Observations of the United States of America
on the Committee for the Elimination of Racial Discrimination's
Thematic Discussion on "Racist Hate Speech"

The United States Government appreciates the opportunity to provide these written comments to the Committee for the Elimination of Racial Discrimination's Thematic Discussion on "Racist Hate Speech." The United States of America is a State Party to the International Convention on the Elimination of All Forms of Racial Discrimination (CERD) and is profoundly committed to combating racial discrimination. The United States has struggled to eliminate racial discrimination throughout our history, from abolition of slavery to our civil rights movement. We are not at the end of the road toward equal justice but our nation is a far better and fairer place than it was in the past. The progress we have made, we have accomplished without banning speech or restricting freedom of expression. In light of this framework, the United States has long made clear its concerns over resorting to restrictions on freedom of expression, association, and assembly[1] in order to promote tolerance and respect. This concern includes the restrictions contained in Article 4 of the CERD to the extent that they might be interpreted as allowing or requiring restrictions on forms of expression that do not constitute incitement to imminent violence or acts of intimidation. Indeed, these concerns were so fundamental that the United States took a reservation, when it became a Party to the CERD, noting it would not accept any obligation that could limit the extensive protections for such fundamental freedoms guaranteed in the U.S. Constitution.[2]

Banning and punishing offensive and hateful speech is neither an effective approach to combating such intolerance, nor an appropriate role for government in seeking to promote respect for diversity. As President Obama stated in a speech delivered in Cairo, Egypt in June 2009, suppressing ideas never succeeds in making them go away. In fact to do so can be counterproductive and even raise the profile of such ideas. We believe the best antidote to offensive and hateful speech is constructive dialogue that counters and responds to such speech by refuting it through principled arguments, causing the hateful speech to fall under its own weight. In addition, we believe government should speak out against such offensive speech, and employ tools to address intolerance that include a combination of robust legal protections against discrimination and hate crimes, proactive government outreach, education, and the vigorous defense of human rights and fundamental freedoms, including freedom of expression. Accordingly, the United States has a strong interest in the subject of this hearing and shares the following views in the hopes that they will help shed light on the need to promote respect for

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[1] While the topic of banning hate speech directly involves the freedom of expression, it also implicates freedom of assembly and association. This Observation will focus on freedom of expression given the nature of the hearing.

[2] Other governments also have noted their concern about the protection of freedom of expression in the CERD. Some States Parties took explicit reservations while others have relied on the "due regard" provision of Article 4 and its reference to rights enshrined in the UN Declaration of Human Rights and in Article 5(d), including the rights to freedom of opinion and expression and the right to freedom of peaceful assembly and association, in order to protect broad protections for such fundamental freedoms. For example, the French reservation states: "With regard to article 4, France wishes to make it clear that it interprets the reference made therein to the principles of the Universal Declaration of Human Rights and to the rights set forth in article 5 of the Convention as releasing the States Parties from the obligation to enact anti-discrimination legislation which is incompatible with the freedoms of opinion and expression and of peaceful assembly and association guaranteed by those texts." The reservation by the Bahamas, Fiji, and other states notes that they interpret Article 4 as requiring a party to the Convention to adopt further legislative measures in the fields covered by subparagraphs (a), (b), and (c) of that article only in so far as it may consider with due regard to the principles embodied in the Universal Declaration set out in Article 5 of the Convention (in particular to freedom of opinion and expression and the right of freedom of peaceful assembly and association). Some 20 States Parties have taken similar reservations to the CERD which address protection of rights to freedom of expression. Available at http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-2&chapter=4&lang=en#21.

broad protections for freedoms of expression in the ongoing global struggle to combat racial discrimination.

Historical and Legal Framework Regarding Hate Speech within the United States

Our own history has taught us that curtailing freedom of expression by banning offensive and hateful speech is both a misguided and dangerous enterprise. The better course is to ensure that avenues of expression remain open – in order to expose, contradict, and drown out hateful speech in a marketplace of ideas. As Thomas Jefferson, the third President of the United States, wrote, "[w]e have nothing to fear from the demoralizing reasonings of some, if others are left free to demonstrate their errors and especially when the law stands ready to punish the first criminal acts produced by the false reasonings…." Offensive speech, in other words, will wither in the face of public scrutiny. Shortly after the birth of our nation, the United States Congress passed the Sedition Act, which made it a crime to publish "false, scandalous, and malicious writing" against the government with the intent to "excite against them … the hatred" of the people. The Sedition Act was used as a political tool to prosecute Americans for speaking out against their government. The Act quickly became unpopular and eventually expired, as we recognized that our young democracy needed dissent, not dictates, in order to survive.

In the first half of the nineteenth century, many states within the United States passed laws that made it illegal to criticize slavery. Those who spoke out against slavery in public or in their writing were punished as criminals, often severely. It was only through the efforts of abolitionists who courageously spread their message – and a bloody civil war – that we ended the horror of American slavery. In so doing, we reaffirmed our commitment to freedom of expression and the right to speak out against injustice. In the past 100 years, our Supreme Court has debated and adopted the notion that competition in ideas is a more appropriate way to address hateful speech than is government action to restrict expression. In 1974, the Court summarized this history, holding that "[h]owever pernicious an opinion may seem, we depend for its correction not on the conscience of judges and juries but on the competition of other ideas."[3]

Following in this vein, U.S. courts have upheld the rights of Neo-Nazis, Holocaust deniers, and members of white supremacist groups to march in public, distribute literature, and attempt to rally others to their cause. When such groups rally and spread their message of hate, more often than not their message of hate is drowned out by other voices standing up for equality and dignity. We have seen victims of the Holocaust join in legal actions to defend the rights of Nazis to demonstrate and then use their own freedom of expression to bring well deserved ridicule upon the Nazis. The Supreme Court has even ruled that burning an American flag – an act that repulses Americans of all political stripes – is protected under the First Amendment of the U.S. Constitution. We protect freedom of expression not only because it is enshrined in our Constitution as the law of the land, but also because our democracy depends on the free exchange of ideas and the ability to dissent. And we protect freedom of expression because the cost of stripping away individual rights is far greater than the cost of tolerating hateful words. We also have grave concerns about empowering governments to ban offensive speech and how such power could easily be misused to undermine democratic principles.

[3] U.S. Supreme Court opinion in *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974).

Alternatives to Restricting Freedom of Expression

In addressing the problems posed by hate speech, the United States believes that robust implementation of obligations to combat racial discrimination, while simultaneously protecting freedom of expression is essential. The CERD contains a number of fundamental and far-reaching obligations – particularly under Articles 2, 3, 5 and 6 – which, if fully implemented, serve as effective tools to comprehensively root out racial discrimination and promote tolerance. For example, Article 2 requires States Parties to "undertake to pursue by all appropriate means and without delay a policy of eliminating racial discrimination in all its forms and promoting understanding among all races." Article 3 requires States Parties to "prevent, prohibit and eradicate" racial segregation and apartheid and other practices of that nature. Article 5 requires States to guarantee equality before the law with respect to a broad range of civil, political, economic, social, and cultural rights. Article 6 requires the provision of effective protection and remedies. By contrast, restricting freedom of expression uniformly fails to achieve these goals. Given the consensus that surrounds such provisions in combating racial discrimination and their proven effectiveness, we would encourage the Committee to focus squarely on how rigorous implementation by States Parties of these non-controversial core obligations can effectively combat racist hate speech without resorting to inherently ineffective restrictions on freedom of expression.

In the United States, we believe the best way to combat intolerance and discrimination is to have a strong legal regime to deal with acts of discrimination and hate crimes, to proactively engage in outreach to affected communities, to speak out against intolerance, and to promote broad protections for freedom of expression. Our network of civil rights laws – forged through our own painful civil rights struggle – deters and punishes those who would undermine the ability of others to live free from discrimination and violence. Several federal statutes punish acts of violence or hostile acts motivated by racial, ethnic, or other hatred and intended to interfere with the participation of individuals in certain activities such as employment, housing, public accommodation, and use of public facilities. The U.S. Supreme Court has determined that bias-inspired criminal conduct may be singled out for especially severe punishment. The prosecution of hate crimes is only one element in a broader effort of community engagement and empowerment. The United States Government works with state and local entities to educate our young people through anti-bullying curricula and other educational programs aimed to eliminate hate among our nation's youth. Through these kinds of actions, the United States encourages communities and schools to address bigotry before it becomes fuel for violence. We also have active outreach programs in our communities, where federal, state, and local law enforcement officers work to build trust among different ethnic and racial groups, to understand sensitivities and break down stereotypes, and to increase dialogue. Finally, political leaders from the President down to state and local officials speak out about intolerance and condemn such acts when they do occur. Discrimination, bigotry, and hate have no place in our nation in 2012. We are committed not only to combating these problems, but also to working with communities to prevent them from occurring in the first place.

This combination of proactive outreach to communities and enforcement of anti-discrimination and hate crimes laws is our response to hateful speech. The alternative option – prohibiting

speech for its offensive content – not only sacrifices freedom of expression and its benefits, but forces hateful ideology to fester and find new fora in which to manifest itself. This is often counterproductive as it can highlight and magnify the offensive ideas. Showing fear of hateful ideas implies that they are powerful; ridiculing and rebutting them makes them less attractive.

The Committee's Focus Should Be on Effective Measures

We question whether it is the best use of this Committee's resources to embark on an in-depth process for addressing the topic of racist hate speech. We would encourage the Committee to consider focusing its efforts and sharing its expertise on effective measures States can take to combat and redress racial discrimination under the CERD rather than resorting to counterproductive restrictions on fundamental freedoms. For example, constructive dialogue regarding best practices on measures such as community outreach, tolerance campaigns, and enforcement of anti-discrimination and hate crime laws is more likely to root out the racial hatred that causes hate speech and better serve the needs of States Parties as they implement their obligations under the CERD. Moreover, we would encourage the Committee to avoid directing scarce resources to commencing a new debate on this issue when other bodies are actively seized of these same issues. For example, in Human Rights Council Resolution 16/18 (which has been endorsed by the UN General Assembly), UN Member States have decided to explore better ways to implement a large number of measures for addressing and combating intolerance and hate speech that do not involve broad bans on fundamental freedoms. Member States are meeting even outside of the UN system to pursue this dialogue and are reporting back the results to the Office of the High Commissioner for Human Rights (OHCHR). This approach should be given a chance to develop before the CERD Committee places more of its focus on the topic of hate speech. In addition, the OHCHR has conducted regional conferences on Article 20 of the International Covenant on Civil and Political Rights. The CERD Committee should allow that process to reach completion and for States to react to it before moving forward on more work relating to hate speech. An extensive CERD process in this area could be duplicative of other work at the UN and should be avoided.

We thank the Committee for its efforts and urge it to focus on sharing effective measures for eliminating racial discrimination which do not infringe on fundamental freedoms and which do not duplicate the work of other UN bodies.