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Increasing International Legal Protections for Freedom of Expression

Alan Wehbé

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Cover Page Footnote

Mr. Wehbé serves as an Operations Attorney in the United States Department of Justice, National Security Division's Office of Intelligence and as a Judge Advocate in the United States Army Reserve, Judge Advocate General's Corps, where he serves as an adjunct faculty member for the International and Operational Law Department, The Judge Advocate General's Legal Center and School. While on active duty as a Judge Advocate, Mr. Wehbé served as the legal advisor to a Military Transition Team during Operation Iraqi Freedom, embedded in and advising the Iraqi Army's 6th Division's legal advisers and lawyers in Baghdad, Iraq. Mr. Wehbé holds a LL.M. in National Security and U.S. Foreign Relations Law from The George Washington University Law School; a J.D. from Villanova Law School; a M.A. in Education from Michigan State University; a M.B.A. from Villanova Business School; and a B.A. from Boston College. The opinions and conclusions expressed herein are solely those of the author. They do not necessarily reflect the views of the Attorney General of the United States, the United States Department of Justice, the Judge Advocate General of the Army, the Department of the Army, or any other government agency.

**INCREASING INTERNATIONAL LEGAL PROTECTIONS FOR
FREEDOM OF EXPRESSION**

ALAN WEHBÉ*

INTRODUCTION	45
A. <i>BACKGROUND</i>	46
B. <i>A NOTE ON FREEDOM OF EXPRESSIONS IN THE UNITED STATES</i>	48
I. INTERNATIONAL LEGAL PROTECTION FOR FREEDOM OF EXPRESSION	50
A. <i>THE UNIVERSAL DECLARATION OF HUMAN RIGHTS—1948</i>	50
B. <i>INTERNATIONAL COVENANT ON THE ELIMINATION OF ALL FORMS OF RACIAL DISCRIMINATION—1965</i>	51
C. <i>INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS—1966</i>	52
D. <i>ICCPR GENERAL COMMENT NO. 10: FREEDOM OF EXPRESSION—1983</i> ...53	
E. <i>REPORT OF THE SPECIAL RAPPORTEUR ON THE PROMOTION AND PROTECTION OF THE RIGHT TO FREEDOM OF OPINION AND EXPRESSION— 2000</i>	53
F. <i>THE DECLARATION OF PRINCIPLES ON FREEDOM OF EXPRESSION IN AFRICA—2002</i>	54
G. <i>AMSTERDAM RECOMMENDATIONS—2003</i>	55
II. ANALYSIS	56
A. <i>SYRIAN ARAB REPUBLIC CASE STUDY</i>	56
B. <i>TENSION WITH OCCUPATIONAL LAW</i>	57
C. <i>INTERNATIONAL COOPERATION IN SUPPORT OF FREEDOM OF EXPRESSION</i>	58
D. <i>A NOTE ON POTENTIAL HARMS OF FREEDOM OF SPEECH</i>	58
III. RECOMMENDATIONS	59
A. <i>A MULTI-LATERAL TREATY ON FREEDOM OF EXPRESSION</i>	59
B. <i>U.S. STATE PRACTICE</i>	60
CONCLUSION.....	61

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INTRODUCTION

*We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness. That to secure these rights, Governments are instituted among Men, deriving their just powers from the consent of the governed*¹

May 13, 2008 (Baghdad, Iraq): The Iraqi Army assembled its military legal advisors at the Baghdad Military Court, located on an Iraqi military base in Baghdad, for an Iraqi Military Justice conference. Military legal advisors, military judges, and the Ministry of Defense General Counsel attended the conference, as well as a U.S. Army Judge advocate and the local press (which led to the interpreter not staying at the conference for his personal safety). During the animated discussion about the Iraqi Code of Military Justice (ICMJ), an Iraqi Colonel (legal advisor to one of the Iraqi Army Divisions) made the point that they should remove the prohibition on alcohol in the ICMJ, claiming that it was put there by the Coalition Forces as something that they (the Coalition Forces) thought that the Iraqi military wanted.² There was a clear perception in the room that the Iraqis' collective voice was not heard in crafting the new ICMJ. Regardless of the accuracy of that perception, it raised the question about whether international law had sufficiently protected the Iraqi people in crafting the new ICMJ as a compartment of the broader experience of the developing government of Iraq.³ The question can extend to all new, developing, or redeveloping nations. Freedom of expression is a key factor in giving the perception that the nation (with international influencers) has been founded (or re-founded) on the will of the people it aims to govern.⁴

The Unanimous Declaration of the Thirteen United States of America (Declaration of Independence) memorialized the resolve of our nation's forefathers and the birth of the United States of America.⁵ Interestingly, the drafters wrote that Governments "deriv[e] their just powers from the consent of

¹ THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

² Alan Wehbé, OIF Journal 88–89 (May 13, 2008) (unpublished journal) (on file with author).

³ The governance of Iraq has evolved time and time again over millennia, specifically including recent events surrounding the rise and potential decline of terrorist groups in the region. *See, e.g., About Iraq: Iraq Government*, IRAQI RESEARCH FOUND. FOR ANALYSIS & DEV., <http://www.irfad.org/iraq-government/> (last visited Nov. 9, 2017); Jason Burke, *Rise and Fall of Isis: Its Dream of a Caliphate is Over, So What Now?*, GUARDIAN (Oct. 21, 2017), <https://www.theguardian.com/world/2017/oct/21/isis-caliphate-islamic-state-raqqa-iraq-islamist>.

⁴ Ibrahim J. Gassama, *Ballots and Bullets: The Right to Democratic Governance in International Law After the Egyptian Coup*, 32 WIS. INT'L L.J. 621 (2014) (generally supporting the concept that freedom of expression is one of the integral freedoms to establishing democratic government post-coup); Nsongurua J. Udombana, *Articulating the Right to Democratic Governance in Africa*, 24 MICH. J. INT'L L. 1209 (2003) (arguing for importance of freedom of expression in nation building in Africa). *But cf.* Susan Gibson, *The Misplaced Reliance on Free and Fair Elections in Nation Building: The Role of Constitutional Democracy and the Rule of Law*, 21 HOUS. J. INT'L L. 1, 21–25 (1998) (arguing, in part, that free and fair elections are not an integral part of Nation Building).

⁵ *See generally* THE DECLARATION OF INDEPENDENCE.

the governed.”⁶ The logical question followed, how is a government to know that it has the “consent of the governed?”⁷ By listening to the governed. Further, the governed can make their collective will known through open or public expression. However, international law currently appears to allow for censorship (or fails to sufficiently protect freedom of expression) at times when such expression is most vital in developing governments that can hope to have the “consent of the governed,” such as allowing for an occupying power to censor occupied territory during belligerent occupation.⁸ This article will go on to discuss other examples of insufficient protection for freedom of expression in international law and propose multilateral treaties and encourage consistent United States state practice.⁹

A. BACKGROUND

*Basic freedoms of expression and association are on the decline around the world, the United States said Friday in a report that warned of worsening conditions for opposition groups and human rights activists. . . . Corruption, use of torture and discrimination against minorities have gotten worse in some parts of the world, the report said.*¹⁰

The freedom of expression is a cherished freedom in the United States, enshrined in the First Amendment to the Constitution.¹¹ Freedom of expression is also a recognized and vital freedom internationally, as outlined in numerous international treaties, covenants, and scholarly works, some of which are examined below.¹² However, aspirational declarations in support of the freedom of expression do not sufficiently protect expression globally.¹³ According to Freedom House (an independent watchdog organization),¹⁴ “[w]ith populist and nationalist forces making significant gains in democratic states, 2016 marked the 11th consecutive year of decline in global freedom.”¹⁵ Freedom House also noted that, “[t]here were setbacks in political rights, civil liberties, or both, in a number of countries rated ‘Free’ by the report, including Brazil, the Czech Republic, Denmark, France, Hungary, Poland, Serbia, South Africa, South

⁶ *Id.* para. 2.

⁷ *Id.*

⁸ See generally Geneva Convention Relative to the Protection of Civilian Persons in Time of War art. 64, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287 [hereinafter GC IV].

⁹ See *infra* Section IV.

¹⁰ Josh Lederman, *US Says Free Expression, Association on Decline Worldwide*, ASSOCIATED PRESS (Mar. 3, 2017), <https://www.apnews.com/7c44f2d0f86f42a994e30070a3d5d813>.

¹¹ U.S. CONST. amend. I; see also *Palko v. Connecticut*, 302 U.S. 319, 326–27 (1937) (overruled on other grounds) (“This is true, for illustration, of freedom of thought and speech. Of that freedom one may say that it is the matrix, the indispensable condition, of nearly every other form of freedom.”).

¹² See *infra* Section II.

¹³ *Id.*

¹⁴ According to their website, “Freedom House is an independent watchdog organization dedicated to the expansion of freedom and democracy around the world.” *About Us*, FREEDOM HOUSE, <https://freedomhouse.org/about-us> (last visited Mar. 18, 2017).

¹⁵ *Freedom in the World 2017, Key Findings*, FREEDOM HOUSE, <https://freedomhouse.org/report/freedom-world/freedom-world-2017> (last visited Mar. 18, 2017).

Korea, Spain, Tunisia, and the United States.”¹⁶ The authors of the introductory overview essay for the Freedom in the World 2017 Report¹⁷ added:

All of these developments point to a growing danger that the international order of the past quarter-century—rooted in the principles of democracy, human rights, and the rule of law—will give way to a world in which individual leaders and nations pursue their own narrow interests without meaningful constraints, and without regard for the shared benefits of global peace, freedom, and prosperity.¹⁸

Freedom House’s findings pointed to many troubling conclusions, such as ten-year score declines (out of 100 possible points) of 30 in the Central African Republic, 28 in Turkey, and 17 in Venezuela.¹⁹ Further, nine countries—Syria (-1), Eritrea (3), North Korea (3), Uzbekistan (3), South Sudan (4), Turkmenistan (4), Somalia (5), Sudan (6), and Equatorial Guinea (8)—had an aggregate score of less than 10.²⁰ Conversely, only three countries scored a perfect 100—Finland, Norway, and Sweden—and (perhaps) shockingly, the United States ranked tied for fiftieth with a score of 89.²¹ Nonetheless, Freedom House found that the “United States has a free, diverse, and constitutionally protected press,” a welcome finding for those with affinity for the First Amendment and its historical and legal protections for freedom of expression generally and freedom of the press specifically.²²

Asserting that freedom of expression is vital to generating “consent of the governed,” this article makes the case for increased international legal protection of freedom of expression for the purpose of encouraging the creation, development, and growth of free governments.²³ Section II will provide a background survey of international legal protections for freedom of expression. Section III considers the context for these protections by identifying their application specifically in the context of emergent or re-emergent governments. Finally, Section IV will outline proposals for international law, including proposed multilateral treaty and state practice(s) to achieve the desired protection of freedom of expression globally.

¹⁶ *Id.*

¹⁷ See generally FREEDOM HOUSE, FREEDOM IN THE WORLD 2017 (2017), https://freedomhouse.org/sites/default/files/FH_FIW_2017_Report_Final.pdf.

¹⁸ Arch Puddington & Tyler Roylance, *Populists and Autocrats: The Dual Threat to Global Democracy*, in FREEDOM HOUSE, *supra* note 17, at 1.

¹⁹ *Id.* at 10. Freedom House’s scoring methodology is based upon assessing specific factors identified in the Universal Declaration of Human Rights and assigning subjective scores to each. Methodology, *id.* at 2. See generally G.A. Res. 217 (III) A, Universal Declaration of Human Rights (Dec. 10, 1948) [hereinafter UDHR].

²⁰ *Regional Trends*, in FREEDOM HOUSE, *supra* note 17, at 11, 16.

²¹ *Freedom of the World 2017 Scores*, in FREEDOM HOUSE, *supra* note 17, at 20, 21–24.

²² *Freedom in the World 2018, United States*, FREEDOM HOUSE, <https://freedomhouse.org/report/freedom-world/2018/united-states> (last visited Mar. 30, 2018). See generally U.S. CONST. amend. I.

²³ THE DECLARATION OF INDEPENDENCE para. 2.

B. A NOTE ON FREEDOM OF EXPRESSIONS IN THE UNITED STATES

The First Amendment, which protects freedom of expression, is a cherished and oft written about legal maxim in the United States.²⁴ Although “[t]he concept of an individual right to free speech dates back at least to Athens and the writings of Plato and Euripides,” the United States was not the first to incorporate free speech into its bill of rights.²⁵ In fact, France did so in 1789 prior to the United States’ adoption of the Bill of Rights in 1791.²⁶ As early as 1925, the United States Supreme Court noted that, “freedom of speech and of the press—which are protected by the First Amendment from abridgment by Congress—are among the fundamental personal rights and ‘liberties’ protected by the due process clause of the Fourteenth Amendment from impairment by the States.”²⁷ Further, as one author described, “[t]he First Amendment has been called the most ‘charismatic’ provision of the United States Constitution by one eminent scholar and has been enshrined in our cultural morality in a way no other law has been.”²⁸ Still, freedom of expression in the United States did not enjoy a flawless arrival and growth in American jurisprudence.²⁹ Another scholar noted that the “[f]reedom of expression often lost out in the years between 1870 and 1929.”³⁰ While the First Amendment’s protection on freedom of expression is cherished, it is not absolute.³¹ In 1951, the Supreme Court noted as much while considering the Government’s power to restrict speech to prevent rebellion stating, “[w]hatever theoretical merit there may be to the argument that

²⁴ See, e.g., Thomas I. Emerson, *Toward a General Theory of the First Amendment*, 72 YALE L.J. 877 (1963) (suggesting an unsatisfactory development of first amendment doctrine); Elisabeth Zoller, *The United States Supreme Court and the Freedom of Expression*, 84 IND. L.J. 885 (2009) (historical discussion of the Supreme Court’s consideration of freedom of expression). But see, e.g., Zaharah R. Markoe, Note, *Expressing Oneself Without a Constitution: The Israeli Story*, 8 CARDOZO J. INT’L & COMP. L. 319 (2000) (a discussion of the Israeli history of freedom of expression).

²⁵ William Magnuson, *The Responsibility to Protect and the Decline of Sovereignty: Free Speech Protection Under International Law*, 43 VAND. J. TRANSNAT’L L. 255, 276–77 (2010).

²⁶ *Id.* (noting that in The Declaration of the Rights of Man and the Citizen, written in 1789, “the National Assembly of France declared that ‘the free communication of ideas and opinions is one of the most precious of the rights of man.’”).

²⁷ *Gitlow v. New York*, 268 U.S. 652, 666 (1925).

²⁸ John F. Wirenius, *The Road to Brandenburg: A Look at the Evolving Understanding of the First Amendment*, 43 DRAKE L. REV. 1, 2 (1994) (citing Jamie Kalven, *Introduction to HARRY KALVEN, A WORTHY TRADITION* xii (1988) (quoting the late Harry Kalven, Jr.)).

²⁹ See generally Michael Kent Curtis, *The Fraying Fabric of Freedom: Crisis and Criminal Law in Struggles for Democracy and Freedom of Expression*, 44 TEX. TECH L. REV. 89 (2011) (discussing the history of the freedom of expression in the United States); see also Emerson, *supra* note 24.

³⁰ Curtis, *supra* note 29, at 114.

³¹ See, e.g., Robert Firester & Kendall T. Jones, *Catchin’ the Heat of the Beat: First Amendment Analysis of Music Claimed to Incite Violent Behavior*, 20 LOY. L.A. ENT. L. REV. 1 (2000) (discussing lyrics claimed to fall outside of protection of first amendment due to incitement); Michael J. Mannheimer, *The Fighting Words Doctrine*, 93 COLUM. L. REV. 1527 (1993) (generally discussing fighting words doctrine); David A. J. Richards, *Free Speech and Obscenity Law: Toward a Moral Theory of the First Amendment*, 123 U. PA. L. REV. 45 (1974) (discussing obscenity doctrine generally); Eugene Volokh, Comment, *Amicus Curiae Brief: Boundaries of the First Amendment’s “False Statement of Facts” Exception*, 6 STAN. J. CIV. RTS. & CIV. LIBERTIES 343 (2010) (discussing false statement of fact doctrine); Linda Friedlieb, Comment, *The Epitome of an Insult: A Constitutional Approach to Designated Fighting Words*, 72 U. CHI. L. REV. 385 (2005) (discussing the fighting words doctrine); Case Comment, *First Amendment – Free Speech – Second Circuit Affirms Threat Conviction in Internet Speech Case – United States v. Turner*, 720 F.3d 411 (2d Cir. 2013), 127 HARV. L. REV. 2585 (2014) (generally discussing the 2d Circuit’s ruling in an incitement case).

there is a ‘right’ to rebellion against dictatorial governments is without force where the existing structure of the government provides for peaceful and orderly change.”³² The implicit acknowledgement inherent in this statement is the concept that a peaceful public discourse—particularly towards governmental or regime change—is protected by the First Amendment.³³

Not only is this freedom cherished, it is also central to having a free government for the people.³⁴ While there is dispute as to the intent of the framers in drafting the First Amendment, one scholar noted that the most popular theory appears to be “the marketplace of ideas model, which, according to Justice Holmes, recognizes that the greatest test of truth ‘is the power of the thought to get itself accepted in the competition of the market.’”³⁵ Furthermore, in a 1940 decision, Justice Murphy noted that:

[t]he safeguarding of these rights to the ends that men may speak as they think on matters vital to them and that falsehoods may be exposed through the processes of education and discussion is essential to free government. Those who won our independence had confidence in the power of free and fearless reasoning and communication of ideas to discover and spread political and economic truth. Noxious doctrines in those fields may be refuted and their evil averted by the courageous exercise of the right of free discussion. Abridgment of freedom of speech and of the press, however, impairs those opportunities for public education that are essential to effective exercise of the power of correcting error through the processes of popular government.³⁶

Justice Murphy’s statement called forth the importance of freedom of expression in self-correcting a free government—importance which extends with global reach, particularly to emergent or post-conflict governments.³⁷

³² *Dennis v. United States*, 341 U.S. 494, 501 (1951).

³³ *Id.* Compare Santiago A. Canton, *The Role of the OAS Special Rapporteur for Freedom of Expression in Promoting Democracy in the Americas*, 56 U. MIAMI L. REV. 307 (2002) (discussing importance of freedom of expression in developing democracy), with Tatyana Beschastna, Comment, *Freedom of Expression in Russia as it Relates to Criticism of the Government*, 27 EMORY INT’L L. REV. 1105 (2013) (discussing the decline in protections for freedom of expression in Russia).

³⁴ See generally Jack M. Balkin, *Cultural Democracy and the First Amendment*, 110 NW. U. L. REV. 1053 (2016) (stressing the virtue of freedom of speech in cultural power); Thomas I. Emerson, *Colonial Intentions and Current Realities of the First Amendment*, 125 U. PA. L. REV. 737 (1977) (discussing historical provenance of the First Amendment); Irwin P. Stotzky, *The Indispensable State*, 58 U. MIAMI L. REV. 201 (2003) (arguing for importance of freedom of expression in a free society).

³⁵ Eric John Nies, *The Fiery Cross: Virginia v. Black, History, and the First Amendment*, 50 S.D. L. REV. 182, 184 (2005) (quoting *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting)).

³⁶ *Thornhill v. Alabama*, 310 U.S. 88, 95 (1940).

³⁷ *Id.*

I. INTERNATIONAL LEGAL PROTECTION FOR FREEDOM OF EXPRESSION

International law provides numerous recitations, declarations, and agreements on freedom of expression.³⁸ While the Universal Declaration of Human Rights (UDHR) may be the primary recitation of the international community's understanding of appropriate protections for the freedom of expression, it is not the sole authority in the field.³⁹ A broad analysis of how international law comes about is beyond the scope of this discussion; however, it bears acknowledgment of the two main types of international law: conventional and customary.⁴⁰ A functional definition of conventional international law provides that "[c]onventional international law is found in conventions, treaties, and similar negotiated agreements between and among States as well as agreements between States and other international actors (like the United Nations or NATO), and it is binding on the parties to such agreements."⁴¹ There are a number of sources of conventional international law for the protection of freedom of expression, some of which will be discussed below.⁴² The second primary type of international law is customary international law, which a scholar has noted "exists whenever two key requirements are met: (1) a relatively uniform and consistent state practice regarding a particular matter; and (2) a belief among states that such practice is legally compelled."⁴³ A more robust discussion of sources of international law is beyond the scope of this article, but a case will be made to encourage State practice consistent with the promotion of the freedom of expression.⁴⁴ More germane to the discussion herein, the following are some sources of international law or norms with regard to freedom of expression.

A. *THE UNIVERSAL DECLARATION OF HUMAN RIGHTS—1948*

The International Bill of Human Rights—comprised of a resolution adopted by the United Nations General Assembly, and two international covenants: the UDHR; the International Covenant on Civil and Political Rights; and the International Covenant of Economic, Social and Cultural Rights)⁴⁵—explicitly

³⁸ See, e.g., UDHR, *supra* note 19.

³⁹ *Id.* art. 19; see also Adam Roberts, *Transformative Military Occupation: Applying the Laws of War and Human Rights*, 100 AM. J. INT'L L. 580, 589 (2006) (stating that the UDHR, "did not take the form of a legally binding instrument, and it does not contain the normal machinery whereby states can become party to it. Rather, it commands the status of an authoritative guide to the relevant parts of the UN Charter.").

⁴⁰ See generally SEAN D. MURPHY, *PRINCIPLES OF INTERNATIONAL LAW* (2006).

⁴¹ Jay Alan Sekulow & Robert Weston Ash, *An Unlawful Overreach: Trying Nationals of Non-Consenting, Non-Party States Before the International Criminal Court*, 26 FLA. J. INT'L L. 1, 4 (2014) (citing Vienna Convention on the Law of Treaties art. 26, May 23, 1969, 1155 U.N.T.S. 331).

⁴² See *infra* Sections II(A)–II(G).

⁴³ MURPHY, *supra* note 40, at 78.

⁴⁴ See generally *id.* at 65–108 (discussing the formation of international law).

⁴⁵ Fact Sheet No. 2 (Rev. 1), The International Bill of Rights, U.N. Office of the High Comm'r for Human Rights (June 1996), <http://www.ohchr.org/Documents/Publications/FactSheet2Rev.1en.pdf>.

acknowledges the freedom of expression.⁴⁶ “Although [the UDHR] technically non-binding as a source of international law, the Universal Declaration was intended to serve as a common standard of achievement to which all states should aspire.”⁴⁷ In fact, one scholar noted that “[s]tate representatives hoped that one day it would become binding law.”⁴⁸ Perhaps that time has come. Further, as discussed in the Freedom in the World 2017 Report, the UDHR is one metric by which international organizations have considered the desired protections of human rights worldwide.⁴⁹

The UDHR’s preamble declares, “[w]hereas disregard and contempt for human rights have resulted in barbarous acts which have outraged the conscience of mankind, and the advent of a world in which human beings shall enjoy freedom of speech and belief and freedom from fear and want has been proclaimed as the highest aspiration of the common people”⁵⁰ The freedom of expression is specifically addressed at Article 19: “Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers.”⁵¹

The importance of the freedom of expression is further underscored by another document included in the International Bill of Human Rights: The International Covenant on Civil and Political Rights (ICCPR). According to the ICCPR, “Everyone shall have the right to freedom of expression.”⁵² Article 40 of the ICCPR requires that states party to the ICCPR “undertake to submit reports on the measures they have adopted which give effect to the rights recognized herein and on the progress made in the enjoyment of those rights” within a year of the ICCPR taking force and then subsequently when requested.⁵³ A broader discussion of some such reports appears below in Section II(D).⁵⁴

B. INTERNATIONAL COVENANT ON THE ELIMINATION OF ALL FORMS OF RACIAL DISCRIMINATION—1965

The International Covenant on the Elimination of All Forms of Racial Discrimination (ICERD) was adopted and opened for signature on December 21, 1965, and entered into force on January 4, 1969.⁵⁵ According to the United Nations Office of the High Commissioner for Human Rights (OHCHR), the ICERD has 178 countries party, five countries signatory, and fourteen with no

⁴⁶ See UDHR, *supra* note 19; International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 U.N.T.S. 171 [hereinafter ICCPR].

⁴⁷ Elizabeth F. Defeis, *Freedom of Speech and International Norms: A Response to Hate Speech*, 29 STAN. J. INT’L L. 57, 76 (1992).

⁴⁸ Tai-Heng Cheng, *The Universal Declaration of Human Rights at Sixty: Is it Still Right for the United States?*, 41 CORNELL INT’L L.J. 251, 252 (2008) (citation omitted).

⁴⁹ Puddington & Roylance, *supra* note 18, at 2.

⁵⁰ UDHR, *supra* note 19, pmb1.

⁵¹ *Id.* art. 19.

⁵² ICCPR, *supra* note 46, art. 19.

⁵³ *Id.* art. 40.

⁵⁴ See *infra* Section II(D).

⁵⁵ International Covenant on the Elimination of All Forms of Racial Discrimination, Dec. 21, 1965, 660 U.N.T.S. 195 [hereinafter ICERD].

action.⁵⁶ Interestingly, and in contrast with the findings of the Freedom in the World 2017 Report, Syria, Eritrea, Somalia and the Sudan are party to the ICERD despite their poor scores.⁵⁷ This reflects what will become a recurring theme in the pages to follow, specifically that aspirational declarations generally do not result in effective or actual protection of the freedom of expression.⁵⁸ Further, Article 5 of the ICERD require “States Parties [to] undertake to prohibit and to eliminate racial discrimination in all its forms and to guarantee the right . . . notably in the enjoyment of the following rights . . . the right to the freedom of expression.”⁵⁹

C. INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS—1966

The ICCPR was adopted and opened for signature in 1966, then entered into force on March 23, 1976.⁶⁰ According to the United Nations OHCHR, the ICCPR has 169 countries party, six countries signatory, and twenty-two with no action.⁶¹ Interestingly, and in contrast with the findings of the Freedom in the World 2017 Report, Syria, Eritrea, Somalia and the Sudan are party to the ICCPR, their dismal scores notwithstanding.⁶² Article 19 of the ICCPR addresses the freedom of expression:

1. Everyone shall have the right to hold opinions without interference.
2. 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.
3. The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:
 - (a) For respect of the rights or reputations of others;

⁵⁶ *Status of Ratification*, U.N. OFFICE OF THE HIGH COMM’R FOR HUMAN RIGHTS, <http://indicators.ohchr.org/> (select “International Convention on the Elimination of All Forms of Racial Discrimination” from drop down menu) (last visited Mar. 8, 2017).

⁵⁷ *Id.*; *Regional Trends*, *supra* note 20.

⁵⁸ *See infra* Sections III(C)–III(G).

⁵⁹ ICERD, *supra* note 55, art. 5(d)(viii).

⁶⁰ ICCPR, *supra* note 46.

⁶¹ *Status of Ratification*, U.N. OFFICE OF THE HIGH COMM’R FOR HUMAN RIGHTS, <http://indicators.ohchr.org/> (select “International Covenant on Civil and Political Rights” from drop down menu) (last visited Mar. 8, 2017).

⁶² *Id.*; *Regional Trends*, *supra* note 20.

(b) For the protection of national security or of public order (order public), or of public health or morals.⁶³

Interestingly, the first and second clauses are nearly identical to Article 19 of the UDHR.⁶⁴ However, the ICCPR has additional provisions in clause 3, which may allow for abuse by individual states. Specifically, the allowance that the right to freedom of expression may be “subject to certain restrictions.”⁶⁵

D. ICCPR GENERAL COMMENT NO. 10: FREEDOM OF EXPRESSION—1983

General Comment No. 10 is a note from the OHCHR⁶⁶ regarding the implementation of the rights recognized by Article 19 (Freedom of Expression) of the ICCPR.⁶⁷ State parties are required by Article 40 to “submit reports on measures they have adopted which give effect to the rights recognized.”⁶⁸ In General Comment No. 10, the High Commissioner identified two concerns with the States’ reports.⁶⁹ The first point deals with the States’ control of media, and the impact on the freedom of expression. As noted, the ICCPR allows for States to restrict the freedom of expression, but only in defined ways dealing with “respect for the rights and reputations of others . . . national security . . . [and] public order.”⁷⁰ Since “[n]ot all States parties have provided information concerning all aspects of the freedom of expression,” it is difficult to evaluate the effectuation of the right.⁷¹ The Commissioner’s second concern was that States have certain constitutional or legal protections for the freedom of expression, but such statements, without additional information, did not provide the Commissioner with an effective way to determine the “actual scope of the individual’s right.”⁷² Finally, in General Comment No. 10 the Commissioner noted that the right to restrict freedom of expression under Article 19 of the ICCPR “carries with it special duties and responsibilities,” but such restrictions “may not put in jeopardy the right itself.”⁷³

E. REPORT OF THE SPECIAL RAPPORTEUR ON THE PROMOTION AND PROTECTION OF THE RIGHT TO FREEDOM OF OPINION AND EXPRESSION—2000

In 1999, the United Nations Commission on Human Rights issued resolution 1999/36, directing the Special Rapporteur on the Promotion and

⁶³ ICCPR, *supra* note 46, art. 19.

⁶⁴ Compare *id.*, with UDHR, *supra* note 19, art. 19.

⁶⁵ ICCPR, *supra* note 46, art. 19.

⁶⁶ The OHCHR “represents the world’s commitment to universal ideals of human dignity. [It has] a unique mandate from the international community to promote and protect all human rights.” *About Us*, U.N. HUMAN RIGHTS, OFFICE OF THE HIGH COMMISSIONER, <http://www.ohchr.org/EN/AboutUs/Pages/WhoWeAre.aspx> (last visited Mar. 26, 2017).

⁶⁷ U.N. Office of the High Comm’r for Human Rights, General Comment No. 10: Freedom of Expression (art. 19), U.N. Doc. 29/06/1983 (1983) [hereinafter General Comment No. 10].

⁶⁸ ICCPR, *supra* note 46, art. 40.

⁶⁹ General Comment No. 10, *supra* note 67.

⁷⁰ ICCPR, *supra* note 46, art. 19.

⁷¹ General Comment No. 10, *supra* note 67, para. 2.

⁷² *Id.* para. 3.

⁷³ *Id.*

Protection of the Right to Freedom of Opinion and Expression, Mr. Abid Hussain, to present a report on the Promotion and Protection of the Right to Freedom of Opinion and Expression.⁷⁴ The report presented information on the Special Rapporteur's activities in assessing the promotion and protection of, among other things, the freedom of expression.⁷⁵ The Special Rapporteur visited numerous countries (while requesting to visit several more) in collecting these findings.⁷⁶ In the executive summary, the Special Rapporteur noted "the right to freedom of opinion and expression is violated regularly in States with widely different political and institutional frameworks," and encouraged Governments to ratify the ICCPR, and amend laws that "may be used to infringe article 19 of the Universal Declaration of Human Rights."⁷⁷ Mr. Husain also noted issues related to States' suppression or infringement of the freedom of expression on the internet and based upon gender.⁷⁸ While these generalities may be sobering enough, the Special Rapporteur reported five concerning categorical trends of governments infringing upon freedom of expression: negatively characterizing expression as treasonous,⁷⁹ legal action or prosecution,⁸⁰ repressive measures against the press,⁸¹ harm to media personnel,⁸² and actions against academic freedom.⁸³ In this report, the Special Rapporteur also included a catchall section that discussed other additional concerns.⁸⁴ The Special Rapporteur added that part of the right to freedom of expression consists of the right for the people obtain "information that is rightly theirs" and "decisions of Governments, and the implementation of policies by public institutions, have a direct and often immediate impact on their lives and may not be undertaken without their informed consent."⁸⁵ The Special Rapporteur's findings will be further discussed below, including in Section III(A), discussing Syria.⁸⁶

F. *THE DECLARATION OF PRINCIPLES ON FREEDOM OF EXPRESSION IN AFRICA—2002*

Unfortunately, the Special Rapporteur's Report does not stand alone as the only report expressing similar concerns. In 2002, the African Commission on Human and Peoples' Rights (ACHPR) issued the Resolution on the Adoption of the Declaration of Principles on Freedom of Expression in Africa (ACHPR Resolution), reaffirming the "fundamental importance of freedom of expression" and expressing "concern[s] at the violations of these rights by States

⁷⁴ Abid Hussain (Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression), *Report of the Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression*, 4, U.N. Doc. E/CN.4/2000/63 (Jan. 18, 2000) [hereinafter *Special Rapporteur's Report*].

⁷⁵ *Id.*

⁷⁶ *Id.*

⁷⁷ *Id.* at 4–5.

⁷⁸ *Id.* at 5.

⁷⁹ *Id.* para. 26, at 11.

⁸⁰ *Id.* paras. 27–29, at 11–12.

⁸¹ *Id.* paras. 30–31, at 12.

⁸² *Id.* paras. 32–36, at 12–13.

⁸³ *Id.* paras. 37–38, at 13–14.

⁸⁴ *Id.* paras. 39–41, at 14.

⁸⁵ *Id.* para. 43, at 15.

⁸⁶ See *infra* Section III(A).

Party to the [Freedom of Expression and the African] Charter.”⁸⁷ The ACHPR Resolution reflected the ACHPR’s stated concern and led to the adoption of the “Declaration of Principles on Freedom of Expression in Africa” (Declaration of Principles).⁸⁸

The Declaration of Principles addresses the ACHPR’s concerns by reaffirming Article 9 of the African Charter on Human and Peoples’ Rights (the Banjul Charter),⁸⁹ which recognized two rights—the right to receive information and, “the right to express and disseminate his opinions within the law.”⁹⁰ The Declaration of Principles also referenced the freedom of expression provisions of the UDHR, ICCPR, and the Banjul Charter generally.⁹¹ Uniquely, the Declaration of Principles also identified the importance of the freedom of expression to African culture and identified oral traditions as of particular note.⁹² The Declaration of Principles described the freedom of expression as “a fundamental and inalienable human right and an indispensable component of democracy.”⁹³ Furthermore, it declared that “[a]ny restrictions on freedom of expression shall be provided by law, serve a legitimate interest and be necessary and in a democratic society.”⁹⁴

G. AMSTERDAM RECOMMENDATIONS—2003

The Organization for Security and Co-operation in Europe (OSCE) published the Amsterdam Recommendations on Freedom of the Media and the Internet (Amsterdam Recommendations) in 2003.⁹⁵ The Amsterdam recommendations reflected a recent application in support of the freedom of expression with regard to contemporaneously methods of expression, i.e. the internet.⁹⁶ The preamble immediately set the tone in support of the freedom of expression by stating “the basic constitutional value of freedom of the media must not be questioned.”⁹⁷ The Amsterdam Recommendations went on to propose a number of measures related to numerous topics, including freedom of expression⁹⁸ Interestingly, the first recommendation under freedom of expression noted that there is a balance between the free flow of information and “misusing the Internet,” therefore the illegal content must prosecute in the

⁸⁷ Afr. Comm’n on Human & Peoples’ Rights, Resolution on the Adoption of the Declaration of Principles on Freedom of Expression in Africa (2002), ACHPR Doc. Res.62 (XXXII) 02 (Oct. 23, 2002) [hereinafter ACHPR Resolution].

⁸⁸ Afr. Comm’n on Human & Peoples’ Rights Res. ACHPR/62(XXXII)02, Declaration of Principles on Freedom of Expression in Africa (Oct. 23, 2002) [hereinafter Declaration of Principles].

⁸⁹ *Id.* See generally African (Banjul) Charter on Human and Peoples’ Rights, June 27, 1981, OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982) [hereinafter Banjul Charter].

⁹⁰ Banjul Charter, *supra* note 89, art. 9.

⁹¹ Declaration of Principles, *supra* note 88, pmb. See generally UDHR, *supra* note 19; ICCPR, *supra* note 46; *Banjul Charter*, *supra* note 89.

⁹² Declaration of Principles, *supra* note 88, pmb.

⁹³ *Id.* art. I.

⁹⁴ *Id.* art. II.

⁹⁵ OSCE Conference on Freedom of Media and the Internet, *Amsterdam Recommendations* (June 14, 2003) [hereinafter *Amsterdam Recommendations*].

⁹⁶ See *id.*

⁹⁷ *Id.* pmb.

⁹⁸ See *id.*

content's country of origin.⁹⁹ The Amsterdam Recommendations went on to state that "[t]he right to disseminate and to receive information is a basic human right," and "new forms of censorship must not be developed."¹⁰⁰

II. ANALYSIS

As a preliminary matter, it is important to have international legal protections for the freedom of expression, which are vital to freedom worldwide.¹⁰¹ The examples provided in Section II highlighted a broad agreement in the fundamental nature and importance of the freedom of expression.¹⁰² However, the Freedom in the World 2017 Report, Special Rapporteur's Report, and ACHPR Resolution have each identified some troubling trends with regard to the human rights implications of a lack of freedom of expression.¹⁰³ One scholar, in pondering the need of international human rights law, noted "[n]ational law and national judiciaries do not always effectively protect human rights, either because of the absence of adequate national laws or because of the ineffective protection and enforcement of national laws by judiciaries and/or executive powers."¹⁰⁴ In order to articulate the importance of the recommendations below, this section will examine the case of Syria briefly, the international framework of occupation law, and the importance of freedom of expression in emergent governments. These examples will illustrate that—whether by flaccid international legal strictures or a simple lack of international action—freedom of expression does not have sufficient global protection.¹⁰⁵

A. SYRIAN ARAB REPUBLIC CASE STUDY

To show the need for international protections on the freedom of expression, a brief case study is helpful. The Syrian Arab Republic (Syria) has been in the

⁹⁹ *Id.*

¹⁰⁰ *Id.*

¹⁰¹ See generally Marc O. DeGirolami, *Virtue, Freedom, and the First Amendment*, 91 NOTRE DAME L. REV. 1465 (2016) (discussing tension between freedom of expression and free society); James E. Fleming, *Securing Deliberative Democracy*, 72 FORDHAM L. REV. 1435 (2004) (discussing clash between free speech and equal protection from government); Marcus C. Johnson, *Let Freedom Reign*, 53 RUTGERS L. REV. 485 (2001) (discussing importance of freedom of expression in preventing tyranny); Blake D. Morant, *Democracy, Choice, and the Importance of Voice in Contemporary Media*, 53 DEPAUL L. REV. 943 (2004) (discussing importance of a robust press in a democratic society); Harry H. Wellington, *On Freedom of Expression*, 88 YALE L.J. 1105 (1979) (discussing a theory of freedom of expression and liberty).

¹⁰² See *supra* Section II.

¹⁰³ *Regional Trend*, *supra* note 20; *Special Rapporteur's Report*, *supra* note 74; Declaration of Principles, *supra* note 88.

¹⁰⁴ Filip Spagnoli, *The Globalization of Human Rights Law: Why Do Human Rights Need International Law?*, 14 TEX. WESLEYAN L. REV. 317, 318 (2008)(citations omitted).

¹⁰⁵ See, e.g., ICCPR, *supra* note 46, art. 19 (stating that freedom of expression is "subject to certain restrictions").

news for myriad reasons related to the ongoing war.¹⁰⁶ Freedom House has given Syria a negative one aggregate score and a designation of “Not Free” in the Freedom in the World 2017 Report.¹⁰⁷ The United States Department of State’s Country Report on Human Rights Practices for 2016 on Syria (Syria Country Report) noted, “[g]overnment authorities rigorously denied citizens the right to a fair public trial and the ability to exercise civil liberties and freedoms of expression, movement, peaceful assembly, and association.”¹⁰⁸ The Syrian Country Report specifically reported, “The government routinely characterized expression as illegal, and individuals could not criticize the government publicly or privately without fear of reprisal. The government also stifled criticism by invoking penal code articles prohibiting acts or speech inciting sectarianism. It monitored political meetings and relied on informer networks.”¹⁰⁹ The Department of State also noted that Syria imposed restrictions on academic freedom, prohibiting teachers from expressing “ideas contrary to government policy.”¹¹⁰ Without context, these shortcomings would certainly be troubling. However, to further confound the issue, the U.N. OHCHR’s website indicated that Syria has ratified numerous human rights instruments (a total of eleven of the eighteen instruments tracked by the OHCHR), including the ICERD, ICCPR.¹¹¹ These findings underscore the importance of international consensus on freedom of expression as well as international support for freedom of expression in individual countries. As demonstrated herein, simply ratifying aspirational instruments is insufficient to result in sufficient legal or moral protection for freedom of expression at the national level.

B. TENSION WITH OCCUPATIONAL LAW

The international law on occupation has provisions allowing infringement on the freedom of expression that create tension with full respect for this freedom. This corner of international law is particularly important in the current discussion, since the formation of government has often occurred under occupation in occupied territory.¹¹² For example, Article 64 of the Geneva Convention Relative to the Protection of Civilian Persons in Time of War (GC IV) permits an occupying power to repeal or suspend penal laws of occupied

¹⁰⁶ Oren Liebermann, *Israel Threatens to Destroy Syrian Air Defenses*, CNN (Mar. 19, 2017), <http://cnn.it/2no1IPm>; Jonathan Marcus, *Syria Conflict: Unraveling the Puzzle*, BBC NEWS (Mar. 16, 2017), <http://www.bbc.com/news/world-middle-east-39284722>; Tom O’Connor, *Syria at War: As U.S. Bombs Rebels, Russia Strikes ISIS and Israel Targets Assad*, NEWSWEEK (Mar. 17, 2017), <http://www.newsweek.com/syria-war-us-rebels-russia-isis-israel-569812>.

¹⁰⁷ *Freedom of the World 2017 Scores*, *supra* note 21, at 23.

¹⁰⁸ BUREAU OF DEMOCRACY, U.S. DEP’T STATE, SYRIA 2016 HUMAN RIGHTS REPORT 2–3 (2016) [hereinafter Syria Country Report], <https://www.state.gov/documents/organization/265732.pdf>.

¹⁰⁹ *Id.* at 28.

¹¹⁰ *Id.* at 32.

¹¹¹ *Status of Ratification*, U.N. OFFICE OF THE HIGH COMM’R FOR HUMAN RIGHTS, <http://indicators.ohchr.org/> (select “Syrian Arab Republic” from sidebar) (last visited Mar. 8, 2017).

¹¹² See, e.g., Gregory H. Fox, *The Occupation of Iraq*, 36 GEO. J. INT’L L. 195 (2005) (discussing the formation of a new Iraqi government post-conflict); Youngjin Jung, *In Pursuit of Reconstructing Iraq: Does Self-Determination Matter?*, 33 DENV. J. INT’L L. & POL’Y 391 (2005) (arguing that a country’s right to self-determination is an important factor in developing a post-occupation government); Peter Wallensteen, *Global Patterns of Conflict and the Role of Third Parties*, 67 NOTRE DAME L. REV. 1409 (1992) (considering “state formation conflicts” and other ways governments develop).

territory for security of the occupying power.¹¹³ Although Article 70 stated that “[p]rotected persons shall not be arrested, prosecuted or convicted by the Occupying Power for acts committed or for opinions expressed before the occupation, or during a temporary interruption thereof,” GC IV has no prohibition on arresting or prosecuting protected persons (i.e. civilian citizens of occupied territory generally), for opinions expressed during the occupation.¹¹⁴ In fact, United States’ policy on this matter is arguably clear: “[t]he belligerent occupant may establish censorship of the press, radio, theater, motion pictures, and television, of correspondence, and of all other means of communication. It may prohibit entirely the publication of newspapers or prescribe regulations for their publication and circulation.”¹¹⁵ This is noteworthy because of the importance of the freedom of expression outlined above in the United States and the international legal framework.¹¹⁶

C. INTERNATIONAL COOPERATION IN SUPPORT OF FREEDOM OF EXPRESSION

International cooperation is vital in the promotion of the freedom of expression in light of the many challenges already discussed.¹¹⁷ One scholar has noted, “ideally human rights protection should be a national matter, but in an imperfect world, with failing national protection, international human rights protection is a necessary alternative.”¹¹⁸ The international community is positioned to pressure or encourage individual nations, such as Syria, to hold true to the ideals with which they have already expressed international agreement by way of treaties or conventions. However, only individual nations can protect their citizens’ freedom of expression.

D. A NOTE ON POTENTIAL HARMS OF FREEDOM OF SPEECH

Thus far, the discussion has remained blissfully devoid of any discussion of the potential harms of the freedom of expression, but that is not to say there are none. As one commentator noted, “[f]ree speech does do harm. It does a lot of harm. And while it may produce social good much of the time, there’s no guarantee—no ‘invisible hand’ of the intellectual market—that ensures that on balance it does more good than harm.”¹¹⁹ An example of such harm may be the proliferation of “fake news.”¹²⁰ That said, “Repressing speech has costs, but so

¹¹³ GC IV, *supra* note 8, art. 64.

¹¹⁴ *Id.* art. 70.

¹¹⁵ DEP’T ARMY, FIELD MANUAL 27–10, THE LAW OF LAND WARFARE, para. 377 (July 18, 1956) [hereinafter FIELD MANUAL].

¹¹⁶ *See supra* Sections I–II.

¹¹⁷ *See supra* Sections I–III(B).

¹¹⁸ Spagnoli, *supra* note 104, at 317.

¹¹⁹ Garrett Epps, *Free Speech Isn’t Free*, ATLANTIC (Feb. 7, 2014), <https://www.theatlantic.com/politics/archive/2014/02/free-speech-isnt-free/283672/>.

¹²⁰ “Fake news” is used here to refer to information—either misleading or false—published under the guise of being a true account of actual events. *See also* Clifford A. Jones, *The Stephen Colbert Problem: The Media Exemption for Corporate Political Advocacy and the “Hail To The Cheese Stephen Colbert Nacho Cheese Doritos® 2008 Presidential Campaign Coverage”*, 19 U. FLA. J.L. & PUB. POL’Y 295 (2008); Melissa J. Sachs, *Manager of ‘Fake News Sites’ Liable for Deceiving Consumers*, 2nd Circuit Says, *FTC v. LeadClick Media*, 34 NO. 9 WESTLAW J. COMPUTER & INTERNET 2 (2016); Eugene Kiely

does allowing it. The only mature way to judge the system is to look at both sides of the ledger.”¹²¹ In so doing, one might reasonably conclude, as is asserted herein, that the interest of the governed is better served by free expression than not.¹²²

III. RECOMMENDATIONS

The above sections outline the international legal consensus that freedom of expression is a desirable aspiration. Just agreeing upon these is simply not enough to protect them the world over. Rather, the United States, and the international community need to continue to strive to push each other and support each other in that pursuit. Therefore, this article makes the following two recommendations: a proposed treaty specifically on the freedom of expression and encourages the United States (and other international leaders) to engage in official State practice consistent with these goals.

A. A MULTI-LATERAL TREATY ON FREEDOM OF EXPRESSION

The UDHR offers a worthy statement of the freedom of expression, many provisions of which have come to be considered customary international law.¹²³ However, the international community does not consistently pursue enforcement of Article 19 and the freedom of expression.¹²⁴ Additional covenants (the ICCPR and ICERD, for example), also do not provide specific enough binding support for the freedom of expression globally.¹²⁵ Therefore, a treaty is necessary that is binding upon the States and offers fundamental protections for freedom of expression as well as a mechanism of enforcement that is internationally recognized. One benefit of doing so is that, “[t]he act of ratifying the international law immediately incorporates the law into national law. International law can be directly applied by a national judge and can be directly invoked by citizens, just as if it were national law.”¹²⁶ The treaty must provide broad protections for the freedom of expression, possibly in simply making the articulation of freedom of expression within the UDHR, ICCPR, ICERD, or regional equivalent (such as the Banjul Convention) a matter of conventional

& Lori Robertson, *How to Spot Fake News*, FACTCHECK.ORG (Nov. 18, 2016), <http://www.factcheck.org/2016/11/how-to-spot-fake-news/>; Sapna Maheshwari, *How Fake News Goes Viral: A Case Study*, N.Y. TIMES (Nov. 20, 2016), <https://www.nytimes.com/2016/11/20/business/media/how-fake-news-spreads.html>.

¹²¹ Epps, *supra* note 119.

¹²² See, e.g., Randy E. Barnett, *Constitutional Legitimacy*, 103 COLUM. L. REV. 111 (2003); Jared L. Hausmann, *[Anarchy] Derived from the Consent of the Governed: Locke, Libertarianism, and American Popular Government*, 5 CHARLOTTE L. REV. 301 (2014); A. John Simmons, *Consent, Free Choice, and Democratic Government*, 18 GA. L. REV. 791 (1984).

¹²³ See UDHR, *supra* note 19. See, e.g., Hurst Hannum, *The UDHR in National and International Law*, 3 HEALTH & HUM. RTS. 144, 145 (1998).

¹²⁴ See, e.g., General Comment No. 10, *supra* note 67; Declaration of Principles, *supra* note 88.

¹²⁵ ICCPR, *supra* note 46; ICERD, *supra* note 55.

¹²⁶ Spagnoli, *supra* note 104, at 332.

international law and therefore binding nationally, as discussed above.¹²⁷ An enforcement mechanism is necessary, whether it be pursuant to actions of the United Nations Security Council, or the International Court of Justice, which would allow for States to be held accountable for broader infringements of the freedom of expression.¹²⁸

B. U.S. STATE PRACTICE

The United States is often viewed as a leader in the international community and international human rights.¹²⁹ As discussed above, customary international law “exists whenever two key requirements are met: (1) a relatively uniform and consistent state practice regarding a particular matter; and (2) a belief among states that such practice is legally compelled.”¹³⁰ Combining these two factors, it seems likely that United States’ action in this arena would likely impact the international legal environment for the better. One such example would be to reverse the United States’ position on censorship in occupation law.¹³¹ Specifically, a more nuanced approach to the freedom of expression in occupation law could arguably represent the United States’ practice of aggressively promoting the freedom of expression and bolster the argument that the freedom of expression is a fundamental right under customary international law. This argument is not intended to discourage the desire for a treaty on the subject, but rather to set the stage for both conventional international law in the field, as well as bolster the case for it to be customary international law. Having these protections as both conventional and customary international law would tend to increase pressure on countries such as Syria and decrease global infringement on the freedom of expression.

¹²⁷ UDHR, *supra* note 19; ICCPR, *supra* note 46; ICERD, *supra* note 55; Banjul Charter, *supra* note 89.

¹²⁸ See generally U.N. Charter; Statute of the International Court of Justice, June 26, 1945, 59 Stat. 1055, 33 U.N.T.S. 933; John F. Murphy, *Medellín v. Texas Implications of the Supreme Court's Decision for the United States and the Rule of Law in International Affairs*, 31 SUFFOLK TRANSNAT'L L. REV. 247, 251–52 (2008) (“Under dualism, international and domestic regimes are viewed as existing on separate planes and international and domestic law as ‘separate spheres of law, not hierarchically organized in any way.’ Domestic law applies in the international sphere only if international actors decide to incorporate it, and, conversely, international law applies in the domestic sphere only if domestic actors decide to incorporate it.” (citations omitted)).

¹²⁹ Mark R. Brawley, *Hegemonic Leadership: Is the Concept Still Useful?*, 19 CONN. J. INT'L L. 345, 345 (2004) (“This is curious because the United States currently wields unparalleled power in the international arena, at least militarily. If there was ever a time in modern history that a hegemonic power existed, it is now.”); Harold Hongju Koh, *On American Exceptionalism*, 55 STAN. L. REV. 1479 (2003); *United States Continues Global Leadership to Combat Illegal, Unreported, and Unregulated Fishing*, NAT'L OCEANIC & ATMOSPHERIC ADMIN. (Feb. 9, 2015), http://www.nmfs.noaa.gov/ia/slider_stories/2017/01/2017biennialreport.html; Barack Obama, *Renewing American Leadership*, FOREIGN AFFAIRS (July/Aug. 2007), <https://www.foreignaffairs.com/articles/2007-07-01/renewing-american-leadership>; *Examining America's Role in Global Affairs*, VOA (Oct. 31, 2009), <http://www.voanews.com/a/a-13-americasrole2006-06-08-voa60/315423.html>.

¹³⁰ MURPHY, *supra* note 40, at 78.

¹³¹ FIELD MANUAL, *supra* note 115.

CONCLUSION

The international community seems to largely agree on the fundamental nature of the freedom of expression.¹³² Even countries that do not seem, in practice, to respect the freedom of expression still tend to ratify, sign, or be party to international instruments to that end.¹³³ This duality tends to simplify the legal argument but complicate the actual practice for promoting freedom of expression worldwide. For those who agree that the United States is a leader in international affairs, a shift towards a more definitive State practice reinforcing the freedom of expression is an easy sell. For those who dispute whether the United States is such a leader, such a shift still provides additional evidence of State practice in support of the freedom of expression, which supports the argument that it is a canon of customary international law. However you view the problem, it seems that almost all of us can agree that increased protection of freedom of expression—in practice as well as in law—is more than just an aspiration. It is a fundamental right worthy of protection.

¹³² See UDHR, *supra* note 19; ICCPR, *supra* note 46; ICERD, *supra* note 55; *Amsterdam Recommendations*, *supra* note 95.

¹³³ See *supra* Section III(A).