PROTECTING RELIGIONS FROM "DEFAMATION": A THREAT TO UNIVERSAL HUMAN RIGHTS STANDARDS

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INTRODUCTION[1]

Over the past decade, countries from the Organization of the Islamic Conference (OIC) have been working through the United Nations system to advance the problematic idea that there should be laws against the so-called "defamation of religions."[2] Although touted as a solution to the very real problems of religious persecution and discrimination, the OIC-sponsored U.N. resolutions on religious defamation instead provide justification for governments to restrict religious freedom and free expression. They also provide international legitimacy for existing national laws that punish blasphemy or otherwise ban criticism of a religion, which often have resulted in gross human rights violations.[3]

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1. The Authors adapted this Essay from a USCIRF Policy Focus prepared by the Authors. *See* U.S. COMM'N ON INT'L RELIGIOUS FREEDOM, POLICY FOCUS: THE DANGEROUS IDEA OF PROTECTING RELIGIONS FROM "DEFAMATION": A THREAT TO UNIVERSAL HUMAN RIGHTS STANDARDS: UPDATE FALL 2010 (2010) *available at* http://www.uscirf.gov/images/stories/PDFs/ PolicyFocus_ USCIRF_final.pdf.

2. U.S. COMM'N ON INT'L RELIGIOUS FREEDOM, ANNUAL REPORT OF THE UNITED STATES COMMISSION ON INTERNATIONAL RELIGIOUS FREEDOM : MAY 2009, at 229 (2009) [hereinafter USCIRF 2009 ANNUAL REPORT] *available at* http://www.uscirf.gov/ images/final%20ar2009 %20with%20cover.pdf.

3. *Id.*

These resolutions deviate sharply from universal human rights standards by seeking to protect religious institutions and interpretations, rather than individuals, and could help create a new international anti-blasphemy norm.

Since 2008, support at the U.N. for these flawed resolutions has been declining.[4] In fact, in 2010 defamation of religions resolutions received the fewest yes votes and the most no votes ever cast on this issue in both the U.N. Human Rights Council and the U.N. General Assembly, coming within, respectively, four[5] and thirteen votes of defeat.[6] This trend is encouraging. The United States and other U.N. member states that make protecting individual human rights an important objective should now redouble their efforts finally to defeat the defamation of religions resolution at the March 2011 Human Rights Council session.

In addition to seeking a new norm through these resolutions, OIC countries have argued in various U.N. contexts that existing international standards prohibiting advocacy of hatred and incitement already outlaw defamation of religions.[7] The provisions on which they rely—Article 20 of the International Covenant on Civil and Political Rights (ICCPR) and Article 4 of the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD)—provide only limited exceptions to the fundamental freedoms of expression and religion.[8] These provisions were intended to protect individuals from violence or discrimination, not to protect religious institutions or ideas from criticism.[9] They should not be expanded to cover alleged religiously defamatory speech. Such an expansion—which unfortunately may have gained support from new language on negative religious stereotyping and incitement in a fall 2009 U.N. Human Rights Council freedom of expression resolution—would undermine international human rights guarantees, including the free-

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4. U.S. COMM'N ON INT'L RELIGIOUS FREEDOM, ANNUAL REPORT OF THE UNITED STATES COMMISSION ON INTERNATIONAL RELIGIOUS FREEDOM: MAY 2010, at 336 (2010) [hereinafter USCIRF 2010 ANNUAL REPORT] *available at* http://www.uscirf.gov/images/annual%20report %202010.pdf.

5. *Id.* at 336 & n.21.

6. Louis Charbonneau, *Support for UN Vote Against Defaming Religion Wanes*, REUTERS, Nov. 23, 2010, *available at* http://www.reuters.com/article/2010/11/23/religion-un-idUSN2317181720101123.

7. USCIRF 2009 ANNUAL REPORT, *supra* note 2, at 229.

8. *Id.* at 229–30.

9. *Id.* at 230.

dom of thought, conscience, and religion. It would also undermine the institutions that protect universal human rights worldwide.

I. ANALYSIS

A. The Flawed Defamation of Religions Concept

Since 1999, the OIC—a regional organization comprised of fifty-seven nations with Muslim majorities or significant Muslim populations—annually has sponsored resolutions in the U.N. Human Rights Council and its predecessor, the U.N. Commission on Human Rights, calling on U.N. member states to outlaw the so-called defamation of religions.[10] Similar resolutions have been adopted at the U.N. General Assembly each year since 2005. At the Human Rights Council in Geneva, Pakistan has led these efforts; at the General Assembly in New York, Egypt also has played a leading role.[11] The OIC has indicated that the goal of its efforts is the adoption of a binding international covenant against the defamation of religions.[12]

Although these resolutions purport to seek protection for religions in general, the only religion and religious adherents that are specifically mentioned are Islam and Muslims.[13] Aside from Islam, the resolutions do not specify which religions, other than Islam, would deserve protection, nor explain how or by whom such a determination would be made.[14] The resolutions also do not define religiously defamatory speech, or explain who has authority to make that determination.[15] For its part, the OIC appears to consider any speech that the organization, or even a cleric or individual, deems critical of or offensive to Islam or Muslims to

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10. *Id.* at 229. In addition, at the March 2008 Human Rights Council session, the OIC succeeded in amending the mandate of the U.N. Special Rapporteur on the Freedom of Opinion and Expression to require that expert "[t]o report on instances in which the abuse of the right of freedom of expression constitutes an act of racial or religious discrimination." Human Rights Council Res. 7/36, Mandate of the Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression, 7th Sess., March 3–28, 2008, U.N. Doc. A/HRC/7/78, at 104 ¶ 4(d) (July 14, 2008).

11. USCIRF 2010 ANNUAL REPORT, *supra* note 4, at 96.

12. USCIRF 2009 ANNUAL REPORT, *supra* note 2, at 229.

13. *See, e.g.*, G.A. Res. 64/156, U.N. Doc. A/RES/64/156 (Dec. 18, 2009).

14. *See, e.g.*, G.A. Res. 65/224, U.N. Doc. A/RES/65/224 (Dec. 21, 2010); G.A. Res. 64/156, *supra* note 13.

15. *See* G.A. Res. 65/224, *supra* note 14; G.A. Res. 64/156, *supra* note 13.

automatically constitute religiously defamatory speech.[16] This view goes far beyond the existing domestic legal concept of defamation, which protects *individuals* against false statements of fact that damage their reputations and livelihoods.[17] Implementing the OIC's approach would violate provisions of the Universal Declaration of Human Rights and various human rights treaties that protect, with only narrow exceptions, every individual's right to receive and impart information and speak out.[18]

In terms of states' practices, there is no universal approach toward defamation of religions. The U.N. High Commissioner for Human Rights conducted a survey in 2008 and found no common understanding of the concept among those countries that said they had laws on the issue.[19] Instead, the report found that the laws surveyed addressed "somewhat different phenomena and appl[ied] various terms such as contempt, ridicule, outrage and disrespect to connote defamation."[20]

In essence, the defamation of religions resolutions are an attempt to export the repressive blasphemy laws found in some OIC countries to the international level. Under these laws, criminal charges can be levied against individuals for defaming, denigrating, insulting, offending, disparaging, or blaspheming Islam,

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16. For example, the March 2008 *First OIC Observatory Report on Islamophobia* cites as religiously defamatory speech the publication of cartoons depicting the Prophet Mohammed or Allah in newspapers in several European countries and South Africa, Pope Benedict's quotation of a fourteenth-century Byzantine emperor's allegation that Mohammed was "bad and inhuman" for commanding his followers to spread Islam by the sword, and comments critical of Islam or Muslims by Dutch, Austrian, Norwegian, Italian, and Swiss politicians, mostly from far-right parties. Also mentioned is right-wing Dutch Parliament member Geert Wilders's production of a then-unreleased film that the OIC believed would "vilify" the Koran, and an article by a British columnist that called Islam "an uncompromising seventh-century ideology." U.N. Human Rights Council, Racism, Racial Discrimination, Xenophobia and Related Forms of Intolerance, Annex: OIC Observatory Report on Islamophobia, U.N. Doc. A/HRC/9/G/2 (July 24, 2008).

17. BLACK'S LAW DICTIONARY 448 (8th ed. 2004).

18. *See, e.g.*, Universal Declaration of Human Rights, G.A. Res. 217 (III) A, U.N. Doc. A/RES/217(III) (Dec. 10, 1948).

19. U.N. High Commissioner for Human Rights, *Report on the Implementation of Human Rights Council Resolution 7/19 Entitled: "Combating Defamation of Religions,"* ¶ 67, U.N. Doc. A/HRC/9/7 (Sept. 12, 2008); *see also* U.N. Human Rights Council, Study of the United Nations High Commissioner for Human Rights compiling existing legislations and jurisprudence concerning defamation of and contempt for religion, U.N. Doc. A/HRC/9/25 (Sept. 5, 2008).

20. U.N. High Commissions for Human Rights, *supra* note 19; *see also* U.N. Human Rights Council, *supra* note 19.

often resulting in gross human rights violations.[21] In Pakistan, for example, domestic law makes blasphemy against Islam a criminal offense subject to severe penalties, including death.[22] Extremists have abused these broad provisions to intimidate and arbitrarily detain members of religious minority communities, including disfavored minority Muslim sects, and others with whom the extremists disagree.[23] Similarly, unscrupulous individuals have misused them to settle personal scores.[24] Blasphemy allegations in Pakistan, which are often false, have resulted in imprisonment on the basis of religion or belief, vigilante violence, or both.[25] In Egypt, the government has used charges of blaspheming or insulting Islam to imprison purportedly unorthodox Muslims and individuals, including bloggers who have called for political and religious reforms.[26]

The defamation of religions resolutions commonly have come before the U.N. General Assembly in the fall and the U.N. Human Rights Council in the spring, and they continue to be adopted each year in each body. Since 2008, however, support for these problematic resolutions has eroded. The last six times the resolutions were considered, the votes in favor decreased from a majority to a plurality of member governments.[27] At the March 2008, March 2009, and March 2010 Human Rights Council sessions, as well as in December 2008, December 2009, and December 2010 General Assembly votes, the combined number of no votes and abstentions outnumbered the yes votes, although the resolutions still were approved.[28] In fact, in 2010, at both the Human Rights Council and the General Assembly, defamation of religions resolutions garnered the least support and most opposition this issue has ever received, coming within, respectively, four and thirteen votes of defeat.[29] U.N. representatives from North America and Europe, including the Holy See, have consistently voted or spoken out

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21. USCIRF 2009 ANNUAL REPORT, *supra* note 2, at 228–29; *see generally* FREEDOM HOUSE, POLICING BELIEF: THE IMPACT OF BLASPHEMY LAWS ON HUMAN RIGHTS 3–4 (2010), *available at* www.freedomhouse.org/uploads/special_report/95.pdf.

22. USCIRF 2009 ANNUAL REPORT, *supra* note 2, at 228–29.

23. USCIRF 2010 ANNUAL REPORT, *supra* note 4, at 337.

24. *Id.*

25. *Id.*

26. *Id.*

27. *Id.* at 336.

28. *Id.*

29. *Id.*

against the concept behind the resolutions, and Latin American and African countries increasingly are joining this group.[30]

Notably, in December 2008, the four international experts serving as freedom of expression rapporteurs of four international institutions—Frank La Rue, U.N. Special Rapporteur on Freedom of Opinion and Expression, Miklos Haraszti, Organization for Security and Cooperation in Europe (OSCE) Representative on Freedom of the Media, Catalina Botero, Organization of American States (OAS) Special Rapporteur on Freedom of Expression, and Faith Pansy Tlakula, African Commission on Human and Peoples' Rights (ACHPR) Special Rapporteur on Freedom of Expression and Access to Information—issued a joint statement urging international organizations to stop supporting the idea of defamation of religions, because it "does not accord with international standards" accepted by pluralistic and free societies.[31] The U.N. Special Rapporteur on the Freedom of Religion or Belief likewise has spoken out against the concept, pointing out that international human rights law protects individuals, not belief systems, and the individual right to freedom of religion or belief does not include the right to have one's religion or belief be immune from criticism. To the contrary, as the Special Rapporteur has noted, "[t]he recognition, respect and practice of religious pluralism . . . encompasses criticism, discussion and questioning of each other's values."[32]

B. Erroneous Efforts to Conflate Defamation of Religions and Incitement

In addition to seeking a new norm through the resolutions discussed above, countries advancing the flawed defamation of religions concept also have argued that existing international norms against incitement already outlaw speech insulting or criticizing

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30. *Id.*

31. Frank La Rue et al., Joint Declaration on Defamation of Religions and Anti-Terrorism and Anti-Extremism Legislation (Dec. 10, 2008), http://www.article19.org/pdfs/other/joint-declaration-on-defamation-of-religions-and-anti-terrorism-and-anti-ext.pdf.

32. U.N. Special Rapporteur on Freedom of Religion or Belief and U.N. Special Rapporteur on Contemporary Forms of Racism, Racial Discrimination, Xenophobia and Related Intolerance, *Report Further Human Rights Council Decision 1/107 on Incitement to Racial and Religious Hatred and the Promotion of Tolerance*, U.N. Doc. A/HRC/2/3 (Sept. 20, 2006).

religions. In support, they mainly cite the prohibition of "advocacy of national, racial, or religious hatred that constitutes incitement to discrimination, hostility or violence" in Article 20(2) of the ICCPR.[33] They sometimes also cite Article 4 of the ICERD, even though this treaty addresses race, not religion.[34] ICERD Article 4 prohibits the "dissemination of ideas based on racial superiority or hatred" and "incitement to racial discrimination, as well as acts of violence or incitement to such acts."[35] (The 1981 U.N. Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief, which is not a treaty, does not contain a prohibition on incitement to religious discrimination.)[36] The United States has reservations to both ICCPR Article 20 and ICERD Article 4, to the extent that they interfere with rights protected under the U.S. Constitution.[37] A number of other countries also have made reservations to or declarations on these provisions.[38]

The efforts by the defamation proponents to redefine and significantly broaden these two provisions to encompass allegedly religiously defamatory speech are of serious concern. ICCPR Article 20 and ICERD Article 4 have always set forth limited exceptions to the fundamental individual freedoms of expression and religion meant to protect individuals from violence or discrimination, not religious beliefs from criticism.[39]

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33. International Covenant of Civil and Political Rights (ICCPR) art. 20(2), Dec. 16, 1966, 999 U.N.T.S. 171.

34. USCIRF 2009 ANNUAL REPORT, *supra* note 2, at 229.

35. International Convention on the Elimination of All Forms of Racial Discrimination art. 4, Dec. 21, 1965, 660 U.N.T.S. 195.

36. G.A. Res. 36/55, U.N. Doc. A/RES/36/55 (Nov. 25, 1981).

37. *International Covenant on Civil and Political Rights*, U.N. TREATY COLLECTION (Mar. 25, 2011, 12:33 PM), http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-4&chapter=4&lang=en [hereinafter U.N. TREATY COLLECTION].

38. In addition to the United States, fifteen countries have reservations to or declarations on all or part of ICCPR Article 20: Australia, Belgium, Denmark, Finland, France, Iceland, Ireland, Luxembourg, Malta, the Netherlands, New Zealand, Sweden, Switzerland, Thailand, and the United Kingdom. *See* U.N. TREATY COLLECTION, *supra* note 37 (listing countries with reservations to the ICCPR). Nineteen countries, including the United States, have reservations to or declarations on ICERD Article 4: Antigua & Barbuda, Australia, Austria, Bahamas, Barbados, Belgium, Fiji, France, Ireland, Italy, Japan, Malta, Monaco, Nepal, Papua New Guinea, Switzerland, Thailand, Tonga, and the United Kingdom. *See id.* (listing countries with reservations to the ICERD).

39. USCIRF 2009 ANNUAL REPORT, *supra* note 2, at 230.

These provisions have always been interpreted together with treaty provisions that protect the freedoms of religion and expression, ensure equality before the law, and prohibit any measures that would destroy guaranteed rights.[40] Attempts to conflate defamation of religions and incitement are underway at the Human Rights Council's Ad Hoc Committee on the Elaboration of Complementary Standards, which is discussing a possible additional protocol to the ICERD, as well as the U.N. Human Rights Committee (the treaty body that monitors implementation of the ICCPR), which is working on a new General Comment on freedom of expression.[41]

The OIC also sought, but failed, to insert language outlawing the "defamation" or "negative stereotyping of religions" in the outcome document of the April 2009 Durban Review Conference.[42] Instead, a compromise was reached to (1) replace the term defamation of religions with incitement language from ICCPR Article 20 and (2) include a phrase deploring "the derogatory stereotyping and stigmatization of persons based on their religion or belief," a somewhat better approach because it focuses on individuals, not religions.[43] As observers noted, the importance of this issue is clear by the fact that the final outcome document contained eight references to incitement.

At the September 2009 U.N. Human Rights Council session, the United States and Egypt co-sponsored a compromise resolution on freedom of expression,[44] surprising many in the human rights community. Like the Durban Review Conference outcome document, this resolution, which sought to find common ground between the defamation proponents and oppo-

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40. USCIRF 2010 ANNUAL REPORT, *supra* note 4, at 338.

41. USCIRF 2009 ANNUAL REPORT, *supra* note 2, at 230.

42. The Durban Review Conference was held in Geneva under the auspices of the Human Rights Council to review the implementation of measures developed at the 2001 World Conference against Racism. 2001 World Conference Against Racism. U.N. Durban Review Conference, Geneva, Switz., Apr. 20–24, 2009, *Outcome Document of the Durban Review Conference* ¶¶ 12–13 (Apr. 21, 2009), http://www.un.org/durbanreview2009/pdf/Durban_Review_outcome_document_En.pdf.

43. *See id.*

44. Human Rights Council Res. 12/16, Promotion and Protection of all Human Rights, Civil, Political, Economic, Social and Cultural Rights, Including the Right to Development, 12th Sess., Sept. 14–Oct. 2, 2009, U.N. Doc. A/HRC/RES/12/16 (Oct. 2, 2009).

nents, does not specifically mention defamation of religions.[45] Rather, it refers to negative religious stereotyping, arguably focusing on individuals rather than belief systems—though less so than the Durban Review document's reference to stereotyping of persons based on their religion or belief. It also does not call for any legal measures prohibiting or criminalizing negative stereotyping, but instead expresses concern about it.[46] Nevertheless, the defamation proponents appear to view these two concepts as indistinct. In explaining the OIC's support for the resolution, Pakistan expressly equated negative religious stereotyping and defamation of religions, and emphasized that "this defamation applies not only to individuals, but also to religions and belief systems."[47]

In addition, in the same paragraph that refers to negative religious stereotyping, the U.S.-Egypt resolution condemns "any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence"—language taken directly from ICCPR Article 20(2)—and calls on states to "take effective measures, consistent with their international human rights obligations" to address such advocacy.[48]

To be sure, the United States has supported earlier U.N. resolutions on religious intolerance that condemn, but do not require laws against, incitement. In addition, without an express call for legal prohibitions, the new resolution, insofar as it applies to the United States, does not run afoul of the U.S. Article 20 reservation since the United States has no international human rights obligations because of that reservation. The U.S.-Egypt text does, however, for the first time give the United States's imprimatur to the demand that other countries that have accepted such legal obligations take effective measures to enforce them. Moreover, the resolution's language is sufficiently broad to allow the defamation proponents to interpret it as supporting their efforts to redefine the existing incitement provisions. Indeed, in its statement introducing the joint resolution, Egypt characterized both negative stereotyping and in-

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45. *See id.*

46. *See id.*

47. Press Release, Human Rights Council, Human Rights Council Adopts Six Resolutions and One Decision on Discrimination Against Women and Freedom of Expression, Among Others, U.N. Press Release HRC09/125E (Oct. 2, 2009).

48. H.R.C. Res 12/L.14, *supra* note 44, ¶ 4.

citement as examples of misuse of the freedom of expression.[49] Hence, the resolution appears to have opened the door for further infiltration of the defamation of religions concept into both U.N. resolutions and national practice.

A related issue has arisen in connection with the European Union's annual resolution in both the Human Rights Council and the General Assembly titled "Elimination of all forms of intolerance and of discrimination based on religion or belief."[50] This resolution traditionally has had two foci: combating religious intolerance and admonishing member states on the importance of protecting religious freedom. For several years, however, the European Union proposed new language urging member states to ensure that "any advocacy of religious hatred that constitutes incitement to discrimination, hostility or violence is prohibited by law," rather than merely verbally condemned.[51] An express call for legal prohibitions is not only problematic for the United States because of its Article 20 reservation, but also could lend support to OIC countries' efforts to reinterpret Article 20(2) to require laws against defamation of religions.[52] Fortunately, this language was not included in the final version of the resolution at the General Assembly in 2008, 2009, or 2010.[53]

C. The Longstanding Interpretation of the Incitement Provisions

ICCPR Article 20(2) does not create a right, but rather limits rights, particularly the ICCPR Article 18 and 19 rights to free expression and to manifest freely one's religion or belief. Article 20(2) therefore must be interpreted narrowly, so as not to unduly restrict those rights.[54] As a narrow exception to the

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49. Press Release, Human Rights Council, Human Rights Council Adopts Fifteen Resolutions and Two Decisions, U.N. Press Release HRC09/124E (Oct. 1, 2009).

50. *See, e.g.*, G.A. Res. 64/164, U.N. Doc A/RES/64/164 (Mar. 17, 2010).

51. USCIRF 2009 ANNUAL REPORT, *supra* note 2, at 230.

52. *Id.*

53. *See, e.g.*, G.A. Res. 64/164, *supra* note 50, ¶ 6.

54. Any limitation enacted under Article 20(2) must comply with that article's own terms, which allow advocacy of hatred to be prohibited only when that advocacy "constitutes incitement to discrimination, hostility or violence." ICCPR, *supra* note 33. In addition, an Article 20(2) restriction limiting expression must meet the requirements of ICCPR Article 19(3): it must be provided for by law and it must be necessary for respect of the rights or reputations of others or for protection of national security, public order, or public health or morals. *Id.* art. 19(3). An

ICCPR's broad free speech and free exercise guarantees, Article 20(2) requires actions that amount to much more than the expression of critical or even insulting views on religious matters.

The idea behind the provision was to prevent incitement of the type used by the Nazis against Jews and other groups targeted during the Holocaust.[55] Accordingly, as the U.N. Special Rapporteur on the Freedom of Religion or Belief has recognized, Article 20(2) protects individuals, both believers and nonbelievers, from acts of violence or discrimination; it does not protect religious beliefs from criticism.[56] Article 20(2) thus sets a high threshold under which expression should be prohibited only if it amounts to "incitement to imminent acts of violence or discrimination against a specific individual or group."[57] Indeed, as the Special Rapporteur has further noted, "any attempt to lower the threshold of article 20 . . . would not only shrink the frontiers of free expression, but also limit freedom of religion or belief itself. Such an attempt could be counterproductive and may promote an atmosphere of religious intolerance."[58] The U.N. Special Rapporteur on the Freedom of Opinion and Expression also stated that Article 20(2) is narrow and meant to protect individuals, not belief systems, and that freedom of expression applies "not only to comfortable, inoffensive or politically correct opinions, but also to ideas that 'offend, shock and disturb.'"[59]

In addition, many international law specialists agree that, to avoid impinging too much on protected rights, Article 20(2) must

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Article 20(2) restriction limiting the right to manifest one's religion or belief must meet the requirements of ICCPR Article 18(3), meaning that it must be prescribed by law and be necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others. *Id.* art 18(3) (Note that in the latter case, national security is not a permissible justification.) Furthermore, it must not contravene Article 18(2), which proscribes coercion being used to impair the freedom to have or adopt a religion. *Id.* art. 18(2).

55. *See* U.N. Special Rapporteur on Freedom of Religion or Belief and U.N. Special Rapporteur on Contemporary Forms of Racism, *supra* note 32, ¶ 47.

56. *Id.*

57. *Id.* ¶¶ 44–47.

58. *Id.* ¶ 50.

59. U.N. Human Rights Council, Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, Ambey; Ligabo, ¶¶ 63–66, U.N. Doc. A/HRC/7/14 (Feb. 28, 2008). The Special Rapporteur further noted that laws under Article 20(2) should not impose prior censorship, should be clearly and narrowly defined, should be the least intrusive as possible on freedom of expression, and should be applied by an independent judiciary. *Id.* ¶ 65.

be read to include an element of intent.[60] For example, the Camden Principles on Freedom of Expression and Equality provide that the term "advocacy," as used in Article 20(2), "is to be understood as requiring an intention to promote hatred publicly towards the target group."[61] Experts at a seminar on Articles 19 and 20 convened by the U.N. High Commissioner for Human Rights similarly identified a showing of intent as among the objective criteria necessary to prevent the arbitrary application of international incitement norms.[62] Likewise, in a joint statement delineating minimum standards for hate speech laws, the U.N., OSCE, and OAS freedom of expression rapporteurs stated that "no one should be penalized for the dissemination of 'hate speech' unless it has been shown that they did so with the intention of inciting discrimination, hostility or violence."[63]

Indeed, because it limits rather than creates rights, Article 20(2)'s very inclusion in the ICCPR, as well as its wording, was controversial and much debated. During the many years of the treaty's negotiation, language on advocacy of hatred was proposed, adopted, amended, removed, and reinserted, several times over.[64] The earliest proposal prohibited only incitement to vio-

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60. Similarly, incitement to genocide, prohibited under the Genocide Convention, requires a showing of intent, which distinguishes it from legitimate expression. In the words of the International Criminal Tribunal for Rwanda, "the person who is inciting to commit genocide must have himself the specific intent to commit genocide, namely, to destroy, in whole or in part, a national, ethnic, racial or religious group, as such." Prosecutor v. Akayesu, Case No. ICTR 96-4-T, Judgment, ¶ 560 (Sept. 2, 1998).

61. ARTICLE 19, THE CAMDEN PRINCIPLES ON FREEDOM OF EXPRESSION AND EQUALITY, at princ. 12.1(ii) (2009), *available at* http://www.article19.org/pdfs/standards/the-camden-principles-on-freedom-of-expression-and-equality.pdf. These principles were developed by the British nongovernmental organization Article 19 based on consultations with experts from international organizations, academia, and civil society.

62. Githu Muigai et al., Joint Statement of Freedom of Expression and Incitement to Racial or Religious Hatred (Apr. 22, 2009) (summarizing the conclusions of the October 2008 OHCHR Expert Seminar on the links between Articles 19 and 20 of the ICCPR).

63. Abid Hussain, Freimut Duve, & Santiago Canton, Joint Statement on Racism and the Media (Feb. 27, 2001).

64. For a detailed discussion of the negotiation and drafting of Article 20(2), see MARC J. BOSSUYT, GUIDE TO THE *"TRAVAUX PRÉPARATOIRES"* OF THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS 403–11 (1987); MANFRED NOWAK, U.N. COVENANT ON CIVIL AND POLITICAL RIGHTS: CCPR COMMENTARY 359–62 (1993); Stephanie Farrior, *Molding the Matrix: The Historical and Theoretical Foundations of International Law Concerning Hate Speech*, 14 BERKELEY J. INT'L L. 1, 21–43 (1996).

lence.[65] A number of delegations, including the United States, opposed further expansion.[66] They feared that an expanded provision could too easily be abused to restrict expression and that the language proposed was too vague and difficult to define. Some delegations also argued that tolerance could not be legislated and was better achieved through other means, such as education.[67]

Ultimately, Article 20(2) was adopted, but not unanimously. There were fifty votes in favor, eighteen against, and fifteen abstentions.[68] (The United States voted against.)[69] Many of the no votes and abstentions were because of the "incitement to hostility" language.[70] As some delegations pointed out, the word "hostility" is so broad that the provision could be used to justify outlawing a mere difference of views.[71] Even France, a longtime and strong supporter of the need for an incitement provision, abstained.[72] The French representative explained that, because hatred necessarily results in hostility, it made no sense to define advocacy of hatred in terms of incitement to hostility.[73]

ICERD Article 4 provoked similar controversy during the drafting of that treaty.[74] Also a limited exception to the freedom of expression, Article 4 was intended to prevent "the revival of authoritarian ideologies" that disseminate ideas of racial superiority and incite racial violence.[75] Thus, Article 4 also requires a high threshold for restricting speech. Unlike ICCPR Article 20, however, ICERD Article 4 does not mention religious hatred or

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65. Farrior, *supra* note 64, at 22.

66. *Id.* at 27.

67. *Id.*

68. *Id.* at 39 n.234.

69. *Id.*

70. *Id.* at 40–42.

71. *Id.* at 42.

72. *Id.* at 39 n.234.

73. *Id.* at 39.

74. *See., e.g.*, Natan Lerner, *Freedom of Expression and Advocacy of Group Hatred: Incitement to Hate Crimes and Religious Hatred*, *in* OHCHR: CONFERENCE ROOM PAPERS FROM EXPERT SEMINARY ON THE LINKS BETWEEN ARTICLES 19 AND 20 OF THE ICCPR 89 (2008); Patrick Thornberry, Forms of Hate Speech and the Convention on the Elimination of All Forms of Racial Discrimination (ICERD), *in* CONFERENCE ROOM PAPERS FROM EXPERT SEMINARY ON THE LINKS BETWEEN ARTICLES 19 AND 20 OF THE ICCPR 106 (Office of the High Comm'r for Human Rights ed., 2008).

75. U.N. Comm. on the Elimination of Racial Discrimination, General Recommendation 15, U.N. Doc. A/48/18 (Sept. 15, 1993).

discrimination. In fact, as the U.N. Committee on the Elimination of Racial Discrimination (the ICERD treaty body) has noted, that treaty's drafting history shows that the General Assembly expressly "rejected the proposal to include racial discrimination and religious intolerance in a single instrument, and decided in the ICERD to focus exclusively on racial discrimination."[76]

Race and religion both constitute impermissible bases for discrimination under international law, and these bases may intersect in specific cases. Conflating them to bring defamation of religions within ICERD Article 4's ambit, however, would raise serious religious freedom problems.[77] A person's race is immutable, but his or her religion is not.[78] Indeed, the individual right to freedom of religion or belief includes the right to freely choose to change one's religion, whether to another religion or to no religion at all.[79] In addition, as the U.N. Special Rapporteurs on Contemporary Forms of Racism, Freedom of Religion, and Freedom of Expression have recognized, although "any doctrine of superiority based on racial differentiation is scientifically false, morally condemnable, socially unjust and dangerous," many religions "are characterized by truth claims—or even by superiority claims—which have been traditionally accepted as part of their theological grounds."[80] Deeming speech that is critical of or insulting to religions as equivalent to racist hate speech would suppress any discussion of truth claims about, among, or within religions—the peaceful sharing of which is an integral part of the freedom of religion or belief.

As predicted during the U.N. debates on both treaties, the international law incitement provisions have indeed proven difficult to implement. In fact, a 2006 study of international, regional, and national laws and practices by the U.N. High Commissioner for Human Rights concluded that the implementation of incitement norms, including ICCPR Article 20(2) and ICERD Article 4, has been "challenging," in large part be-

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76. U.N. Comm. on the Elimination of Racial Discrimination, P.S.N. v. Denmark, Aug. 8, 2007, U.N. Doc. CERD/C/711/D/36/2006, ¶ 6.3 (2007).

77. USCIRF 2010 ANNUAL REPORT, *supra* note 4, at 338.

78. *Id.*

79. U.N. Human Rights Comm., General Comment Adopted by the Human Rights Committee Under Article 40, Paragraph 4, of the ICCPR, U.N. Doc. CCPR/C/21/Rev.1/Add.4 (July 20, 1993).

80. Githu Muigai et al., *supra* note 62, at 2.

cause of the "lack of clarity on key elements" such as the definitions of incitement, hostility, and hatred.[81]

II. CONCLUSION AND RECOMMENDATIONS

National or international laws purporting to ban criticism or defamation of religions do not solve the very real problems of religious persecution and discrimination faced by the adherents of many religions around the world. In fact, such prohibitions do more harm than good, as evidenced by the documented human rights abuses perpetrated under them in countries such as Pakistan and Egypt.[82]

All U.N. members should oppose both the defamation of religions resolutions and efforts to reinterpret ICCPR Article 20(2) and ICERD Article 4 to encompass allegedly religiously defamatory speech. To that end, the U.S. government and other U.N. members who support universal human rights, including freedom of religion, should:

- Emphasize, at every possible opportunity, the vital importance of the intertwined rights to freedom of thought, conscience, and religion or belief and freedom of opinion and expression to the enjoyment of all other rights, as well as to stability, development, and democracy;

- Work diplomatically to persuade OIC members that religious intolerance can best be fought not through national or international laws prohibiting speech that "defames" religions, but rather through efforts, including education, public diplomacy, and the enforcement of laws against bias-motivated violence and discrimination, to ensure respect for the human rights of every individual;

- Educate U.N. member states that have not voted against past defamation of religions resolutions, as well as moderate OIC countries, about the human rights abuses perpetrated under this concept, and urge them to oppose the resolutions and any attempts to reinterpret ICCPR Article 20 or ICERD Article 4;

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81. U.N. High Commissioner for Human Rights, *Incitement to Racial and Religious Hatred and the Promotion of Tolerance*, ¶ 81, U.N. Doc. A/HRC/2/6 (Sept. 20, 2006).

82. USCIRF 2010 ANNUAL REPORT, *supra* note 4, at 337.

- Reach out in particular to the OIC Secretary-General and to the governments of Pakistan and Egypt, among others, to raise concerns about the defamation of religions, ICCPR Article 20, and ICERD Article 4 initiatives;

- Clarify to independent expert members of the Human Rights Committee and the Committee on the Elimination of Racial Discrimination and to governmental representatives on the Ad Hoc Committee on the Elaboration of Complementary Standards the concerns over any reinterpretation or expansion of ICCPR Article 20 or ICERD Article 4; and

- Ensure that language in the annual resolution on "Elimination of all forms of intolerance and of discrimination based on religion or belief" calls only for condemnation of, not legal prohibitions against, "advocacy of religious hatred that constitutes incitement to discrimination, hostility, or violence" so as not to support OIC efforts to undermine international human rights norms.[83]

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83. In a late-breaking positive development, the UN Human Rights Council did not adopt a defamation of religions resolution at its March 2011 session. Instead, on March 24, the Council adopted a consensus resolution on "combating intolerance, negative stereotyping and stigmatization of, and discrimination, incitement to violence, and violence against persons based on religion or belief." Press Release, Human Rights Council, Human Rights Council Extends Mandates on the Effects of Foreign Debt and on Enforced or Involuntary Disappearances, U.N. Press Release HRC11/051E (Mar. 24, 2011). The new resolution properly focuses on protecting individuals from discrimination or violence, instead of protecting religions from criticism. Human Rights Council Res. 16/L.38, Combating Intolerance, Negative Stereotyping and Stigmatization of, and Discrimination, Incitement to Violence, and Violence Against Persons Based on Religion or Belief, 16th Sess., Feb. 18–Mar. 25, 2011, U.N. Doc. A/HRC/RES/16/L.38 (Mar. 21, 2011). The resolution protects persons identified with all religions or beliefs, instead of focusing on one religion, and does not conflate race and religion. *Id.* Moreover, unlike the defamation of religions resolutions, the new resolution does not call for legal restrictions on peaceful expression. *Id.* In fact, the resolution calls for criminalization only in the case of incitement to imminent violence, the U.S. First Amendment standard, which is more protective of expression than Article 20(2) of the International Covenant on Civil and Political Rights. *Compare* Chaplinsky v. New Hampshire, 315 U.S. 568 (1942), *and* Brandenburg v. Ohio, 395 U.S. 444 (1969), *with* ICCPR, *supra* note 33. Nevertheless, the United States and other U.N. members who support universal human rights should remain vigilant against any efforts by the proponents of defamation of religions to incorporate that concept into international law by other means, including attempts to conflate defamation of religions and incitement.