SPECIAL PROCEDURES
UNITED NATIONS
HUMAN RIGHTS COUNCIL

Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, Ben Saul

Submission to the NSW Parliament Legislative Assembly Committee on Law and Safety – Inquiry into prohibiting slogans that incite hatred

12 January 2026

Introduction

1. The United Nations Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms while Countering Terrorism welcomes the opportunity to make a submission in this inquiry into the use of slogans that are directed at certain communities to intimidate those communities and instil fear of violence. **The submission focuses on the scope of permissible restrictions on the human right to freedom of expression under international human rights law, which is legally binding on all NSW public authorities.**

2. The mandate of the Special Rapporteur was established in 2005 by the United Nations Commission on Human Rights and has been continuously renewed by resolutions of the Human Rights Council. The Special Rapporteur is an independent expert mandated to address concerns about the impact of counter-terrorism measures on human rights. The current mandate holder is Professor Ben Saul. The Special Rapporteur is part of "[t]he system of Special Procedures" that "is a central element of the United Nations human rights machinery".[1] The Special Rapporteur is independent human rights expert selected for his "(a) expertise; (b) experience in the field of the mandate; (c) independence; (d) impartiality; (e) personal integrity; and (f) objectivity."[2] Special Rapporteurs "undertake to uphold independence, efficiency, competence and integrity through probity, impartiality, honesty and good faith" and "do not receive financial remuneration."[3]

3. In the performance of his mandate, the Special Rapporteur is considered an expert on mission within the meaning of Articles VI and VII of the Convention on the Privileges and Immunities of the United Nations, adopted by the United Nations General Assembly on 13 February 1946. In accordance with Article VI, Section 22, of the Convention, as United Nations experts on mission, Special Rapporteurs enjoy the privileges and immunities necessary for the independent exercise of their functions, including immunity from legal process in respect of words spoken or written and their acts in the performance of their mission. This submission is provided voluntarily, without prejudice to, and should not be considered or interpreted as a waiver, express or implied, of these privileges and immunities.

[1] https://www.ohchr.org/en/hrbodies/sp/pages/introduction.aspx.
[2] A/HRC/RES/5/1.
[3] OHCHR, *Special Procedures of the Human Rights Council.*

The human right to freedoms of opinion and expression

4. Article 19 of the International Covenant on Civil and Political Rights 1966, reflecting customary international law, guarantees the right to freedom of opinion and the right to freedom of expression, which includes the right "to seek, receive and impart information and ideas of all kinds, either orally, in writing or in print, in the form of art, or through any other media". This right applies online as well as offline and includes not only the exchange of information that is favourable but also that which may criticise, shock, or offend. Freedom of expression is not only an individual human right but is an essential underpinning of other human rights (including the right to participate in public affairs and freedoms of assembly and association) and of democracy itself.

5. In General Comment No. 34, which is regarded as an internationally authoritative interpretation of the article 19 of the ICCPR, the United Nations Human Rights Committee affirmed that States parties to the ICCPR are required to guarantee the right to freedom of expression, including "political discourse, commentary on one's own and on public affairs, canvassing, discussion of human rights, journalism, cultural and artistic expression, teaching, and religious discourse" (para. 11). The Committee further noted that States parties "shall put in place effective measures to protect against attacks aimed at silencing those who exercise their right to freedom of expression" (para. 23).

Restrictions on freedom of expression: articles 19(3) of the ICCPR

6. Any restriction on the right to freedom of expression must be compatible with the requirements set out in article 19(3) of the ICCPR. Restrictions must (i) be provided by law; (ii) pursue one of the legitimate aims for restriction, which are the respect of the rights or reputations of others and the protection of national security or of public order *(ordre public)*, or of public health or morals; and (iii) be necessary and proportionate for those objectives.

7. To be provided by law, a restriction must be formulated with sufficient precision to enable individuals to regulate their conduct accordingly, must not confer unfettered discretion, and must provide sufficient guidance to those charged with their execution to enable them to ascertain what sorts of expression are properly restricted and what sorts are not.[4] Any restriction on expression or information that a government seeks to justify on grounds of national security and counter-terrorism must have the genuine purpose and demonstrable effect of protecting a legitimate national security interest.

8. The State has the burden of proof to demonstrate that any restrictions are compatible with the Covenant, proving "in specific and individualized fashion the precise nature of the threat, and the necessity and proportionality of the specific action taken, in particular by establishing a direct and immediate connection between the expression and the threat".[5] Restrictions must not be overbroad, blanket or untargeted or go beyond the scope of harmful speech and rule out legitimate speech.[6] They must be proportionate in that the benefit to the protected interest outweighs the harm to freedom of expression, including in respect to the sanctions authorised.

[4] General Comment No. 34, para. 25.
[5] General Comment No. 34, para. 35.
[6] Camden Principles on Freedom of Expression and Equality 2009, principle 11.

9. A restriction must be "the least intrusive instrument among those which might achieve their protective function".[7] Criminal sanctions should also be seen as last resort measures to be applied only in strictly justifiable situations.[8]

10. In General Comment No. 34, the Human Rights Committee further noted that "[l]aws that penalize the expression of opinions about historical facts are incompatible" with freedom of expression, since the ICCPR "does not permit general prohibition of expressions of an erroneous opinion or an incorrect interpretation of past events."

Incitement to ethnic, racial or religious hatred: article 20 of the ICCPR

11. Article 20(2) of the ICCPR provides that: "Any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law." Restrictions on the basis of article 20(2) are additionally subject to the requirements of article 19(3), including legality, necessity and proportionality.[9] Article 20(2) requires a high threshold because, as a matter of fundamental principle, limitation of speech must remain an exception.[10]

12. Authoritative international guidance on the interpretation of article 20(2) is found in the 2012 Rabat Plan of Action on the prohibition of advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence.[11] Since overbroad definitions of terms such as hatred, hostility, advocacy and incitement can lead to arbitrary application, States should narrowly define them.[12] Specifically:

- '**hatred'** and '**hostility'** refer to intense and irrational emotions of opprobrium, enmity and detestation towards the target group;
- '**advocacy'** is to be understood as requiring an intention to promote hatred publicly towards the target group; and
- '**incitement'** refers to statements about national, racial or religious groups, which create an imminent risk of discrimination, hostility or violence against persons belonging to those groups. [13]

13. The Rabat Plan of Action recommends a six-part test for assessing whether expression constitutes criminal incitement to ethnic, racial or religious hatred:

(a) **Context**: Context is of great importance when assessing whether particular statements are likely to incite discrimination, hostility or violence against the target group, and it may have a direct bearing on both intent and/or causation. Analysis of the context should place the speech act within the social and political context prevalent at the time the speech was made and disseminated;

(b) **Speaker**: The speaker's position or status in the society should be considered, specifically the individual's or organization's standing in the context of the audience to whom the speech is directed;

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[7] General Comment No. 34, para. 34.
[8] A/HRC/22/17/Add.4, annex, para. 34.
[9] A/HRC/22/17/Add.4, annex, para. 18.
[10] Ibid.
[11] A/HRC/22/17/Add.4, annex, https://www.ohchr.org/en/freedom-of-expression.
[12] Ibid, para. 21.
[13] Camden Principles on Freedom of Expression and Equality 2009, principle 12.

(c) **Intent**: Article 20 of the ICCPR anticipates intent. Negligence and recklessness are not sufficient for an act to be an offence under article 20 of the Covenant, as this article provides for "advocacy" and "incitement" rather than the mere distribution or circulation of material. In this regard, it requires the activation of a triangular relationship between the object and subject of the speech act as well as the audience.

(d) **Content and form**: The content of the speech constitutes one of the key foci of the court's deliberations and is a critical element of incitement. Content analysis may include the degree to which the speech was provocative and direct, as well as the form, style, nature of arguments deployed in the speech or the balance struck between arguments deployed;

(e) **Extent of the speech**: Extent includes such elements as the reach of the speech act, its public nature, its magnitude and size of its audience. Other elements to consider include whether the speech is public, what means of dissemination are used, for example by a single leaflet or broadcast in the mainstream media or via the Internet, the frequency, the quantity and the extent of the communications, whether the audience had the means to act on the incitement, whether the statement (or work) is circulated in a restricted environment or widely accessible to the general public;

(f) **Likelihood, including imminence**: Incitement, by definition, is an inchoate crime. The action advocated through incitement speech does not have to be committed for said speech to amount to a crime. Nevertheless, some degree of risk of harm must be identified. It means that the courts will have to determine that there was a reasonable probability that the speech would succeed in inciting actual action against the target group, recognizing that such causation should be rather direct.

Considerations in the context of NSW

14. It follows from the foregoing that it will be seldom justified to legislate prospective, blanket bans on particular expressions, except in those relatively rare cases where the meaning of a phrase is unambiguously or intrinsically an incitement to violence or hatred (e.g. "Heil Hitler" or "kill Jews") and is not open to multiple interpretations including lawful meanings.

15. In most cases, including where it is suspected that an expression could constitute an indirect, disguised or coded incitement, it is necessary to examine expression on an individual basis, considering context, speaker, intent, content and form, extent of the speech and the likelihood and imminent of violence or harm resulting. This is particularly the case in Australia, which contextually is geographically distant from actual violence and conflict in Israel and Palestine.

16. **Expressions such as "from the river to the sea, Palestine will be free", and "globalise the intifada", are not intrinsically or objectively incitements to violence or hatred against Jews, although they could be in an individual cases, depending on the Rabat Plan factors. As such, a blanket legislative ban would violate Australia's human rights obligations, since it would be overbroad and preclude case-by-case, contextual assessment.**

17. In many cases, these statements appear to constitute lawful, legitimate expression relating to the political resolution of the Israel/Palestine dispute, including matters such the human right to self-determination and national liberation, independence and

statehood, opposition to and condemnation of Israel's violations of international humanitarian law and human rights law in the State of Palestine, and the international legal right to resist the forcible denial of statehood by a foreign State – a right recently affirmed by Judge Hilary Charlesworth in the International Court of Justice's 2024 advisory opinion on Israel's policies and practices in the Occupied Palestinian Territory.[14]

18. "Globalise the intifada" is commonly understood as a call for (peaceful) global solidarity and action to resist Israel's systemic violations of international law in Palestine, including through political and legal campaigns, protest, "boycott, divestment, sanctions" (BDS – previously adjudged by the European Court of Human Rights to constitute protected freedom of expression under the European Convention on Human Rights) and the like. It is clearly directed against Israel. There is little evidence that it is understood as a call to unlawful violence or hatred against Jews, whether generally or in Australia in particular. The UK's blanket prohibition on "globalise the intifada", far from representing best practice, is likely to lead to systemic violations of the human right to freedom of expression, in violation of the UK's international obligations.

19. In her recent report on "Global threats to freedom of expression arising from the conflict in Gaza", the Special Rapporteur on Freedom of Opinion and Expression, Ms. Irene Khan, emphasised that States must refrain from blanket prohibitions of demonstrations, slogans, symbols or other forms expression in support of the Palestinian people.[15] Any decision to prohibit such acts or expressions on the grounds of incitement must be done on a case-by-case basis, taking into account international legal standards under article 19(3) and 20(2) of the ICCPR as well as specific contextual and other factors, as articulated in the Rabat Plan of Action on the prohibition of advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence.[16] Further, in the light of the advisory opinion of the International Court of Justice of 2024, States should repeal – or refrain from adopting – laws and policies that penalize opposition to or impede advocacy against Israeli occupation and segregation, such as laws against the boycott, divest and sanctions movement.[17]

20. **It should be emphasised that concerns about "social harmony and cohesion" or "cultural safety" are not free-standing grounds for the restriction of freedom of expression under international law, let alone criminal liability, unless the strict requirements for restrictions are met under article 19(3) and article 20(2).** Freedom of expression protects speech that shocks, offends or disturbs. There is no right to be protected from criticism of a foreign State or its policies or other subjectively disagreeable messages that one may not wish to hear.

Incitement to terrorist violence

21. Restrictions on expression to prevent incitement to terrorism must likewise satisfy the requirements of article 19(3) of the ICCPR. Best practice international guidance has

[14] International Court of Justice, *Legal Consequences arising from the Policies and Practices of Israel in the Occupied Palestinian Territory, including East Jerusalem*, *Advisory Opinion*, 19 July 2024, General List No. 186, Declaration of Judge Charlesworth, para. 23.
[15] A/79/319.
[16] Ibid, para. 93.
[17] Ibid, para. 94.

been provided by the former Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms while Countering Terrorism, Professor Martin Scheinin. Thus, any offence of incitement to terrorism:

(a) must be limited to the incitement to conduct that is truly terrorist in nature, as properly defined according to best practice international standards;

(b) must restrict the freedom of expression no more than is necessary for the protection of national security, public order and safety or public health or morals;

(c) must be prescribed by law in precise language, including by avoiding reference to vague terms such as "glorifying" or "promoting" terrorism;

(d) must include an actual (objective) risk that the act incited will be committed;

(e) should expressly refer to two elements of intent, namely intent to communicate a message and intent that this message incite the commission of a terrorist act; and

(f) should preserve the application of legal defences or principles leading to the exclusion of criminal liability by referring to "unlawful" incitement to terrorism.[18]

22. Paragraphs (d)-(e) are particularly relevant. Again, there is no basis to enact prospective bans on particular expressions which carry multiple meanings; an assessment must be made on a case-by-case basis in context.

Discrimination on the basis of political opinion and/or nationality

23. Article 2 of the ICCPR prohibits discrimination, including on the basis of political opinion and nationality. In her report on "Global threats to freedom of expression arising from the conflict in Gaza", the Special Rapporteur on Freedom of Opinion and Expression noted that "the most fundamental principle of human rights – that all persons have an equal right to enjoy all human rights – has been endangered by an extensive pattern of unlawful, discriminatory and disproportionate restrictions and repression of freedom of expression, primarily of Palestinian activists and their supporters in Western Europe and North America".[19] She noted that restrictions may only be imposed on the basis of article 19(3) and 20(2) of the ICCPR, with full respect for the obligation of non-discrimination.[20]

24. Blanket bans on particular expressions which are not intrinsically or objectively incitements to violence or hatred, but carry multiple meanings including lawful and legitimate ones, may have directly or indirectly discriminatory effects on the basis of political opinion and/or nationality, by penalizing pro-Palestinian expression or other criticism of Israel.

25. Restrictions on expression that are discriminatory, or are otherwise unnecessary or disproportionate in pursuit of a legitimate aim, are themselves sources of division that undermine "social cohesion" by silencing legitimate dissent and criticism and undermining pluralism, inclusion and political participation in a democracy.

[18] A/HRC/16/51, para. 31. See also A/HRC/40/52, para. 37.
[19] A/79/319, paras. 83 and 85.
[20] Ibid, para. 92.

Non-legislative measures

26. Legislation, and particularly criminal law, alone cannot prevent incitement and hatred or manufacture social cohesion. After terrorist attacks, legislators in many countries are tempted to rush through new laws that overreach, are unjustified, violate human rights, and even have counter-productive security effects. They are frequently not based on evidence, including objective data about the prevalence of particular threat. While a legal response is important, legislation is only part of a larger toolbox to respond to the challenges of hate speech.[21]

27. Cultural change must also be driven by education, training of law enforcement, public messaging and ethical conduct by members of political parties, promoting pluralism and diversity of the media, stronger media self-regulation, empowerment of marginalised voices, and systematic collection of data in relation to incitement to hatred offences to enable evidence based responses.[22] States, media and society have a collective responsibility to ensure that acts of incitement to hatred are spoken out against and acted upon with the appropriate measures, in accordance with international human rights law.

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[21] A/HRC/22/17/Add.4, annex, para. 35.
[22] See e.g. ibid, paras 42-48, 57-58.