressive governments in terms of expanding public access to information (and of course, their own access to markets). Surveillance and data collection grew exponentially, not only because developments in modern technology

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[25] Orhan Pamuk, a Nobel Prize-winning author, for example, was charged with this crime in December 2005 after saying in a newspaper that 30,000 Kurds and one million Ottoman Armenians were killed in Turkey yet nobody in the Turkish population would dare talk about it. The trial was dismissed by the Turkish Ministry of Justice at the beginning of 2006. The novelist Elif Shafak was also indicted under this provision but charges were dropped in September 2006. Daniel Dombey and Vincent Boland, "Why Turkey's long journey west is in jeopardy," *Financial Times,* November 7, 2006.

[26] Indeed, the guarantee of free speech in the International Covenant on Civil and Political Rights provides so explicitly. Article 19(2) states, "Everyone shall have the right to freedom of expression; this right shall include 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."

[27] The protection of privacy in international law is from "arbitrary" or "unlawful" interference. See International Covenant on Civil and Political Rights, art. 17, and General Comment 16 of the United Nations Human Rights Committee, interpreting these qualifiers.

made such practices more economically feasible, but also because security fears made them more politically palatable.

Some governments have been eager to grasp the internet as a tool for economic and educational development but are wary that losing control over information will also cause them to lose control over their population. A number of Middle Eastern governments have embraced the cause of improving public access to the internet, but at the same time use advanced filtering and surveillance technology to monitor online expression. Egypt, Tunisia, Iran, and Syria prosecute and imprison online writers for politically objectionable material, and these as well as many other countries in the Middle East block websites for political, human rights, or Islamist content in addition to pornography and gambling, and monitor internet cafes.

In 2005 Tunisia hosted the World Summit on the Information Society to showcase its commitment to internet access. What also fell into the global spotlight was the government's robust censorship, harassment, and prosecution of online critics for offenses such as false news, defamation, or terrorism, expansively defined and interpreted. Tunisia strictly controls internet service providers, regulates internet cafes, and uses filtering technology to block political, news, and human rights sites. It has cited counterterrorism and the need to curb incitement to hatred and violence as among its justifications for censoring information online. Yet tests that Human Rights Watch ran in September 2005 on 41 radical Islamist sites found only four blocked, and numerous sites relating to weapons manufacture and purchase were also readily available. In contrast, the website of Reporters Without Borders was blocked as were numerous opposition political and news sites, discrediting the government's justifications for censorship.[28]

The Great Firewall of China is a case of corporate collaboration in censorship. Press liberty has deteriorated since 2003 when President Hu Jintao took office, and the government has taken harsh steps to control and suppress peaceful political and religious dissent, including jailing journalists and bloggers. China operates the most sophisticated internet filtering and surveillance apparatus in the world, employing tens

[28] Human Rights Watch, *False Freedom: Online Censorship in the Middle East and North Africa*, vol. 17, no. 10(E), November 2005, http://hrw.org/reports/2005/mena1105/index.htm.

of thousands, but also relying on the active cooperation of major internet companies in proactive censorship. Yahoo! has provided user information to government authorities that enabled China to convict four government critics, and it has censored the results generated by its search engine to eliminate politically controversial terms and sites. Microsoft and Google also proactively censor their Chinese search engines, in anticipation of what the government would require them to block.

Censorship has not always been transparent, with companies sometimes providing minimal notice that results have been filtered, but no indication of what is missing or why. Skype also censored text-chats, but without notifying users that it was doing so.[29] Pressure is on internet companies to create a voluntary code of conduct to guide their dealings with governments that do not respect freedom of expression or information. It is unlikely, however, that this alone will avert a "race to the bottom" in human rights standards without government regulation to put the brakes on proactive censorship and the lack of transparency.

While China is probably the most advanced in filtering and monitoring its slice of the internet, it is hardly alone. China has exported its technology to censor and monitor electronic communications to Robert Mugabe's government in Zimbabwe. Other governments are trying to reproduce China's success in fencing in cyberspace and purging it of unwanted ideas, among them Iran, Yemen, Vietnam, and Tunisia. Burma monitors emails and uses software in internet cafes that records what is displayed on the screen every five minutes, while Uzbekistan fines cafe surfers for accessing banned political sites.[30]

As important as it is to free speech, the internet is only one arena for burgeoning state surveillance. The US requires telephone companies to have a surveillance capability, and has pressed for internet voice telephony to have surveillance capability embedded into the service as well.[31] In most jurisdictions, governments

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[29] See Human Rights Watch, *Race to the Bottom: Corporate Complicity in Chinese Internet Censorship*, vol. 18, no. 8(C), August 2006, http://www.hrw.org/reports/2006/china0806/index.htm.

[30] Reporters Without Borders, The Internet Black Holes, "Burma," undated, http://www.rsf.org/int_blackholes_en.php3?id_mot=86&annee=2006&Valider=OK, and "Uzbekistan," undated, http://www.rsf.org/int_blackholes_en.php3?id_mot=105&annee=2005.

[31] Electronic Privacy Information Center, "Internet Telephony," undated, http://www.epic.org/privacy/voip/.

have easy access to both telephone traffic data and internet traffic data as collected by internet service providers, in distinction to the substantive content of calls, which usually requires judicial warrant. Internet traffic data, however, gives far more information than telephone traffic data—for example, websites and pages visited, chat partners, searches—enabling the monitor to create a thorough profile of individuals. EU nations have sometimes considered whether to require retention of electronic communications records for a period of time so that they may be searched, a measure the US supports.[32] Governments are creating enormous databases of personal information in many other ways (from data collected during travel, corporate records, national identity documents) that can be shared. These days, the person standing on the soapbox in Hyde Park is likely to be preserved by the government on film; London has one of the highest densities of public surveillance cameras in the world. Many are unaware of this surveillance explosion, which is likely to continue and deepen as technological ability to track people improves. But when surveillance pierces the consciousness, as the intensive monitoring of Muslim charities has in the US, it can have a profoundly intimidating effect.[33]

Assessing the Erosion

Cataloguing, even anecdotally, the many encroachments on free expression since 9/11 is a little like writing about global warming. The danger is real, catastrophic, accelerating, and yet almost invisible. So many things are going on at so many levels we fail to see the interconnections.

Among the interconnections is the chill that one instance of censorship throws upon other speakers (as, for example, in the selective prosecution of reporters) but also the pall that violations of related rights throw onto free expression. When it is unsafe to assemble, it is usually unsafe to speak as well, or even to express one's identity in other ways. When the internet is monitored, blogging becomes unsafe, and freedom of opinion and information suffer. And the repression of speech can swiftly lead to other rights violations, as when a controversial speaker is first arrested, imprisoned, and then tortured, or when candid messages on preventing AIDS through condoms

[32] "US Data Access Proposal Shows Need for More Protection, EU Official Says," *Communications Daily*, May 15, 2000.

[33] Neil Macfarquhar, "Fears of inquiry dampen giving by U.S. Muslims," *New York Times,* October 30, 2006.

and safe sex are banned, leading to more cases of risky sex, and ultimately more preventable deaths from the disease. Had the White House and Pentagon managed to suppress all photographs of Abu Ghraib, it is difficult to imagine that the issue of torture and permissible interrogation techniques would have received the Congressional or global attention it did.

National security anxiety also connects many of the new developments. Security has justified restrictions on what electronic information may be accessed, what headgear or facial hair can be worn, what scholars may be invited to speak, what political arguments can be voiced, and what newspapers will dare to publish. And this is no new phenomenon.

In 1995 a group of eminent scholars met in Johannesburg to consider the relation between national security and freedom of expression. The resulting Johannesburg Principles are often invoked as reflecting the best practices of many domestic jurisdictions. They define as a "legitimate" national security interest only those interests whose genuine purpose and demonstrable effect is to protect a country's existence or its territorial integrity against the use or threat of force, or its capacity to respond to the use or threat of force. Protecting the state against embarrassment, industrial unrest, exposure of wrongdoing, ideological deviance, or muckraking are not interests that can justify censorship.[34]

Our fragmented perspective on the problem is reinforced by the infrequency with which most people encounter new restrictions or perceive them. We do not suffer bullets or subpoenas, we are not accused of glorification of terrorism or hate speech, and we are mostly unaware of internet censorship or most forms of surveillance. That is, unless we are Muslims in Europe, Islamists in Egypt, journalists in Sudan, rights advocates in Uzbekistan, democracy activists in Vietnam, or Uighurs in China. Members of these targeted groups experience the full cumulative force of many forms of restriction and are painfully aware of the narrowing space they have for expression.

[34] The Johannesburg Principles on National Security, Freedom of Expression and Access to Information, adopted October 1, 1995, U.N. Doc. E/CN.4/1996/39 (1996), principle 2.

How can the rest of us be less like the frog placed in a pot on a stove that eventually boils to death because it fails to notice the gradual rise in the temperature? There is not just one practice to protest and reverse but a myriad of them, with each contributing to a new and more illiberal world.

One precept that has stood the test of time is, do not unto others as you would not have them do unto you. This works fairly well as a pocket "rule of engagement" to test our reactions. It is clarifying on the issue of torture to imagine how we would want our own troops treated as prisoners. Similarly, when evaluating concepts such as defamation of religion, we should imagine our co-religionists on trial for blaspheming another faith.

Another precept is that criminal penalties should be reserved for criminal actions and not for insults or falsehoods, however hurtful. Blasphemy laws should be repealed. There are other means to rectify many of the harms associated with hate speech than loss of liberty. A corollary is insisting on rigorous justification for each restriction of speech, with scrutiny of the magnitude and immediacy of the threats it presents, rather than opting for a categorical approach that lumps art along with incitement, debate with criminal demagoguery.

A third precept is that governments should cultivate a sense of global responsibility in policy. They should be mindful of how their own well-intentioned but restrictive laws and practices can take on a life of their own domestically, when different groups are perceived as threatening, pressure to censor spreads, or zealous prosecutors target types of expression not originally contemplated. Moreover, laws and policies that tread the margins of free expression can also wreak damage internationally, when removed from their domestic context and held up as a template by states that wish to justify crackdowns on critics or disfavored minority groups. Taking responsibility for policy also means not shifting blame—to unregulated corporations, answerable only for profits, or to multilateral fora, where broad mandates to combat support for terrorism can be translated domestically into laws that significantly encroach on free expression.

It is possible to repair the damage already done, but doing so will require a wide-angle perspective and a better appreciation that these days, silencing dissent in one group invariably imperils expression—and myriad other rights—worldwide.

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