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## **Defamation of Religions: A Vague and Overbroad Theory that Threatens Basic Human Rights \***

**SUMMARY: 1. Introduction - 2. History of and Motivations for the OIC Defamation of Religions Resolutions - 2.a - The OIC Exerts a Concerted Effort to Protect Islam - 2.b - Terrorist Attacks and Danish Cartoons Raise the Stakes - 3. Defamation of Religions: A Permissible Restraint on Freedom of Speech and Expression? - 3.a - History, Basic Elements, and Contemporary Usage of Defamation - 3.b - Interaction Between Defamation of Religions and the Basic Human Rights Enumerated in Major International Instruments - 4. The Evolution of a Resolution - 4.a. 1999-2000: Beginnings - 4.b. 2001: A Pre-9/11 World - 4.c. 2002: Reactions to the Violent Backlash Against Muslims - 4.d. 2003-2004: Fluctuations in Support - 4.e. 2005: Intensification of a Campaign - 4.f. 2006-2007: The Move to the General Assembly - 4.g. 2008: Decreasing Margins of Support - 4.h. 2009: Current Resolution and Recommendations for Application - 5. Consequences of Accepting the Resolutions and Subsequent Enactment of Statutes Designed to Prevent Defamation of Religions - 5.a. Human Rights Committee - 5.b. The European Court of Human Rights - 5.c. Blasphemy, Incitement, and Hate Speech Laws and Their Enforcement - 5.d. Possible Future Statutes and Enforcement Under Defamation of Religions Theory - 6. Alternatives to Defamation of Religions in the U.N. Resolutions - 7. Conclusion.**

### **1. Introduction**

The Organization of the Islamic Conference (the "OIC") created its "defamation of religions" theory to specifically protect and empower Islam. Rather than preventing defamation of any religion, as its name suggests, this theory simply maintains Islamic countries' rights to enact and enforce blasphemy, defamation, and incitement statutes that persecute and punish non-adherents. Since 1999, the OIC has

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\* Il contributo è pubblicato con il permesso della Brigham Young University Law Review - dove è apparso nel vol. n. 2 del 2010 (*Tribute to Professor Michael Goldsmith*), alle pp. 101-148) - e dell'Autrice, che ringraziamo sentitamente.

\*\* Much thanks to Professor W. Cole Durham and his careful guidance and contribution to this work.



successfully drafted and ensured the passage of multiple U.N. resolutions encouraging member States to enact legislation prohibiting the defamation of religions. Though the general language has broadened over time to indicate protection for multiple religions, each of these resolutions has listed only one specific religion for protection - Islam.

Though the motives behind the defamation of religions theory likely include an honest desire to prevent discriminatory treatment suffered by Muslims worldwide, the current doctrine is so broad that it poses a serious threat to the human right to freedom of expression. Thus, the U.N. should not promulgate defamation of religions legislation, but should instead work within the guidelines of established international law principles to encourage States to enforce religious rights, limit discrimination, and create an atmosphere of mutual respect. To accomplish this, the U.N. should encourage a narrower notion of incitement that balances regulation and even criminalization of speech or expression with robust discussion that sometimes shocks and offends.

Suggestions that the international legal community merely adopt the U.S. First Amendment standards in related areas, are overtly imperialistic and ignore the unique histories, cultures, and experiences of an international jurisdiction. Instead, the U.N. should encourage member States to legislate more broadly than modern U.S. constitutional standards and allow for some limitations on speech. However, such limitations must be (1) specifically intended to protect individuals rather than beliefs or ideas and (2) narrowly defined, thus preventing vague and overbroad statutes that could serve as effective tools for governments to quash ideas with which they do not agree.

Section II of this Article offers a brief history of the OIC as well as the background of and possible motivations for the defamation of religions resolutions in the U.N. Section III examines the history of defamation as a legal theory, the foundations of international human rights, and the question of whether defamation of religions can lead to permissible limitations on the human rights of expression. Section IV traces the evolution of the resolutions to determine if and how the language has changed over time and to examine whether those changes infringe more or less on freedoms of speech and religious expression. Section V analyzes the consequences of the U.N.'s and the international legal community's acceptance of defamation of religions as a legal theory. Finally, in section VI, the Article suggests an alternative theory that strikes a better balance between ensuring the right to freely hold and express opinions on the one hand, and individual rights to hold



religious beliefs and freely practice religion in an atmosphere of civility and respect on the other.

## **2 - History of and Motivations for the OIC Defamation of Religions Resolutions**

The promulgation of the defamation of religions resolutions began with the creation of the OIC and its efforts to protect Islam from defamatory comments and attacks by non-adherents. The September 11 terrorist attacks, the ensuing violence against Muslims worldwide and the publication of now infamous cartoons in a Danish newspaper raised the stakes on both sides of the already highly-charged issue. Though it is difficult to understand all the intricacies that motivated the OIC's promulgation of the resolutions, an examination of the history of the organization and its defamation of religions resolutions may provide important clues.

### **2.a - The OIC Exerts a Concerted Effort to Protect Islam**

The OIC was established in Morocco in 1969 after Zionists attacked the Al-Aqsa Mosque<sup>1</sup>. Currently, its membership consists of fifty-seven States<sup>2</sup>: all have large Muslim populations<sup>3</sup> and many proclaim Islam as

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1. Permanent Mission of the Organization of the Islamic Conference, [http://www.oic-un.org/about\\_oic.asp](http://www.oic-un.org/about_oic.asp) (last visited Mar. 4, 2010) [hereinafter *OIC Website*].

2. *Id.* (listing Afghanistan, Albania, Algeria, Azerbaijan, Bahrain, Bangladesh, Benin, Brunei, Burkina Faso, Cameroon, Djibouti, Chad, Egypt, Cote D'Ivoire, Gabon, Gambia, Guinea, Indonesia, Iran, Iraq, Jordan, Kazakhstan, Kuwait, Kyrgyzstan, Lebanon, Libya, Malaysia, Maldives, Mali, Mauritania, Mozambique, Morocco, Niger, Nigeria, Oman, Pakistan, Palestine, Qatar, Saudi Arabia, Senegal, Somalia, Sudan, Syria, Tajikistan, Togo, Tunisia, Turkey, Turkmenistan, Uganda, United Arab Emirates, Uzbekistan, and Yemen as member States).

3. See THE PEW FORUM ON RELIGION AND PUB. LIFE, GLOBAL MUSLIM POPULATION: A REPORT ON THE SIZE AND THE DISTRIBUTION OF THE WORLD'S MUSLIM POPULATION (2009), available at <http://pewforum.org/newassets/images/reports/Muslimpopulation/Muslimpopulation.pdf> (indicating that there is a Muslim majority in the population of forty-five of the member states and that there is still a substantial Muslim population (10% or higher) in those States where Muslims are in the minority, including Benin, Cameroon, Cote D'Ivoire, Gabon, Mozambique, Togo, and Uganda). Interestingly, there are a few States that enjoy a large Muslim majority in terms of population, but are not members of the OIC, including Comoros, Mayotte, Sierra Leone, Kosovo and Western Sahara. *Id.*; OIC Website, *supra* note 1.



the state religion<sup>4</sup>. The goal of the OIC is to “safeguard the interests and secure the progress and well-being of their peoples and of Muslims in the world”<sup>5</sup>. Among other things, it aims to “safeguard [the] dignity, independence and national rights” of Muslims<sup>6</sup>.

In 1999, Pakistan, acting on behalf of the OIC, submitted a draft resolution dealing with defamation of religions to the United Nations Commission on Human Rights (the “Commission”)<sup>7</sup>. The resolution was sub-titled “Defamation of Islam” and it expressed “deep concern that Islam [was] frequently and wrongly associated with human rights violations and with terrorism”<sup>8</sup>. It also expressed concern over increasing intolerance of Islam and<sup>9</sup> urged States to pass laws to “combat hatred, discrimination, intolerance and acts of violence, ... and to encourage understanding, tolerance and respect in matters relating to freedom of religion or belief”<sup>10</sup>. Finally, the resolution called on the U.N. to continue to monitor “attacks against Islam and attempts to defame it”<sup>11</sup>. Despite the text clearly favoring Islam over any other religion<sup>12</sup> the Commission passed the resolution without a vote<sup>13</sup>. A similar Resolution passed in 2000<sup>14</sup>, again with no vote<sup>15</sup>. The 2001 resolution - passed before the attacks of September 11 - “not[ed] with concern that defamation of religions [was] among the causes of social disharmony and [led] to violation of the human rights of their

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4. See, e.g., The Constitution of Pakistan, Part I, 2 (“Islam shall be the State religion of Pakistan”); U.S. Dept. of State, Background Note: Brunei, <http://www.state.gov/r/pa/ei/bgn/2700.htm> (last visited Nov. 27, 2009) (“Islam is the official religion”); Constitution Of The Arab Republic of Egypt, Part I, Article 2, <http://www.uam.es/otroscentros/medina/egypt/egypolcon.htm> (last visited Nov. 27, 2009) (“Islam is the religion of the state ...”).

5. OIC Website, *supra* note 4.

6. *Id.*

7. U.N. Econ. & Soc. Council [ESCOR], Comm’n on Human Rights, Pakistan, Draft Res. *Racism, Racial Discrimination, Xenophobia and all Forms of Discrimination*, U.N. Doc. E/CN.4/1999/L.40 (Apr. 20, 1999).

8. *Id.*

9. *Id.* at 2.

10. *Id.*.

11. *Id.* at 3.

12. See *id. passim*.

13. CHR Res 1999.82, at 280–81, U.N. ESCOR 55th Sess., Supp. No. 3, U.N. Doc. E/CN.4/1999/167 (Apr. 30, 1999).

14. CHR Res. 2000/84 at 336–338, U.N. ESCOR, 56th Sess. Supp. No. 3, U.N. Doc. E/CN.4/2000/167 (Apr. 26, 2000).

15. *Id.* at 338.



adherents”<sup>16</sup>. Facially, these early resolutions appear to be motivated by a desire to eliminate intimidation and coercion and strengthen protection for basic human rights. However, the resolution is quite specific in mentioning the poor treatment of Islam. After 9/11, the self-preservation approach became even clearer.

## 2.b - Terrorist Attacks and Danish Cartoons Raise the Stakes

On September 11, 2001, terrorists connected with Islamic extremists hijacked four commercial airline jets and crashed three of them into iconic buildings in the United States: two crashed into the World Trade Center in New York City and one into the Pentagon in Washington, D.C.<sup>17</sup>. The fourth jet crashed into a rural area in Pennsylvania<sup>18</sup>. Almost immediately, reports of crimes against Muslims and others who were mistaken for Muslims noticeably increased<sup>19</sup>. In this highly charged atmosphere, the Commission finally called for a vote on the defamation of religions resolution. For the first time, the resolution passed by a majority vote in favor of the resolution - twenty-eight States voted in favor, fifteen opposed, and nine abstained<sup>20</sup>. The 2002 resolution expresses alarm at the impact of the events of 11 September 2001 on Muslim minorities and communities in some non-Muslim countries and the negative projection of Islam, Muslim values and traditions by the media as well as at the introduction and enforcement of laws that specifically discriminate against and target Muslims<sup>21</sup>.

It also “[n]otes with concern the intensification of the campaign of defamation of religions and the ethnic and religious profiling of Muslim minorities in the aftermath of the tragic events of 11 September 2001”<sup>22</sup>. Though there are general references to “religion” and “religions,” indicating at least some expectation that religions other

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16. ESCOR, *supra* note 7 at 2.

17. See, e.g., Michael Grunwald, *Terrorists Hijack 4 Airliners, Destroy World Trade Center, Hit Pentagon; Hundreds Dead*, WASHINGTON POST, Sep. 12, 2001, <http://www.washingtonpost.com/wp-dyn/content/article/> (last visited Mar. 4, 2010).

18. *Id.*

19. See, e.g., *Hate Crime Reports up in Wake of Terrorist Attacks*, CNN, Sept. 17, 2001, <http://archives.cnn.com/2001/US/09/16/gen.hate.crimes/> (last visited Mar. 4, 2010).

20. CHR Res. 2001/4, at 47–48, U.N. ESCOR, 58th Sess., Supp. No. 3, U.N. Doc. E/CN.4/2001/167 (Apr. 18, 2001).

21. ESCOR, *supra* note 7 at 1.

22. *Id.* at 2.



than Islam would be included in these new protections, the document specifically mentions only the Islamic religion as needing protection and lists offenses suffered by Islam generally and its adherents specifically. The Commission voted to pass similar resolutions in each of the subsequent four years<sup>23</sup>.

Four years later, *Jyllands-Posten*, a Danish newspaper, printed cartoons that portrayed Muhammad in a less than favorable light<sup>24</sup>. Islam forbids any graphic representations of Muhammad, and the cartoons - which showed images of the prophet with a bomb nestled in his turban, and awarding virgins to martyrs - created enough controversy that some deemed it a global crisis<sup>25</sup>. Interestingly, the violence incited by the cartoons was neither instigated by non-adherents, nor was it directed at Islam. The reactionary death threats, violent acts, and subsequent casualties were mostly the result of extremist Muslim groups reacting violently to the publication of the cartoons<sup>26</sup>. In the wake of these controversial cartoons and the subsequent violent reactions worldwide, the General Assembly of the U.N. took up the issue of defamation of religions and, for the first time, this principle organ of the U.N. debated, voted, and passed a General Assembly Resolution entitled "Combating Defamation of Religions"<sup>27</sup>.

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23. CHR Res. 2005/3, U.N. ESCOR, 61st Sess., U.N. Doc. E/CN.4/2005/L.12 (April 12, 2005); CHR Res. 2004/6, at 28–31 U.N. ESCOR, 60th Sess., Supp. No. 3, U.N. Doc. E/CN.4/2004/127 (Apr. 13, 2004); CHR Res. 2003/4, at 34–37, U.N. ESCOR, 59th Sess., Supp. No. 3, U.N. Doc. E/CN.4/2003/135 (Apr. 14, 2003); CHR Res. 2002/9, at 56–59, U.N. ESCOR, 58th Sess., Supp. No. 3, U.N. Doc. E/CN.4/2002/200 (Apr. 15, 2002).

24. See, e.g., *Muslim Anger at Danish Cartoons*, BBC NEWS, Oct. 20, 2005, <http://news.bbc.co.uk/2/hi/europe/4361260.stm> (last visited Mar. 4, 2010).

25. See, e.g., *Mohammad Cartoons Global Crisis*, BBC NEWS, Feb. 7, 2006, [http://news.bbc.co.uk/2/hi/south\\_asia/4690338.stm](http://news.bbc.co.uk/2/hi/south_asia/4690338.stm) (last viewed Mar. 4, 2010).

26. See, e.g., Spiegel Online International, *Cartoon Violence Spreads: Arson and Death Threats as Muhammad Caricature Controversy Escalates*, SPIEGEL ONLINE INTERNATIONAL, Feb. 4, 2006, <http://www.spiegel.de/international/0,1518,399177,00.html> (last viewed Mar. 4, 2010) (quoting a radical imam, "These drawings are a declaration of war," and reporting that signs at demonstrations read, "Butcher those who mock Islam" and "Europe take some lessons from 9/11"); *Mohammed Cartoons Global Crisis*, supra note 25 (detailing global demonstrations in which Muslims burned buildings and flags, stormed embassies, and called for the fall of Denmark); *Muslim Cartoon Fury Claims Lives*, BBC NEWS, Feb. 6, 2006, [http://news.bbc.co.uk/2/hi/south\\_asia/4684652.stm](http://news.bbc.co.uk/2/hi/south_asia/4684652.stm) (last visited Mar. 4, 2010); *Muhammed Cartoon Row Intensifies*, BBC NEWS, Feb. 1, 2006, <http://news.bbc.co.uk/2/hi/europe/4670370.stm> (last visited Mar. 4, 2010) (detailing bomb threats to publishers of the cartoons and other repercussions to European newspapers who reprinted the original cartoons).

27. G.A., 60th Sess., 3d Comm., *Yemen: Draft Resolution: Combating Defamation of Religions*, U.N. Doc. A/C.3/60/L.29 (Oct. 31, 2005).





Considering the tenor of the times, it is no surprise that the resolution easily passed<sup>28</sup>.

The cartoon controversy tightened the tension between the defamation resolutions and the principle of freedom of expression. On one side, angry Muslims demanded punishment for the insult they had suffered at the hands of the artists and publishers of the cartoons; on the other side, newspaper officials and journalists insisted that their right to speak their opinion could not be quashed merely because their views offended a religion - an idea<sup>29</sup>. Even before the controversy, the United States did not support the defamation of religions resolutions with their narrow view favoring Islam<sup>30</sup>. After the controversy, the United States better understood the impact the resolutions could have on First Amendment free speech principles and, along with other Western States, began to oppose the resolutions more vigorously<sup>31</sup>.

More recently, the OIC has used the term "Islamophobia" to describe the discriminatory treatment suffered by Muslims worldwide. This discrimination is quite real and is manifest in a number of settings towards a variety of Muslims. Noah Feldman stated that "familiar old

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28. There were 101 votes in favor of the resolution, and only fifty-three opposed. Twenty abstained from voting.

29. See *Are Protests over Cartoons Justified?*, BBC NEWS, February 5, 2006, [http://news.bbc.co.uk/2/hi/talking\\_point/4678264.stm](http://news.bbc.co.uk/2/hi/talking_point/4678264.stm) (last visited Mar. 4, 2010) (listing comments from across the world on both sides of the issue).

30. U.N. GAOR, 60th Sess., 3d Comm., 45<sup>th</sup> mtg. ¶ 39, U.N. Doc. A/C.3/60/SR.45 (Nov. 21, 2005). Ms. Zach (United States of America) said that her country had been founded on the principle of freedom of religion. Every State must protect the right of its peoples to worship freely and to choose or change religions. Her delegation agreed with many of the general tenets of the draft resolution and deplored the denigration of religions. The draft resolution was incomplete, however, as it failed to address the situation of all religions. More inclusive language would have furthered the objective of promoting religious freedom. Furthermore, any resolution on the topic must include mention of the need to change educational systems which promoted hatred of particular religions or State-sponsored media which negatively targeted any one religion or people of a certain faith.

31. See, e.g., HILARY RODHAM CLINTON, REMARKS ON THE RELEASE OF THE 2009 ANNUAL REPORT ON INTERNATIONAL RELIGIOUS FREEDOM (Oct. 26, 2009), <http://www.state.gov/secretary/rm/2009a/10/130937.htm> ¶ 5 (last visited Nov. 25, 2009) ("[S]ome claim that the best way to protect the freedom of religion is to implement so-called anti-defamation policies that would restrict freedom of expression and the freedom of religion. I strongly disagree."); U.N. Rights Body Condemns "Defamation" of Religion, REUTERS, Mar. 30, 2007, <http://www.reuters.com/article/latestCrisis/idUSL30414112> (last visited Nov. 25, 2009) (pointing out the difference in position between Islam States and Western States); Marc D. Stern, *Don't Defend Religion By Silencing Free Speech*, SOUTH FLORIDA SUN-SENTINEL, Dec. 2, 2008, at 27 (calling for more governments to join the U.S. in paying attention to and debating the OIC proposals).



arguments against immigrants - that they are criminals, that their culture makes them a bad fit, that they take jobs from natives - are mutating into an anti-Islamic bias that is becoming institutionalized in the continent's otherwise ordinary politics"<sup>32</sup>.

Such discriminatory biases is evident in the recent constitutional amendment passed by 57.5% of Swiss voters prohibiting the construction of new minarets<sup>33</sup>. A recent report from the OIC cites several such examples of discrimination. For example, a Dutch survey indicated a majority of the population in the Netherlands agreed that the country should stop allowing the construction of some mosques<sup>34</sup>. Additionally, a British study reporting that even dismissing the articles about the 9/11 attacks in the United States and the July 7, 2005 bombing in London, two thirds of newspaper articles about Muslims in England portrayed them as threatening and problematic<sup>35</sup>. In the United States, a Gallup poll found that thirty-nine percent of Americans have felt some prejudice towards Muslims<sup>36</sup>. The report also describes problems faced by Muslims in education (lack of curriculum about Islamic history and civilization), in government (lack of knowledge of the state language), and other generally discriminatory practices (lack of employment, headscarf bans, etc.) as problems faced by Muslims regularly<sup>37</sup>. It also lists a number of "Islamophobic" incidents, from incidents as relatively mild as op-eds against Islam to crimes as serious as personal physical attacks on Muslims and attacks on groups and property such as congregations and mosques<sup>38</sup>.

Certainly much of this prejudicial behavior is real. Muslims should have a right to peacefully believe and practice the Islamic religion and there are, at times, behavior and comments that make it difficult to do so. Again, at least facially, the OIC is motivated to promulgate defamation of religions as a protection against such behavior. There are certainly issues of prejudice here that deserve sensitive treatment. Nonetheless, critics assert that the defamation of

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32. Noah Feldman, *The Way We Live Now: The New Pariahs?*, N. Y. TIMES, Jun. 22, 2008, at *available at* [http://www.nytimes.com/2008/06/22/magazine/22wwln-lede-t.html?\\_r=1&ref=magazine&oref=slogin](http://www.nytimes.com/2008/06/22/magazine/22wwln-lede-t.html?_r=1&ref=magazine&oref=slogin).

33. *See, e.g.*, [http://en.wikipedia.org/wiki/Minaret\\_controversy\\_in\\_Switzerland](http://en.wikipedia.org/wiki/Minaret_controversy_in_Switzerland).

34. OIC, 2ND OIC OBSERVATORY REPORT ON ISLAMOPHOBIA: JUNE 2008 TO APRIL 2009, at 9–10 (2009), OIC-CS-2d OBS-REP-FINAL-May 10, 2009, *available at* [http://www.oic-un.org/document\\_report/Islamophobia\\_rep\\_May\\_23\\_25\\_2009.pdf](http://www.oic-un.org/document_report/Islamophobia_rep_May_23_25_2009.pdf).

35. *Id.* at 10.

36. *Id.*

37. *Id.* at 12.

38. *Id.* at 13–14.





religions movement is more about granting OIC member-States even more power to oppress their citizenry and to assure the preeminence of Islam as a state religion. Through such a lens, the OIC's resolutions appear as a poorly masked method to infringe on individual rights of expression and religion in the name of protecting against defamation of religions<sup>39</sup>.

### **3 - Defamation of Religions: A Permissible Restraint on Freedom of Speech and Expression?**

The theory of defamation of religions as set forth by the OIC takes a wide divergence from the traditional defamation doctrine. The essential question, considered in the framework established by foundational texts in international human rights law, is whether defamation can be narrowly applied to preserve civility and respect for adherents of minority religions while still allowing for freedom of speech and religious expression. Answering that question requires a knowledge and comparison of the doctrine of defamation in various legal traditions, an understanding of the human rights enumerated in international instruments, and an application of the defamation of religions theory to the enumerated rights.

#### **3.a - History, Basic Elements, and Contemporary Usage of Defamation**

In writing about the varied history of defamation, Prosser and Keeton stated "it must be confessed at the beginning that there is a great deal of the law of defamation which makes no sense. It contains anomalies and absurdities for which no legal writer ever has had a kind word"<sup>40</sup>. In the middle ages, reputation was defended vigorously and led to defamation becoming an actionable right providing for recovery in the late 1500s<sup>41</sup>. With the advent of the printing press and the attendant implications for an absolute monarchy, German and English law

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39. See, e.g., Steven Groves, *Why the U.S. Should Oppose "Defamation of Religions" Resolutions at the United Nations*, BACKGROUNDER, (The Heritage Foundation), No. 2206, Nov. 10, 2008, available at [http://www.heritage.org/research/LegalIssues/upload/bg\\_2206.pdf](http://www.heritage.org/research/LegalIssues/upload/bg_2206.pdf); Christopher Hitchens, *Don't Say a Word*, SLATE, Mar. 2, 2009, <http://www.slate.com/id/2212662/>.

40. W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 111, 771 (5th ed. 1984).

41. Van Vechten Veeder, *The History and Theory of the Law of Defamation*, 3 Colum. L. Rev. 546, 546-47 (1903).



adopted Roman defamation laws directly<sup>42</sup>, thus laying the foundation for defamation jurisprudence in both the civil and the common law traditions. Early on, defamation laws were designed to protect individuals, and sometimes groups, from hateful, libelous, or slanderous comments<sup>43</sup>. However, there is no evidence that any law has ever protected an idea or a collection of ideas from what may be deemed defamatory comments.

The concept of defamation wound its way through both English common law history and the civil law history of other States. In the United States it eventually became a tort, but in civil law traditions it generally emerged as a criminal statute<sup>44</sup>. However, several countries are in the process of decriminalizing defamation<sup>45</sup>, and between 2005 and 2007, only a few countries punished five or more individuals for defamation by fine or imprisonment<sup>46</sup>. Thus, defamation generally does not rise to the import of a crime and retains only limited status as a tort for which some remedy may be sought. Even though defamation is, in

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42. *Id.* at 547.

43. *Id.* at 548–49.

44. *See, e.g.*, SERGE L. LEVITSKY, COPYRIGHT, DEFAMATION, AND PRIVACY IN SOVIET CIVIL LAW 114–51 (1979) (outlining the law of defamation in the Soviet Union); Alexander Bruns, *Access to Media Sources in Defamation Litigation in the United States and Germany*, 10 DUKE J. COMP. & INT'L L. 283 (comparing actions and remedies for defamation in the United States with those under the German civil law).

45. *See, e.g.*, TOBY MENDEL, ASSESSMENT OF MEDIA DEVELOPMENT IN THE MALDIVES 5 (2009) (explaining that defamation is a criminal offense in the Maldives but indicating that this is not the favorable treatment when compared with practices internationally). *But see* Article 19, Defamation Legislation Maps, <http://www.article19.org/advocacy/defamationmap/map> (last visited Nov. 25, 2009) (showing that, though a majority of countries have criminal defamation legislation in place, a number of those countries have already initiated decriminalization of defamation).

46. Article 19, Maps: Punishment, <http://www.article19.org/advocacy/defamationmap/map/?dataSet=imprisonment> (last visited Nov. 25, 2009) (showing that China, the Philippines, Uzbekistan, Iran, Syrian Arab Republic, Egypt, Chad, and the Congo were the few countries punishing five or more individuals for defamation). Interestingly, three of those countries - China, Uzbekistan, and Iran - are on the U.S. Commission on International Religious Freedom (USCIRF) Countries of Particular Concern List, [http://www.uscirtf.gov/index.php?option=com\\_content&task=view&id=1456&Itemid=59](http://www.uscirtf.gov/index.php?option=com_content&task=view&id=1456&Itemid=59) (last visited Nov. 25, 2009), and one other - Egypt - is on the USCIRF Watch List, [http://www.uscirtf.gov/index.php?option=com\\_content&task=view&id=1457&Itemid=60](http://www.uscirtf.gov/index.php?option=com_content&task=view&id=1457&Itemid=60) (last visited Nov. 25, 2009), indicating a close correlation between countries that put more value on enforcing defamation statutes and enforcing defamatory language and those that have “ongoing, egregious violations of religion freedom,” or which “require close monitoring due to the nature and extent of violation of religious freedom engaged in or tolerated by the government”. Countries of Particular Concern List *supra*; USCIRF Watch List *supra*.



very few countries, still considered a serious enough infringement to warrant criminal penalties in some cases, it is important to understand that the basic elements of defamation apply to the rights of individuals to maintain their reputations. In rare instances where States punish defamation through criminal penalties, the government often uses the punishment neither to protect an individual's reputation nor to enforce a human right to dignity, but rather to maintain autocratic stability and absolute government control.

The Constitution of the United States, along with First Amendment jurisprudence, provides strong protection for the freedom speech. Accordingly, defamation in the United States has withered into little more than a narrowly-defined tort providing limited injunctive and/or monetary remedies. Contemporarily, the basic rule for finding liability for defamation in the United States requires four elements:

(a) a false and defamatory statement concerning another; (b) an unprivileged publication to a third party; (c) fault amounting to at least negligence on the part of the publisher; and (d) either actionability on the statement irrespective of special harm or the existence of special harm caused by the publication<sup>47</sup>.

It is worth reiterating that the statement must be false, it must be about another *individual*, and it must be in a publication that is not privileged. Additionally, the plaintiff must show that the speaker or publisher of the statement acted negligently and that the publication or the statement resulted in harm to the plaintiff. Therefore, in the United States a true statement cannot be defamation, even if it is defamatory in nature<sup>48</sup>; neither can a defamatory comment about a belief or idea be defamation per se because it is not made about a person<sup>49</sup>. Once a person is held liable for defamation, U.S. Courts may award a plaintiff actual damages only<sup>50</sup>, meaning compensation for the harm the publication caused to the plaintiff's reputation<sup>51</sup>. There is neither any

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47. RESTATEMENT (SECOND) OF TORTS § 558 (1977).

48. "A communication is defamatory if it tends so to harm the reputation of another as to lower him in the estimation of the community or to deter third persons from associating or dealing with him". *Id.* § 559.

49. *Id.* § 564 cmt. a (noting that "the recipient of the defamatory communication understand [that the communication] refer[s] to the plaintiff"). In this case the language and intent of the law clearly indicates that defamation is applicable to publications in which statements are made regarding individuals, not thoughts, beliefs, or ideals.

50. *Id.* § 621.

51. *Id.* at cmt. a.



criminal statute nor any criminal penalty for defamation in the United States.

Defamation plays out differently in civil law countries. As mentioned above, most other countries in the world have criminal defamation statutes on the books, but few regularly enforce them. Germany has defended criminal defamation statutes, stating that they are needed to guarantee the right to dignity as stated in the German Constitution<sup>52</sup>. However, truth is generally not a complete defense under the Western European defamation criminal statutes as it is in U.S. civil provisions<sup>53</sup>. This indicates a stronger desire in Western Europe to protect an atmosphere of civility and respect and an increased willingness to infringe on an individual's rights of freedom of speech and expression.

An even larger gap exists between defamation as defined in the United States and defamation as defined in Eastern European and Central Asian countries. Countries such as Belarus, Azerbaijan, Uzbekistan, Kazakhstan, Tajikistan, and Turkmenistan - all members of the OIC - also retain criminal defamation statutes<sup>54</sup>. Additionally, some of these countries actively prosecute and convict journalists under defamation statutes, in an ostensible effort to encourage self-censorship<sup>55</sup>. At best, criminal defamation statutes began as "a peaceful alternative to the duel and other violent forms of self help"<sup>56</sup>, but at worst, they are "rooted in authoritarianism and autocracy, in intolerance of dissent, and in distrust of public opinion. [They] keep[] the masses in their place and under control, by suppressing information about rulers that might incite unrest or rebellion"<sup>57</sup>.

Note that criminal defamation statutes as used in the aforementioned OIC member-countries have amounted to little more

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52. See Peter E. Quint, *Free Speech and Private Law in German Constitutional Theory*, 48 MD. L. REV. 247, 295 (1989); GG, pt. I, art. 1., Protection of Human Dignity (1990).

53. Jane E. Kirtley, *Criminal Defamation: An "Instrument of Destruction,"* in ENDING THE CHILLING EFFECT: WORKING TO REPEAL CRIMINAL LIBEL AND INSULT LAWS 89-101, 94 (Ana Karlsreiter and Hanna Vuokko eds., 2004).

54. See generally, Elena Yanchukova, *Criminal Defamation and Insult Laws: An Infringement on the Freedom of Expression in European and Post-Communist Jurisdictions*, 41 COLUM. J. TRANSNAT'L L. 861.

55. Kirtley, *supra* note 53 at 97 (citing Elena Yanchukova, *Criminal Defamation and Insult Laws: An Infringement on the Freedom of Expression in European and Post-Communist Jurisdictions*, 41 COLUM. J. TRANSNAT'L L. 861 (2003)).

56. MLRC Bulletin, *Criminalizing Speech About Reputation: The Legacy of Criminal Libel in the U.S. After Sullivan and Garrison*, at 1 (March 2003), *quoted in* Kirtley, *supra* note 53 at 98.

57. Kirtley, *supra* note 53 at 98.



than a guise through which the state can justify intolerance and suppression of contrary ideas and information. It is easy to see how such countries - where the sovereign is used to being able to prosecute and terminate anti-government speech, where there is a substantial percentage of the population who are active adherents to a particular religion, and where that religion is often an official state religion - would justify taking the short step towards protecting that official religion, and from there to protecting religion generally through an expansion of existing defamation theories bolstered by the human right of freedom of religion. At first glance, the potential costs to freedom of expression and freedom of religion are not obvious; thus, defamation of religions may appear as an acceptable vehicle for such countries to safeguard their ability to silence individuals or groups with viewpoints deemed detrimental to the religion and the state. However, relying on the human right of freedom of religion to justify censorship and oppression does not align with the meaning or purpose of the promulgation and enforcement of international human rights. No "State, group or person [has] any right to engage in any activity or perform any act aimed at the destruction of any [human right or fundamental freedom]"<sup>58</sup>.

### **3.b - Interaction Between Defamation of Religions and the Basic Human Rights Enumerated in Major International Instruments**

Establishing a universal definition of human rights has proven challenging. In 1948, the General Assembly of the U.N. adopted the Universal Declaration of Human Rights ("UDHR")<sup>59</sup>. This declaration recognizes that the "foundation of freedom, justice, and peace in the world" are the "inherent dignities" and the "equal and inalienable rights of all members of the human family"<sup>60</sup>. Though the UDHR implicitly asserts universality of the enumerated rights, some nations aver that this view reflects neither their traditional culture, nor their religious beliefs. The foundational principles of the UDHR varied enough from the foundational beliefs of Islamic States that the OIC

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58. Convention for the Protection of Human Rights and Fundamental Freedoms as amended by Protocol No. 11, Sept. 2003.

59. Universal Declaration of Human Rights, G.A. Res. 217A at 71, U.N. GAOR, 3d Sess., 1st plen. Mtg., U.N. Doc. A/810 (Dec. 12, 1948).

60. *Id.*



drafted and submitted the Cairo Declaration of Human Rights in Islam (the "Cairo Declaration") in 1993<sup>61</sup>.

The Cairo Declaration asserts many rights similar to the UDHR<sup>62</sup>; however, the guiding principles are clearly limited to providing a "dignified life in accordance with the Islamic Shari'ah" and the key rights enumerated in the Cairo Declaration are "subject to the Islamic Shari'ah"<sup>63</sup>. Human rights in the Cairo Declaration are "an integral part of the Islamic religion" and are "binding divine commandments, ... contained in the Revealed Books of God and ... sent through the last of His Prophets ... thereby making their observance an act of worship and their neglect or violation an abominable sin, and accordingly every person is individually responsible ... for their safeguard"<sup>64</sup>.

Realistically, it would be impossible for any international body to adopt such a declaration since, by favoring Islam, it would be disfavoring all the other religions in the world. Therefore, where the Cairo Declaration enjoyed only limited support - generally from Islamic States - the UDHR maintained its status as the most widely supported declaration of human rights<sup>65</sup>. It provides guidelines for an evolving international human rights jurisprudence. Addressing the broad-ranging and often subtle difficulties regarding cultural relativism and state imperialism surrounding the human rights debate exceeds the scope of this Article; however, it is enough to recognize that there is no unanimous consensus regarding "universal human rights." Since the UDHR has been adopted by a majority of U.N. nation States, it can be used as a starting point for developing a common ground. Through its quasi-universal lens, human rights are viewed as a most basic endowment of autonomy, common in one way or another to all

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61. OIC, The Cairo Declaration on Human Rights in Islam, Secretariat, Status of Preparation of Publications, Studies and Documents for the World Conference, delivered to the World Conference on Human Rights Preparatory Committee, U.N. Doc. A/CONF.157/PC/62/Add.18 (June 9, 1993).

62. See, e.g., *id.* art. I(a) ("All human beings ... are equal in terms of basic human dignity ...").

63. *Id.* art. 24.

64. *Id.* art. I(a) para. 5.

65. The UDHR was adopted by the General Assembly on Dec. 10, 1948 after a vote resulting in 48 in favor, 0 against and 8 abstentions. See UDHR, *supra* note 56. In contrast, the Cairo Declaration was adopted by 45 ministers of the OIC, but has been generally rejected by the U.N. community. *But see* HUMAN RIGHTS: A COMPILATION OF INTERNATIONAL INSTRUMENTS: VOLUME II: REGIONAL INSTRUMENTS (1997) (including the Cairo Declaration as the final document in this collection compiled by The Office of the High Commissioner for Human Rights).





humankind and deserving of the most stringent protection possible through legal instruments and government regulation.

The UDHR declares that “[e]veryone has the right to freedom of thought, conscience and religion; ... and freedom, either alone or in community with others and in public or private, to manifest his religion or belief in teaching, practice, worship and observance”<sup>66</sup>, and that there is a “right to freedom of opinion and expression” including the right to “hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers”<sup>67</sup>. Undoubtedly, there are instances in which one individual’s opinions might be contrary to another’s religious belief, a tension foreshadowed in U.S. First Amendment jurisprudence. Thus, the clear difficulty in attempting to protect against defamation of religions comes in determining where to draw the line between protecting individual rights to believe and practice a religion and individual rights to hold and express opinions - some of which may be offensive to certain sects.

Additionally, Article 19 of the International Covenant on Civil and Political Rights<sup>68</sup> (“ICCPR”) creates a nuance in the already tense balance between freedom to believe and practice one’s religion and freedom to hold and express one’s opinion. “Everyone shall have the right to freedom of expression; ... [t]he exercise of [which] carries with it special duties and responsibilities. It may therefore be subject to certain restrictions ... [f]or respect of the rights or reputations of others ...”<sup>69</sup>. Article 19 thus specifically provides for a limitation on free expression and gives the OIC a foundation to claim that its resolutions combating defamation of religions are nothing more than an attempt to

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66. UDHR, *supra* note 56 art. 18

67. *Id.* art. 19.

68. The ICCPR is a U.N. treaty designed as the legal documentation enforcing the UDHR and entered into force on March 23, 1976. *See* Audiovisual Library of International Law, <http://untreaty.un.org/cod/avl/ha/iccpr/iccpr.html> (last visited Feb. 28, 2010).

69. International Covenant on Civil and Political Rights, Art. 19(2)–(3)(a) (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR). Seventeen countries (including the United States) have entered declarations or reservations on all or part of ICCPR Article 20. *See* International Covenant on Civil and Political Rights Declarations and Reservations, <http://treaties.un.org/doc/publication/mtdsg/volume%20i/chapter%20iv/iv-4.en.pdf> (listing Australia, Belgium, Denmark, Finland, France, Iceland, Ireland, Luxembourg, Malta, The Netherlands, New Zealand, Norway, Sweden, Switzerland, Thailand, the United Kingdom and the United States as making declarations or reservations as to article 20).



appropriately limit the right of expression<sup>70</sup>. The Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression agrees that the ICCPR provides that there must be a limit on freedom of expression, but asserts that the limitations allowed by Article 19 “should be clearly and narrowly defined” so as to be the “least intrusive means” of limiting expression and should not be allowed to justify prior censorship on speech<sup>71</sup>.

Another complication in this balancing act appears in Article 20 of the ICCPR. “Any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law”<sup>72</sup>. The OIC has conflated defamation of religions with “incitement to religious hatred” and thus has justified its advocacy of permissible limitations on the freedom of expression<sup>73</sup>. In the OIC’s effort to secure its right to believe and worship without suffering offensive expressions from others, it presents the two doctrines of defamation of religions and incitement to violence as if they are the same. In fact, defamation of religions is a much broader category - one under which incitement may fall, but which still would allow for much broader regulation than incitement would alone. Incitement, unlike defamation of religions, is a specific existing legal doctrine with varied definitions depending on the country at issue.

In the United States, incitement is a very narrowly enforced doctrine. It prohibits the government from regulating speech as incitement unless the speech was “directed to inciting or producing imminent lawless action and is likely to incite or produce such action”<sup>74</sup>. The three requirements of the present-day test - intent, imminence, and likelihood - make it a very narrow doctrine. However, before promulgating the contemporary, narrow rule, the Court was

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70. OIC, 2<sup>ND</sup> OIC OBSERVATORY REPORT ON ISLAMOPHOBIA: JUNE 2008 TO APRIL 2009, 5, 15, 44 (2009), OIC-CS-2d OBS-REP-FINAL-May 10, 2009, *available at* [http://www.oic-oci.org/uploads/file/Islamophobia/Islamophobia\\_rep\\_May\\_23\\_25\\_2009.pdf](http://www.oic-oci.org/uploads/file/Islamophobia/Islamophobia_rep_May_23_25_2009.pdf) (emphasizing that the ICCPR Art. 19 provides for “certain restrictions” on the freedom of expression and reiterating that the U.N. General Assembly approves of limiting expression to protect against defamation of religions as manifest by the passing of defamation of religions resolutions since 1999).

71. Special Rapporteur, Report on the Promotion and Protection of the Right to Freedom of Opinion and Expression, ¶65, delivered to the Human Rights Council, U.N. Doc. A/HRC/7/14 (2008).

72. ICCPR, *supra* note 66 Art. 20.

73. OIC, *supra* note 62 at 14.

74. *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969).



much more lenient as to what constituted incitement<sup>75</sup>. This seemed particularly so in times of national stress or danger<sup>76</sup>.

Internationally, incitement can be a much more serious offense and is often criminalized<sup>77</sup>. Each country has various definitions of incitement - an exploration of which go beyond the scope of this paper - but in general much of the consequential international law of incitement has been motivated by the desire to prevent massacres such as the Holocaust of World War II, the “cleansing” of Muslim inhabitants in Bosnia in the early 1990s, or the Rwandan genocide of 1994<sup>78</sup>. This has led to broader definitions of incitement that allow for more regulation of expression than would be permissible in the United States. Generally, direct, public incitement is viewed more seriously than private incitement<sup>79</sup> and, there is often some requirement that the “incitee” have at least some intent to act - though the action itself does not necessarily have to be accomplished<sup>80</sup>.

In this case, though, the expressions that the OIC desires to limit do not always rise to the level of even the broader non-U.S. definitions of incitement. The Danish cartoons as well as other expressions<sup>81</sup> condemned by the OIC are expressions covered under Article 19 of the UDHR and Article 19 of the ICCPR, and therefore should be limited only if they are shown to be “advocacy of national, racial or religious

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75. See, e.g., *Schenk v. U.S.* 249 U.S. 47 (1919); *Debs v. U.S.*, 249 U.S. 211 (1919); *Masses Pub. Co. v. Patten*, 246 F.24 (S.D.N.Y. 1917).

76. See, e.g., *Dennis v. U.S.*, 341 U.S. 494 (1951); *Whitney v. California*, 274 U.S. 357 (1927); *Gitlow v. New York*, 268 U.S. 652 (1925); *Abrams v. U.S.*, 250 U.S. 616 (1919).

77. See Wibke Kristin Timmermann, *Incitement In International Criminal Law*, 88 INT’L REV. RED CROSS 823 (2006), available at [http://www.icrc.org/Web/eng/siteeng0.nsf/htmlall/review-864-p823/\\$File/irrc\\_864\\_Timmermann.pdf](http://www.icrc.org/Web/eng/siteeng0.nsf/htmlall/review-864-p823/$File/irrc_864_Timmermann.pdf) (including an excellent discussion of the history and evolution of incitement in international law).

78. Timmerman, *supra* note 74, at 823-824.

79. *Id.* at 838-839. One example of a fairly stringent incitement law comes from the German Penal Code, providing that “instigators” are punishable for influencing the will of another to commit a criminal act - even if that person’s effort to commit the act fails. *Id.* at 848. The U.N.’s Convention on Genocide prohibits “[d]irect and public incitement to commit genocide”, United Nations Convention on the Prevention and Punishment of the Crime of Genocide, Dec. 9, 1948, art. 3(c).

80. Timmerman, *supra* note 75, at 839 (“[T]he instigation must be causally connected to the substantive crime in that it must have contributed significantly to the commission of the latter, the instigator must act intentionally or be aware of the substantial likelihood that the substantive crime will be committed, and he must intend to bring about the crime instigated”).

81. See, e.g., *Life of Slain Dutch Film-Maker*, BBC NEWS, Nov. 2, 2004, available at <http://news.bbc.co.uk/2/hi/entertainment/3975211.stm>.



hatred [constituting] incitement to ... violence"<sup>82</sup>. Though the publication of the Danish cartoons and other expressions labeled as defamatory by the Muslim community have been followed by violence, as noted above, the violence in this case was more akin to violence that would lead to a heckler's veto<sup>83</sup> than violence springing as result of incitement.

Generally, for a statement or publication to be incitement, the speaker speaks to a group who then, incited by the speaker's words, goes forward with the intent to commit an illegal act. In this case, the resultant violence was not "incitees" acting out violence against Muslims, rather, Muslim extremists were reacting to the offensive cartoons, films, or statements and attempting to silence those who had published and provided access to the ideas expressed. Not surprisingly, this campaign of violence was effective and publishers have shied away from printing materials that may result in a violent reaction from Islamic extremists<sup>84</sup>, including a refusal to print a novel about one of Mohammed's wives because of the fear of ensuing violence<sup>85</sup>. In India, a newspaper editor was arrested for publishing material criticizing Islam (as well as Christianity and Judaism) after Muslims protested the paper<sup>86</sup>. Thus, the violent actions of the offended extremists have been

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82. ICCPR, *supra* note 67, at art. 20.

83. "[A] 'heckler's veto' is an impermissible content-based restriction on speech where the speech is prohibited due to an anticipated disorderly or violent reaction of the audience". 16A Am. Jur. 2D Constitutional Law § 477 (2010); *see, e.g.*, Pleasant Grove City v. Sumnum, 129 S.Ct. 1125 (2009); Startzell v. City of Philadelphia, 533 F.3d 183 (3d Cir. 2008); Roe v. Crawford, 514 F.3d 789 (8th Cir. 2008); Center for Bio-Ethical Reform, Inc. v. Las Angeles County Sherriff Dep't, 533 F.3d 780 (9th Cir. 2008).

84. *See, e.g., Publisher's Statement, Author's Statement* in JYTTE KLAUSEN, THE CARTOONS THAT SHOOK THE WORLD, vi (2009).

85. *See* Asra Q. Nomani, *You Still Can't Write About Muhammad*, THE WALL STREET JOURNAL ONLINE (Aug. 6, 2008) available at [http://online.wsj.com/public/article\\_print/SB121797979078815073.html](http://online.wsj.com/public/article_print/SB121797979078815073.html). Later, the same novel was contracted to be published in the United Kingdom, but was dropped again after the publisher's home was firebombed. *See* Jamin Doward and Mark Townsend, *Firebomb Attack on Book Publisher*, THE GUARDIAN (Sept. 28, 2008) available at <http://www.guardian.co.uk/uk/2008/sep/sep/28/muhammad.book.attack>; Sarah Lyall, *Attack May Be Tied to Book About Muhammad*, N.Y. TIMES (Sept. 28, 2008) available at [http://www.nytimes.com/2008/09/29/world/europe/29jewel.htm?\\_r=2&oref=slogin](http://www.nytimes.com/2008/09/29/world/europe/29jewel.htm?_r=2&oref=slogin). Ultimately, the book was published and distributed by a U.S. publisher - not without controversy. *See* Laurel Maury, *'Jewel' is Finally Here; Was it Worth the Wait?* L.A. TIMES (OCT. 6, 2008) available at <http://articles.latimes.com/2008/oct/06/entertainment/et-book6>.

86. Jerome Taylor, *Editor Arrested for 'Outraging Muslims,'* Independent (Feb. 12, 2009) available at <http://www.independent.co.uk/news/world/asia/editor-arrested-for-outraging-muslims-1607256.html>.



validated and have had a documented “chilling effect” on the category of expressions at issue.

In addition to successfully chilling expression through actions akin to a heckler’s veto, the OIC states have successfully played defamation from two sides. On one side, they allow Islamic extremists to create an atmosphere of fear through violent reactions to actions deemed defamatory to Islam in non-member states without loudly decrying that behavior<sup>87</sup>, thus encouraging a disposition of absolute protection for Islam. On the other side, OIC states have used the defamation of religions theory to persecute individuals and groups within their own borders for blasphemy, defamation, or slander of Islam - thus squelching any dissenting or critical discourse<sup>88</sup>. This self-preservation approach is clearly manifest in the evolution of the defamation of religions resolutions from the U.N.

#### **4 - The Evolution of a Resolution**

The defamation of religions resolutions have slowly changed since they were first introduced in 1999. Originally, they were passed through the U.N. commission without so much of a vote, but have since been voted on numerous times and now appear to be losing support in the General Assembly. In some cases, the changes in the text demonstrate an increased effort for the OIC to promote protection of Islam over all other religions and an effort to present defamation of religions as a permissible limitation of freedom of speech and religious expression.

##### **4.a - 1999-2000: Beginnings**

As mentioned above, the defamation of religions statute was passed without a vote from 1999-2001, and when the Commission first put it to a vote, it passed easily<sup>89</sup>. The resolutions have continued to pass when voted on by the General Assembly in 2005 and every year since then<sup>90</sup>. Though the 1999 resolution specifically mentions “Islam” twice, it also

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87. See sources cited *supra* note 83.

88. See *infra* Parts V.C.1-2.

89. See *supra* Part I.A.

90. *Supra* note 25; *Infra* notes 97, 110, 118, 124, 125, 127, 134.



uses the more general term “religion” several times<sup>91</sup> indicating that though the resolution was sponsored by the OIC, there was certainly room for protection against defamation of any religion. This first resolution had just three recommended actions. First, it urged States to “take all necessary measures to combat hatred, discrimination, intolerance and acts of violence, intimidation and coercion motivated by religious intolerance”<sup>92</sup>. Second, it “[i]nvite[d] the High Commissioner ... to formalize the holding of seminars to promote a dialogue among cultures” in order to add to the dialogue on universal human rights<sup>93</sup>. Finally, it asked that the Special Rapporteurs on religious intolerance and on racism, racial discrimination, xenophobia and related intolerance ... take into account the provisions of the present resolution when reporting to the Commission on Human Rights at subsequent sessions<sup>94</sup>. The most problematic of these is the encouragement of state action to “take all necessary measures” to combat the offensive behavior constituting defamation of religions. This broad directive encouraged States to act appropriately “within their national legal framework [and] in conformity with international human rights instruments”<sup>95</sup>. There was neither a specific mention of how those actions may engage other rights, nor was there a suggested boundary on the limitations that may be justified as appropriate to combat the offensive behavior. This set the stage for a very broad application of government limitations on otherwise protected expressions because they defame a religion.

The 2000 resolution asserted that “discrimination based on religion or belief constitutes an *offence to human dignity and a violation of human rights*”<sup>96</sup>. This was a much stronger assertion than anything in the earlier resolution and signaled a move towards even broader protections threatening more limitations on rights of expression. The new resolution still advocated the same three actions as the earlier version with no other major changes.

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91. ESCOR, Comm’n on Human Rights, Pakistan, Draft Res. *Racism, Racial Discrimination, Xenophobia and all Forms of Discrimination*, U.N. Doc. E/CN.4/1999/L.40 (Apr. 20, 1999).

92. *Id.* at 2 (emphasis added).

93. *Id.* at 3.

94. *Id.*

95. *Id.*

96. CHR Res. 2000/84, at 336, U.N. ESCOR, 56th Sess. Supp. No. 3, U.N. Doc. E/CN.4/2000/167 (Apr. 26, 2000) (emphasis added).





#### 4.b - 2001: A Pre-9/11 World

The 2001 resolution was passed by a vote of twenty-eight to fifteen with nine abstentions in April, before the September 11 attacks in the United States<sup>97</sup>. This resolution specifically used “Islam” only once - perhaps in an attempt to broaden the protections for all religions - but, for the first time used “defamation of religions” in the actual text of the Resolution. First, it “not[ed] with concern that defamation of religions is among the causes of social disharmony and leads to violation of the human rights of their adherents”<sup>98</sup>. Second, it asked States “to provide adequate protection against all human rights violations resulting from defamation of religions”<sup>99</sup>. The use of the “defamation of religions” language is interesting because there had never been a concise definition for “defamation of religions.” Thus far, all the resolutions had provided is a sort of amorphous list of words with very little decisive meaning - intolerance, discrimination, violence, intimidation, coercion. From this language it was difficult to know whether defamation of religions was an act against a religion or some type of inchoate offense. If it was inchoate, there were no guidelines to determine what would fit the category. This vagueness created the opportunity for States to draft enormously broad statutes that could be deemed permissible limitations on expression and the exercise of religion based on the resolution.

Additionally, this resolution was also the first in which the OIC encouraged States, within their own law and value systems, to “*provide adequate protections against all human rights violation resulting from defamation of religions*”<sup>100</sup>. This goes a step further than the “necessary measures to combat” language in the original resolution suggesting that the OIC favored stronger protection against defamation of religions than may have been indicated earlier.

Furthermore, the indication that preventing defamation of religions will protect human rights is clearly articulated for the first time in this resolution with the assumption that the right to be protected has to do with the right to hold and practice religious beliefs. Interestingly, there is still no mention of the potential conflict between

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97. CHR Res. 2001/4, at 47, U.N. ESCOR, 58th Sess., Supp. No. 3, U.N. Doc. E/CN.4/2001/167 (Apr. 18, 2001).

98. *Id.* at 48.

99. *Id.*

100. *Id.*



creating and enforcing defamation of religions statutes and the right to expression.

This version also emphasized a need for “respect for religious diversity”<sup>101</sup> and added to the list of actions requested as a response to the resolution. Specifically, it called for joint conferences between the U.N. High Commissioner for Human Rights and other organizations to inform the conversation surrounding the universality of human rights and requested a report from the High Commissioner to the Commission at a subsequent session<sup>102</sup>.

#### **4.c - 2002: Reactions to the Violent Backlash Against Muslims**

The 2002 resolution passed after the September 11 attacks and used the strongest language yet in favor of defining defamation of religions as an “affront to human dignity and a disavowal of the principles of the Charter of the United Nations”<sup>103</sup>. Additionally, it contained noticeably more references to “Islam” and “Muslim” than any of the earlier resolutions. Islam is mentioned three times and Muslim is used seven<sup>104</sup>. What is most surprising about much of the language in this version is that it still emphasized prejudicial behavior towards Muslims only. For example: “Alarmed at the impact of the events of 11 September 2001 on Muslim minorities and communities in some non-Muslim countries and the negative projection of Islam, Muslim values and traditions by the media as well as the introduction and enforcement of laws that specifically discriminate against and target Muslims”<sup>105</sup>. Clearly, the backlash against Muslims resulting from the attacks was real and, in many cases, prejudicial and discriminatory. However, the resolution made no mention of the prejudice and discrimination that motivated the attacks nor does it include language indicating that those injured in the attacks were also deserving of protection.

This resolution provided another justification for the defamation of religions theory by calling for increased respect of all cultures in hopes of creating a “globalized world” and recognized that allowing the continuing defamation of religions was incompatible with that

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101. *Id.*

102. *Id.* at 2.

103. CHR Res. 2002/9, at 56, U.N. ESCOR, 58th Sess., Supp. No. 3, U.N. Doc. E/CN.4/2002/200 (Apr. 15, 2002).

104. *Id.*

105. *Id.* at 57.



goal<sup>106</sup>. Essentially, through the resolution, the OIC suggested that unless action was taken to provide for protection against defamation of religions, globalization was an impossible goal. This version also noted “the intensification of the campaign of defamation of religions,” particularly as applied to profiling of Muslims<sup>107</sup> and “express[ed] deep concern at programmes and agendas pursued by extremist organizations and groups aimed at defamation of religions”<sup>108</sup>.

Finally, this resolution called for more action than previous versions. It asked the “international community” to begin a dialogue forwarding tolerance and respect for individuals and for “religious diversity”; and most specifically asked the “Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance to examine the situation of Muslim and Arab peoples”<sup>109</sup>. The marked increase of specific references to “Muslim” and “Islam” indicated an increased willingness of the OIC to assert the right to protection of Islam above the right of such protection for other beliefs and expressions of such beliefs. The 2002 resolution enjoyed slightly increased support over the previous resolution and passed by a vote of thirty to fifteen with eight abstentions<sup>110</sup>.

#### **4.d - 2003-2004: Fluctuations in Support**

The 2003 resolution specifically mentioned Islam three times and used “Muslim” five times continuing the strong preferential treatment for Islam and its adherents that had been strongly asserted the previous year<sup>111</sup>. The resolution reasserted the theses that “defamation of religions is among the causes of social disharmony and leads to violations of human rights of their adherents”<sup>112</sup>, and that “defamation of religions and cultures [is incompatible] with the objectives of a truly globalized world and the promotion and maintenance of international peace and security”<sup>113</sup>. It articulated “deep concern [about] the intensification of the campaign of defamation of religions, and the

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106. *Id.*

107. *Id.* at 58.

108. *Id.*

109. *Id.* at 59.

110. *Id.* at 61.

111. CHR Res. 2003/4, at 34-37, U.N. ESCOR, 59<sup>th</sup> Sess., Supp. No. 3, U.N. Doc. E/CN.4/2003/135 (Apr. 14, 2003).

112. *Id.* at 35.

113. *Id.*



ethnic and religious profiling of Muslim minorities, in the aftermath of the tragic events of 11 September 2001”<sup>114</sup>, but still failed to recognize the profiling and other persecutions that other world religions had suffered in the same period.

For the first time, this resolution “*expresse[d]* deep concern” regarding motivations and actions of “*extremist organizations*,” particularly those aided by governments, whose aim is to defame religions<sup>115</sup>. This version encouraged governments to “ensure that all public officials ... in the course of their official duties respect different religions and beliefs and do not discriminate on the grounds of religion or belief”<sup>116</sup> and again requested that the Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance examine and report on physical assaults, and attacks on places of worship, businesses and properties of Muslim and Arab people specifically<sup>117</sup>. Thus, this resolution reiterated the preferential treatment for Islamic concerns and underscored the general acceptance of the defamation of religions resolutions by requesting particularized action by governments and officials to limit “defamation” specifically as directed towards Muslims. Again, this resolution had increased support and was adopted by a vote of thirty-two to fourteen with only seven abstentions<sup>118</sup>.

The 2004 resolution recognized the report submitted by the Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance, presumably submitted in response to the request in the 2003 resolution<sup>119</sup>. The recommendations to prevent defamation of religions in this version combined the “provide adequate protection” language of the 2001 and subsequent resolutions with the “take all appropriate measures” language of earlier versions<sup>120</sup>, perhaps indicating a disagreement as to the most appropriate language. Notably, this resolution marked the first decrease in support as it passed with three fewer votes than the previous year - twenty-nine in favor, sixteen opposed, and seven

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114. *Id.* at 36.

115. *Id.*

116. *Id.*

117. *Id.* at 37.

118. *Id.*

119. CHR Res. 2004/6, at 28, U.N. ESCOR, 60th Sess., Supp. No. 3, U.N. Doc. E/CN.4/2004/127 (Apr. 13, 2004).

120. *Id.* at 30.



abstentions. The reasons for this temporary decrease are unclear and support for the resolution increased the following year.

#### **4.e - 2005: Intensification of a Campaign**

The 2005 resolution was noticeably longer than previous versions and included several additions. This version again demonstrated an increase of specific references to the Islamic religions using “Islam” six times and “Muslim” seven times<sup>121</sup>. This indicated at least a continuing effort to make the defamation of religions theory particularly applicable to Islam. Additionally, the resolution noted “the *intensification of the campaign* of defamation of religions” since September 11, 2001<sup>122</sup>. It asserted that “in the context of the fight against terrorism and the reaction to counter-terrorism measures, defamation of religions becomes an aggravating factor that contributes to the denial of fundamental rights and freedoms to target groups, as well as their economic and social exclusion” and emphasized “the need to effectively combat defamation of all religions, Islam and Muslims in particular, especially in human rights forums”<sup>123</sup>. This was a clear assertion that the defamation resolutions had not been as effective as the OIC had hoped and served as a call for increased limitation on expressions that could be deemed defamation of religions. This version of the resolution serves as a clear indication that the OIC believed Islam deserves particularized protection from offense compared to other religions. The Commission adopted this version on a vote of thirty-one to sixteen with five abstentions, indicating strong endorsement of these assertions that had such broad implications for human rights generally.

#### **4.f - 2006-2007: The Move to the General Assembly**

The 2006 resolution was the first to be adopted by the General Assembly, did not vary substantially from the 2005 resolution adopted by the Commission, and still made frequent, obvious, particularized reference to Islam and Muslims as a specific religion and group of adherents principally deserving of protection<sup>124</sup>. This resolution is important because it is the first adopted by majority vote by the main

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121. CHR Res. 2005/3, U.N. ESCOR, 61st Sess., U.N. Doc. E/CN.4/2005/L.12 (April 12, 2005).

122. *Id.* (emphasis added).

123. *Id.*

124. G.A. Res. 60/150, 60th Sess., U.N. Doc. A/Res/60/150 (Jan. 20, 2006).



organ of the U.N. This brought heightened attention to the defamation of religions debate and encouraged participation by a wider swath of States regarding the issue.

The 2007 resolution still made frequent reference to Islam and to Muslims, indicating that “defamatory” treatment of the religion and its adherents warranted special recognition and urging regulatory measures of such treatment. This resolution was the first to recognize the conflict between the defamation of religions theory and the right to freedom of expression. However, the resolution stated specifically that freedom of expression, “should be exercised with responsibility and may therefore be subject to limitation as provided by law and necessary for respect of the rights or reputations of others, protection of national security or of public order, public health or morals and *respect for religions and beliefs*”<sup>125</sup>. Furthermore, the resolution “[u]rge[d] States to take *resolute* action to prohibit” defamation of religions<sup>126</sup>. The first statement recognized the conflict and promptly asserted that protection against defamation of religions is a valid justification to limit the right of expression. The second took the “provide adequate protection” and “all appropriate measures” language of earlier versions to a new level - requiring that States take “resolute action.” As this resolution also passed by a majority vote, it appeared that the main body of the U.N. accepted this assertion and that defamation of religions was gaining recognition and strength.

#### 4.g - 2008: Decreasing Margins of Support

The 2008 resolution was substantively similar to the 2007 version. However, the newer version asked “the Secretary-General to submit a report on the implementation of the present resolution, including on the possible correlation between defamation of religions and the upsurge in incitement”<sup>127</sup>. Motivation for the inclusion of this request is unclear given that former resolutions and the resolution at issue already make the correlation between defamation of religions and incitement/intolerance. Perhaps the OIC was attempting to strengthen the link between the relatively new theory of defamation of religions and the already established laws regarding incitement. In linking the two theories, the OIC may have been attempting to lend credibility to

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125. G.A. Res. 61/164, 61st Sess., U.N. Doc. A/Res/61/164 (Feb. 21, 2006) (emphasis added).

126. *Id.*

127. G.A. Res. 62/154, 62d Sess., U.N. Doc. A/Res/62/154 (Mar. 6, 2008).





the defamation ideas thereby facilitating increased acceptance of the theory internationally. Notably, this version was not adopted by a majority, but by a plurality vote - twenty-one in favor, ten opposed, and fourteen abstentions - indicating a slight but noteworthy decrease of support that may have led to changes in subsequent resolutions.

#### 4.h - 2009: Current Resolution and Recommendations for Application

The 2009 resolution had noticeably fewer references to Islam<sup>128</sup>. It was considerably longer than previous versions - seven pages rather than two, three, or four - and for the first time made repeated references to “incitement to religious hatred”<sup>129</sup>. It mentioned an “overall campaign of defamation of religions, and incitement to religious hatred in general” before specifically mentioning the “ethnic and religious profiling of Muslim minorities”<sup>130</sup>. The resolution “deplore[d] all acts of psychological and physical violence and assaults, and incitement thereto, against persons on the basis of their religion or belief”<sup>131</sup>. This broader language concerning the religions and beliefs implicated indicated a willingness to afford protection to more than just Islamic beliefs. This is important because the question of defamation may arise between opposing religions and the broader language removes the weight favoring protection specifically for Islam<sup>132</sup>. It also added the language “enact the necessary legislation” to the stated obligation for state action indicating strong encouragement to pass statutes regulating behavior that may be deemed defamation of religions<sup>133</sup>.

Late in 2009, Belarus, the Syrian Arab Republic and Venezuela submitted a draft resolution that was subsequently approved by the General Assembly, the official version of which is not yet available<sup>134</sup>. This most recent draft specifically mentions “Islam” or “Muslim” only

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128. G.A. Res. 63/171, 63d Sess., U.N. Doc. A/Res/63/171 (Mar. 24, 2009).

129. *Id.*

130. *Id.*

131. *Id.*

132. For example, a Muslim may claim that the witness of a Christian is offensive because it asserts that Muhammad was not a prophet, that Christ is the Messiah, and that an individual can only be “saved” through faith in Christ. In this case, the Christian’s exercise of a basic right of freedom of belief and practice runs in direct opposition to the core beliefs of the Muslim. Earlier resolutions emphasizing protection for Islam over other religions may provide support for countries embracing Islam as a state religion to prohibit any such actions deemed offensive to Islam.

133. G.A. Res. 63/171, *supra* note 123.

134. G.A. Res., 64/PV.65, 64th Sess., U.N. Doc A/Res/64/156 (Dec. 18, 2009).



three times and adds recognition of “the valuable contributions of all religions and beliefs to modern civilization and the contribution that dialogue among civilizations can make to an improved awareness and understanding of common values”<sup>135</sup>. This language is encouraging as it recognizes some value to all religious beliefs and encourages improved awareness and understanding among varied beliefs.

This resolution also adds an assertion that defamation of religions “give[s] rise to polarization and disturb[s] social cohesion” and introduces a recognition of “the importance of the interface between religion and race, and that instances of multiple or aggravated forms of discrimination can arise on the basis of religion and other grounds such as race, colour, descent, or national or ethnic origin”<sup>136</sup>. This assertion may inspire stronger support for the prevention of defamation of religions as it perhaps appropriately conflates defamation ideals with those of racial or ethnic discrimination. Certainly, the right to believe and practice a religion is deserving of strict protections, similar to the strict restrictions on racial or ethnic discrimination. But discrimination is a different animal than defamation in that discrimination usually requires a showing of some sort of treatment or exclusion based primarily on the stated classification. On the other hand, defamation can be much more broadly interpreted such that another person’s ideas or mere expression that may be offensive to adherents of a particular religion can be limited. This does not require a showing of unfair treatment or exclusion, merely an assertion that the expression offended and thus should be prohibited. This broad theory applied with the same force as protections designed to prevent racial or ethnic discrimination would most certainly impinge on individual rights of expression.

This most recent General Assembly Resolution passed with eighty votes in favor, sixty-one votes opposed, and forty-two abstentions, indicating that support for the resolution continues to wane<sup>137</sup>. This version advocates for protection against defamation of religions generally, but still makes special mention only of Islam, stating that it is a religion that “is frequently and wrongly associated

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135. *Id.*

136. *Id.*

137. G.A./10905, 64th Sess., General Assembly Adopts 56 Resolutions, 9 Decisions Recommended by Third Committee, available at <http://www.un.org/News/Press/docs/2009/ga10905.doc.htm>.



with human rights violations and terrorism”<sup>138</sup>. It also condemns “racism, racial discrimination, xenophobia and all other forms of related intolerance”<sup>139</sup>; and it again urges member States to enact legislation to “provide ... adequate protection against acts of hatred, discrimination, intimidation and coercion resulting from the defamation of religions, and incitement to religious hatred in general”<sup>140</sup>.

There continues to be debate about what this actually means and how States can enforce laws meant to prevent giving offense to what amounts to a collection of ideas and beliefs<sup>141</sup>. The most recent report and recommendations of the Special Rapporteur to the U.N. Human Rights Council (the “Council”) discuss this conceptual difficulty and advise that the Council move away from the “sociological notion of the defamation of religions” and instead embrace the “human rights concept of incitement to racial and religious hatred”<sup>142</sup>. The Special Rapporteur also notes this approach would lead towards the necessary balance between freedom of expression and the need to eliminate hate speech<sup>143</sup>.

Interestingly, this approach shifts the focus from a general protection against defamation of religions towards an individualized protection against discrimination, incitement, and hate speech. It leans towards curbing undesirable words and actions against another person rather than against beliefs and provides slightly more preferential

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138. G.A. 64th Sess., 3d Comm., Belarus, Syrian Arab Republic, and Venezuela: Draft Resolution: Combating Defamation of Religions, U.N. Doc. A/C.3/64/L.27 (Oct. 29, 2009) at ¶ 7.

139. *Id.* ¶ 12.

140. *Id.* ¶ 15.

141. See, e.g., John Cerone, *Inappropriate Renderings: The Danger of Reductionist Resolutions*, 33 *BROOK. J. INT’L L.* 357 (2008) (illustrating the two extreme positions and asserting that the corpus of international law provides a sufficient framework to understand and find a balance between the interests); Joshua Foster, *Prophets, Cartoons, and Legal Norms: Rethinking the United Nations Defamation of Religion Provisions*, 48 *J. CATH. LEGAL STUD.* 19 (2009) (contending that the U.N.’s approach is overly paternalistic and infringes on free speech principles); L. Bennett Graham, *Defamation of Religions: The End of Pluralism?*, 23 *EMORY INT’L L. REV.* 69 (2009) (asserting that the defamation of religions solution is problematic because it inhibits the protection of other fundamental freedoms).

142. Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance, *Racism, Racial Discrimination, Xenophobia and Related Forms of Intolerance: Follow-up to and Implementation of the Durban Declaration and Programme of Action*, ¶ 5, delivered to the Human Rights Council, U.N. Doc. A/HRC/12/38 (Jul. 1, 2009) [hereinafter S.R. Report 2009].

143. *Id.* ¶ 19.



treatment for the right to hold and express autonomous opinions than would be provided by a strong anti-defamation approach.

Over time, the Resolutions on the Defamation of religions have broadened to include all religions within their circle of proposed protection, but continue to specifically mention only Islam - setting it up as the one set of beliefs that is in particular need of such protections. The resolutions have asked state governments and international bodies to provide protection against defamation of religions in increasingly robust terms. Finally, they have made increasingly vigorous connections between defamation of religions and other more strictly prohibited expressions that are generally more narrowly defined such as incitement and racial discrimination. Though some changes are encouraging - *e.g.* the inclusion of all religions as worthy of protection - others present concern about the enactment and enforcement of statutes designed to follow the defamation of religions principles and recommendations. An examination of such statutes and their enforcement in OIC member and non-member states exemplifies such concerns.

## **5 - Consequences of Accepting the Resolutions and Subsequent Enactment of Statutes Designed to Prevent Defamation of Religions**

Broad acceptance of the Defamation of Religions Resolutions will contribute to the enactment and enforcement of overbroad, vague laws that may appear to protect religious interests, but actually impinge impermissibly on individual rights of freedom of expression and freedom of religion. Below are examples of laws and rulings in State courts that follow the doctrinal basis of the defamation of religions resolutions. The degree to which such a theory can infringe on the basic human rights of freedom of speech and expression are clearly illustrated in the following examples, including international adjudications as well as statutes and adjudications in OIC member and non-member states.

### **5.a - Human Rights Committee**

The Human Rights Committee (the "Committee") is a body of experts charged with monitoring the implementation of the ICCPR by State



parties<sup>144</sup>. The Committee is also the successor to the body that initially approved the defamation of religions resolutions and it tends to fall on the side of stricter protection against defamation. It has the authority to clarify articles of the ICCPR by issuing general comments and by hearing and deciding cases brought under the articles of the ICCPR. The cases brought pursuant to Article 20 reinforce the idea that the ICCPR provides broad discretion to limit an individual's freedom of expression because of the possibility of offending another's religious beliefs.

#### 1. J.R.T. & the W.G. Party v. Canada

In this case, the Committee held that anti-Semitic views were expressions subject to limitation under Article 20 when the leader of an unincorporated political party created messages designed to «warn ... "of the dangers of international finance and international Jewry leading the world into wars, unemployment and inflation and the collapse of world values and principles"» that were accessible by telephone to persons who dialed a specific number<sup>145</sup>. The court's reasoning was limited and provided almost no instruction on how to determine where to draw the line between freedom of expression and the responsibility not to discriminate.

#### 2. Faurisson v. France

Nearly ten years after J.R.T., the Committee upheld a conviction under French law for contesting the history of the Holocaust and held the conviction was not a violation of the ICCPR where a university professor questioned the existence of extermination gas chambers in Nazi concentration camps<sup>146</sup> even though the professor claimed he had suffered ridicule, death threats and personal attacks, and asserted that the act under which he was prosecuted and convicted<sup>147</sup> posed "a threat to freedom of research and freedom of expression"<sup>148</sup>. In this case, the

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144. Office of the United Nations High Commissioner for Human Rights, Human Rights Committee Website, <http://www2.ohchr.org/english/bodies/hrc/> (last visited Mar. 4, 2009).

145. J.R.T. and the W.G. Party v. Canada, CCPR/C/18/D/104/1981, Human Rights Committee (1981) available at <http://www1.umn.edu/humanrts/undocs/html/104-1981.htm>.

146. Faurisson v. France, Communication No. 550/1993, U.N.Doc. CCPR/C/58/D/550/1993 (1996).

147. The Act in question was titled the "Gayssot Act" and "makes it an offence to contest the existence of the category of crimes against humanity . . . on the basis of which Nazi leaders were tried and convicted by the International Military Tribunal at Nuremberg in 1945-1946." *Id.* at ¶ 2.4.

148. *Id.* at ¶ 2.5.



Committee considered several factors. First, it considered the issue through a broad social context, giving deference to the French government's assertion that challenging the truth of the Holocaust was a "principal vehicle for anti-semitism"<sup>149</sup>. Thus, the court found the limitation necessary under Article 19 because the government acted to prevent what it had determined constituted discrimination towards a particular group.

## 5.b - The European Court of Human Rights

Decisions of the European Court of Human Rights (the "Court") are not binding internationally beyond the forty-seven member States that have ratified the European Convention for the Protection of Human Rights ("ECHR"). However, it is a court with international influence and its decisions provide some of the most persuasive authority available in analyzing the implications of parallel international instruments such as the ICCPR. John Cerone asserts that jurisprudence arising under Article 10 of ECHR has provided "the most extensive freedom of expression jurisprudence"<sup>150</sup>. The Court is charged with interpretation of the ECHR and Cerone has identified two separate analyses with which the court has examined limitations on expression. The first relies on Article 17 of the ECHR and applies to a narrow factual application. The second relies on the limitations clause of Article 10 and is applied more broadly.

### 1. Limitations of expressions under Article 17

Article 17 is an abuse of rights provision of the ECHR and states:

Nothing in this Convention may be interpreted as implying for any State, group or person any right to engage in any activity or perform any act aimed at the destruction on any of the rights and freedoms set forth herein or at their limitation to a greater extent than is provided for in the Convention<sup>151</sup>.

Though it is difficult to get facts to fit in this vague language, Cerone identified three factors the Court has considered when examining limitations on expressions specifically involving challenges to the validity of the Holocaust. Though these factors are likely fact-

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149. *Id.* at ¶ 9.7.

150. Cerone, *supra* note 136, at 363 (analyzing in detail the cases and trends towards increasing limitations on expression as justified by defamation of religions principles).

151. European Convention on Human Rights art. 17, Nov. 4, 1950, 2 B.D.I.E.L. 165.





specific, they give some insight into the Court's treatment of defamation issues.

First, the expression being limited must be "one of the most serious forms of incitement to hatred of Jewish people"<sup>152</sup>. Second, the expression must infringe on the rights of others<sup>153</sup>. Finally, the expression must be a "serious threat to public order"<sup>154</sup>. Cerone notes that these factors have been strictly limited to cases involving a denial of the Holocaust because of the "significance of the Holocaust in European history"<sup>155</sup>. He further notes that the Court otherwise accords a lofty status to Article 10, holding that "freedom of expression ... constitutes one of the essential foundations of a democratic society and one of the basic conditions for its progress and for each individual's self-fulfillment"<sup>156</sup>.

## 2. Limitations of expression under Article 10

When examining limitations on expression that are not denials of the Holocaust, the Court's analysis stays more closely aligned with the limitations clause of Article 10<sup>157</sup> which states:

The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions, or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary<sup>158</sup>.

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152. Cerone, *supra* note 136, at 364.

153. *Id.*

154. *Id.*

Denying crimes against humanity is therefore one of the most serious forms of racial defamation of Jews and of incitement to hatred of them. The denial or rewriting of this type of historical fact undermines the values on which the fight against racism and anti-Semitism are based and constitutes a serious threat to public order. Such acts are incompatible with democracy and human rights because they infringe the right of others. Their proponents indisputably have designs that fall into the category of aims prohibited by Article 17 of the Convention.

*Id.* at 364–65 n.47 (citing *Garaudy v. France*, 2003-IX Eur. Ct. H.R. 369, 397).

155. *Id.* at 365.

156. *Id.* (quoting *Lingens v. Austria*, 103 Eur. Ct. H.R. (ser. A) at 26 (1986)).

157. *Id.*

158. ECHR, *supra* note 152 at art. 10(2).



The standard analysis the Court uses in examining limitations on expressions under Article 10 consists of two basic parts<sup>159</sup>. First, the Court asks whether there has been an interference with freedom of expression as stated in article 10(1)<sup>160</sup>. Then, if there is interference, the Court determines whether the interference is permissible<sup>161</sup>. A limitation is permissible only if it is “prescribed by law, [or is] one of the enumerated aims [of Article 10], and [is] necessary to a democratic society”<sup>162</sup>. In applying this test, the Court has not drawn a hard line between categories of what is an acceptable limitation and what is not, but it prefers to balance several factors on a case by case basis<sup>163</sup>. Notably, when the expression is one of core speech such as political speech, the category of permissible limitation will be narrowed<sup>164</sup>. Conversely, if the expression incites violence, the category of permissible limitations will be broadened<sup>165</sup>.

Ultimately, the Court has created a confusing and unpredictable jurisprudence that nonetheless gives preferential treatment to protecting religious sensibilities and provides some support for the defamations of religions theory. Cerone points out that in *Kokkinakis v. Greece* the Court held that a State may legitimately limit conduct “judged incompatible with respect for the freedom of thought conscience, and religion of others”<sup>166</sup>. Additionally, in *Otto-Perminger-Institut v. Austria* the Court held that seizure of a film by a State may be a permissible limitation on expression when the State has found that the film is an attack on religion<sup>167</sup>. *Otto-Perminger* provided the OIC with a strong precedent favoring implementation of defamation of religions principles. There, the court articulated a new “right of citizens not to be insulted in their *religious feelings*” through the expressions of others<sup>168</sup>. The court has tied this right to the right of religious freedom, but it has

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159. Cerone, *supra* note 83, at 366.

160. *Id.*

161. *Id.*

162. *Id.* (citing *Sürek v. Turkey* (No. 1) 1999-IV Eur. Ct. H.R. 355; *Jersild v. Denmark*, 298 Eur. Ct. H.R. (ser. A) (1994); *Lingens v. Austria*, 103 Eur. Ct. H.R. (ser. A) (1986)).

163. *Id.* (citing *Sürek*, 1999-IV Eur Ct. H.R. at 382; *Jersild* 298 Eur. Ct. H.R. (ser. A) at 24–25; *Lingens*, 103 Eur. Ct. H.R. (ser. A) at 25).

164. *See id.* at 367.

165. *Id.*

166. *Id.* at 369 (citing *Kokkinakis v. Greece*, 260-A Eur. Ct. H.R. (ser. A) 20 (1993)).

167. *Id.* (citing *Otto-Perminger Institut v. Austria*, 295 Eur. Ct. H.R. (ser. A) 17–18 (1994)).

168. *Id.* (quoting *Otto-Perminger*, 295 Eur. Ct. H.R. (Ser. A) at 18) (emphasis added)).



clearly stated that those exercising their freedom of religion cannot expect to be free from criticism; rather, believers should be prepared to “tolerate and accept the denial by others of their religious beliefs and even the propagation by others of doctrines hostile to their faith”<sup>169</sup>. This, it would seem, is the heart of religious freedom - inherent in the acceptance that each is free to believe and to exercise that belief is the acceptance that the beliefs of some will conflict with the beliefs of others. It follows that individual rights such as freedom of expression should be limited only to the extent absolutely necessary to prevent infringement on others’ fundamental rights.

Unfortunately, the international adjudicatory precedents on permissible limitations of expression are unclear and leave little surety as to which expressions are allowed and which will be limited. Perhaps more problematic is the lack of clarity as to *why* expressions may be limited or protected and the Court’s apparent willingness to show a great amount of deference to the State even when it limits the expression of individuals who do not subscribe to majoritarian beliefs in their respective countries. For example, in more recent decisions, the Court has upheld a ban of a film deemed blasphemous and offensive to Christians by the British government, and it found a Turkish criminal blasphemy statute consistent with Article 10<sup>170</sup>. Cerone points out that in the continuing expansion of permissible limitations, the Court “may have lost its sense of the balance between [freedom of expression and freedom of religion]”<sup>171</sup>.

Though these precedents lend ample support to the theory behind the defamation of religions resolutions, there is a danger in allowing a broadening of acceptable limitations in relation to the injured feelings of groups of adherents to particular religions. In

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169. *Id.* at 371 (quoting *Otto-Perminger*, 295 Eur. Ct. H.R. (Ser. A) at 17–18)).

170. *Id.* at 370–371 (citing *Wingrove v. U.K.* 1996-V Eur. Ct. H.R. 1960; *İ.A. v. Turkey*, App. No. 42571/98, Eur. Ct. H.R. (2005)).

171. *Id.* at 372. Cerone illustrates that the Court appears to be allowing limitations on expression when there has been no showing as to how those expressions limit or infringe on any specific right of another person. Additionally, the Court has failed to establish a clear link between its articulation of protection of religious feelings and the right to freedom of religion. Moreover, he notes that protection for religious feelings seems more appropriate when applied to vulnerable minorities rather than to majorities that may use defamation or blasphemy to keep the minority in check. Finally, Cerone notes that an inherent problem with blasphemy laws - often created and maintained as a protection of religious feelings - is that they focus on protecting the feelings of a group rather than regulating actions or behavior that would limit an individual’s or the group’s right to believe and practice religion as they choose. *Id.* at 372.



continuing to accept these precedents and encouraging a broad category of limitations on freedom of expression, the human rights framework would be undermined by claims of offense from even majoritarian groups exercising their right to have their religious feelings insulated from injury. And thus majority groups could then oppress and discriminate against minority groups - even when those minority groups may be exercising their own religious beliefs through various expressive means like teaching, witnessing, or sharing their beliefs with others.

### **5.c - Blasphemy, Incitement, and Hate Speech Laws and Their Enforcement**

Currently, a number of States prevent defamation of religions through blasphemy, incitement, or hate speech laws. Though not labeled as defamation statutes, these laws protect interests parallel to those that the OIC seeks to protect through promulgation of the defamation of religions theory, and they act as a sanctioned limitation on the right of expression. This Section first gives a brief sampling of such statutes and their enforcement in OIC member States, and then explores them in non-member States<sup>172</sup>.

#### *1. OIC Member States*

*a. Afghanistan.* Afghanistan takes a strong stance against blasphemy and even allows death sentences to those who violate its blasphemy laws. Journalist Sayed Perwiz Kambakhsh was sentenced to death after being found guilty of blasphemy<sup>173</sup>. Kambakhsh was arrested after fellow university students complained that he was mocking Islam and the Qur'an and that he had circulated an article stating that Mohammad failed to enforce women's rights<sup>174</sup>. Reportedly, Kambakhsh confessed to blasphemy and upon his sentencing, the Afghan court threatened

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172. Because of the difficulty in locating source materials in English from the member States, many of these examples are taken from news sources, and the legal reasoning of the courts is not always evident. However, this gives a good sampling of the possible abuses by governments under the OIC's defamation of religions theory. Many of these examples were first found at [http://www.eclj.org/PDF/080623\\_Recent Defamation\\_of\\_Religion\\_Incidents\\_and\\_Cases.pdf](http://www.eclj.org/PDF/080623_Recent_Defamation_of_Religion_Incidents_and_Cases.pdf) as part of an appendix posted online by the European Centre for Law and Justice.

173. *U.S. Troubled by Afghan Journalist's Death Sentence*, REUTERS, Jan. 25, 2008, <http://www.reuters.com/article/worldNews/idUSN2536506520080125>.

174. *Id.*



arrest for any who protested his punishment<sup>175</sup>.

*b. Iran.* Like Afghanistan, Iran takes a hard stance against anything it considers blasphemy. Hashem Aghajari was a university professor in Iran when he gave a speech urging the listeners to question religious teachings including the words of the clerics, which he categorized as part of history rather than sacred writ<sup>176</sup>. After being found guilty of blasphemy, Aghajari was originally sentenced to death, but that sentence was reduced to “insulting religious values”<sup>177</sup>. He ultimately spent more than two years in prison before being released on \$122,500.00 bail<sup>178</sup>.

*c. Pakistan.* Pakistan, a leading member of the OIC and the country that first submitted a draft resolution on defamation of religions, clearly has a history of limiting the fundamental right of expression in order to protect the reputation and feelings of Islam, but not necessarily other religions. Pakistan’s enforcement of blasphemy and defamation laws is extensive and well-documented. Punishment for insults against Islam can lead to fines, life imprisonment, or a death sentence<sup>179</sup>, though no one has been officially sentenced to death due to a lack of sufficient evidence in Pakistan’s high courts<sup>180</sup>. The National Commission for Justice and Peace states that 537 people were charged with blasphemy during the time period from 1986 - when the blasphemy rule was first promulgated - through 2003, and sixteen of those accused were arbitrarily killed before they appeared in court, or were arrested<sup>181</sup>. Additionally, forty-one Christians were killed and ninety-one were

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175. *Afghan ‘Blasphemy’ Death Sentence*, BBC NEWS, Jan. 23, 2008, [http://news.bbc.co.uk/2/hi/south\\_asia/7204341.stm](http://news.bbc.co.uk/2/hi/south_asia/7204341.stm).

176. *Iran Frees Professor Set to Die for Free Speech*, N.Y. TIMES, Aug. 1, 2004, § 1, at 12.

177. Nazila Fathi, *Iran Drops Death Penalty for Professor Guilty of Blasphemy*, N.Y. TIMES, Jun. 29, 2004, at A8.

178. *Iran Frees Professor Set to Die for Speech*, *Supra* note 171, at 12.

179. Pakistan Penal Code, ch. XV, art. 295 (1986), available at [http://www.punjabpolice.gov.pk/user\\_files/File/pakistan\\_penal\\_code\\_xlv\\_of\\_1860.pdf](http://www.punjabpolice.gov.pk/user_files/File/pakistan_penal_code_xlv_of_1860.pdf).

180. *Pakistan Shuts Nursing College After Blasphemy Scare*, REUTERS, Jun. 4, 2007, <http://in.reuters.com/article/topNews/idINIndia-30139120070604> (last visited Nov. 26, 2009).

181. U.N. Comm’n on Human Rights, Working Group on Minorities, 10th Sess. *National Commission for Justice and Peace Letter to the U.N. Commission on Human Rights*, (Mar. 1, 2004), <http://www2.ohchr.org/english/issues/minorities/docs/NCJP3a.doc>

Jagdeesh Kumar’s co-workers allegedly found him guilty of blasphemy and sentenced him to die before enforcing the sentence themselves by beating the twenty-year-old to death. Felix Qaiser, *Mgr Saldanha Slams Murder of Hindu, Killed for Alleged Blasphemy*, ASIANEWS.IT April 9, 2008, <http://www.asianews.it/index.php?l=en&art=11971> (last visited Nov. 26, 2009).



injured in attacks against Christian (minority) churches<sup>182</sup>.

The threat of punishment for blasphemy was enough to shut down a nursing school in Islamabad after allegations arose saying that verses from the Qur'an posted on a wall had been defaced<sup>183</sup>. Teachers were suspended and students sent away for more than two weeks as a precaution<sup>184</sup>. Ultimately the trouble was ascribed to "invisible hands trying to ... create disharmony among Muslim and Christian students"<sup>185</sup>.

As late as 2008, Robin Sardar, a Christian physician was charged with blasphemy in Hafizabad<sup>186</sup>. He was accused of making derogatory comments about Mohammed's beard and the Qur'an<sup>187</sup>. A mob allegedly attacked his home and threatened his life and his family; Sardar was then taken into custody<sup>188</sup>. He faces the death penalty under Pakistan's penal code<sup>189</sup>.

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182. *National Commission for Justice and Peace Letter to the U.N. Commission on Human Rights*, *supra* note 176.

183. *Pakistan Shuts Nursing College After Blasphemy Scare*, *supra* note \*\*\*.

184. *Id.*

185. *Id.*

186. *Persecution.org, Muslims Want Christian Doctor Hanged Publicly for "Blasphemy" in Pakistan*, May 14, 2008, <http://www.persecution.org/suffering/ICCnews/newsdetail.php?newscode=7737>.

187. *Id.*

188. *Id.*

189. Pakistan Penal Code, at article 295-C ("Use of derogatory remarks, etc., in respect of the Holy Prophet: Whoever by words, either spoken or written, or by visible representation or by any imputation, innuendo, or insinuation, directly or indirectly, defiles the sacred name of the Holy Prophet Muhammad (peace be upon him) shall be punished with death, or imprisonment for life, and shall also be liable to fine").





d. *Saudi Arabia*. To a lesser degree than Pakistan, perhaps, Saudi Arabia still allows preservation of religious feelings to outweigh individual right to expression leading to extreme punishments merely for holding and expressing an idea. After police received complaints of a barber swearing at God in public, Sabri Bogday, age thirty, was arrested and sentenced to death after a closed trial in Jeddah<sup>190</sup>. He is not fluent in Arabic, and was not allowed to have a lawyer or a translator during his trial<sup>191</sup>.

Mustafa Ibrahim was beheaded in 2007 after being convicted of desecrating the Qur'an, sorcery, and adultery<sup>192</sup>. He was arrested under charges of placing the Qur'an in washrooms<sup>193</sup>. At the time of his arrest there was no mention of adultery or sorcery<sup>194</sup>.

Muhammad Al-Harbi, a Saudi high school teacher, was accused by his students and fellow teachers of mocking Islam while showing favoritism for Jews and Christians<sup>195</sup>. The students that accused him had recently failed a test administered by Al-Harbi and he had refused to allow them to retake the exam<sup>196</sup>. Additionally, Al-Harbi had allegedly advocated against terrorism - an action that offended the fundamentalist students in his classrooms<sup>197</sup>. Al-Harbi was arrested and sentenced to three years in prison and fifty lashes a week for fifteen weeks to be administered in the public market of Al-Bikeriya. At trial, Al-Harbi's lawyer was not acknowledged as such, and Al-Harbi was not allowed to question his accusers, nor call any witnesses<sup>198</sup>.

e. *Sudan*. In the Sudan, the reach of these limitations of expressions extends severe punishment even to those who are unaware that their words or actions are in any way offensive, let alone defamatory or blasphemous. British School teacher, Gillian Gibbons, was arrested by

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190. Amnesty International Doc. MDE 23/014/2008 (Apr. 23, 2008), <http://www.amnesty.org/en/library/asset/MDE23/014/2008/en/224d8f74-115a-11dd-a414-a101e24af105/mde230142008eng.pdf>. (last visited November 27, 2009).

191. *Id.*

192. *Saudi Executes Egyptian for Practising 'Witchcraft'*, REUTERS, Nov. 2, 2007, <http://africa.reuters.com/wire/news/usnL02434180.html> (last visited Nov. 27, 2009).

193. *Id.*

194. *Id.*

195. Ebtihal Mubarak, *Teacher Charged with Mocking Religion Sentenced to Jail*, ARAB NEWS, Nov. 14, 2005, <http://www.arabnews.com/?page=1&section=0&article=73171> (last visited Nov. 29, 2009).

196. *Id.*

197. *Id.*

198. *Id.*



“men with big beards ... saying they wanted to kill her” and imprisoned for blasphemy after allowing her primary school class to name a teddy bear Mohammed<sup>199</sup>. She faced public lashing, or up to six months in jail if she was found guilty<sup>200</sup>. Within a month, she had been sentenced to prison but granted a presidential pardon, largely due to the intervention of two British Muslim parliamentarians<sup>201</sup>.

In these brief examples from OIC member States, the problems inherent in the defamation of religions theory are clear. Because there is no line drawn between acceptable speech that may seem insulting or offensive speech that actually leads to discrimination or incitement against the targeted religion, and because the defamatory - in these cases blasphemous - nature of the expression is judged not by the action that results but by a per se standard (meaning if the prohibited expression happens it is blasphemous and thereby punishable) there is a broad range of “permissible” limitations on the freedom of expression in order to preserve the majority religion’s freedom from religious injury. This effect can be seen in non-member States as well, including some Western States.

## 2. Non-Member States

*a. India.* The Indian government has demonstrated a willingness to ban written works rather than defend authors from serious personal threats. Well-known author Talima Nasreem was forced to flee her home country of Bangladesh after publication of her book, *Shame*, when Muslim extremists made her into the object of threats and unofficial death sentences. Nasreem initially resorted to heavy security but eventually went into exile. Officially, her government has banned her writings claiming they could “hurt the people’s religious sentiments,” has stopped imports of magazines carrying her poems, and sentenced her to one year in prison for “writing derogatory comments about Islam.”<sup>202</sup>. Even these government actions, which do not rise to the threat of long-term imprisonment or death, still demonstrate a

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199. Rob Crilly, *The Blasphemous Teddy Bear*, TIME, Nov. 26, 2007, <http://www.time.com/time/world/article/0,8599,1687755,00.html> (last visited Nov. 27, 2009).

200. *Id.*

201. Sam Dealey, *The Teddy Bear Tumult’s Legacy*, TIME, Dec. 3, 2007, <http://www.time.com/time/world/article/0,8599,1690280,00.html?iid=sphere-inline-bottom> (last visited Nov. 27, 2009).

202. *Talima Nasreen: Controversy’s Child*, BBC NEWS, Nov. 23, 2007, [http://news.bbc.co.uk/2/hi/south\\_asia/7108880.stm](http://news.bbc.co.uk/2/hi/south_asia/7108880.stm) (last visited Nov. 27, 2009).



willingness to protect against religious defamations rather than other human rights.

*b. Italy.* Even in Europe, States have demonstrated a willingness to protect the sentiments of a religion by prosecuting an author for written works deemed offensive. A well-known Italian author, Oriana Fallaci faced charges of “outrage” toward religion. The president of the Muslim Union of Italy accused her by saying the book in question was “offensive to Islam and Muslims,” and argued that it incited religious hatred<sup>203</sup>. Fallaci defended her writing, responding that she had “expressed [her] opinion through the written word through [her] books, that is all”<sup>204</sup>. She was living in the United States at the time and did not travel to Italy to appear in court<sup>205</sup>. She died just three months after the trial began.

*c. Canada.* Canada has also rejected the United States’ very broad protection of speech, favoring instead to allow criminal punishment for “hate propaganda,” including statements that tend to produce hateful feelings towards an identifiable group<sup>206</sup>. Additionally, Canada openly advocates limits to the right of expression<sup>207</sup>. In 1990, the Canadian Supreme Court upheld a criminal conviction of a teacher for “unlawfully promoting hatred against an identifiable group by communicating anti-Semitic statements to his students”<sup>208</sup>. The Court

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203. *Islam “Defamation” Trial Delayed*, WORLD NET DAILY, June 14, 2006, [http://www.wnd.com/news/article.asp?ARTICLE\\_ID=50636](http://www.wnd.com/news/article.asp?ARTICLE_ID=50636) (last visited Nov. 27, 2009).

204. *Italian Author to be Tried for Defaming Islam*, THE JERUSALEM POST, Jun 12, 2006, <http://www.jpost.com/servlet/Satellite?cid=1150035834414&pagename=JPost%2FJP%2FShowFull>, (last visited Nov. 27, 2009).

205. *Islam “Defamation” Trial Delayed*, supra note 199.

206. Canadian Criminal Code § 319, available at <http://laws.justice.gc.ca/eng/C-46/20091128/page-0.html?rp2=HOME&rp3=SI&rp1=hate&rp4=all&rp9=cs&rp10=L&rp13=50#idhit1> (making public statements that incite hatred against an identifiable group and which are likely to create a breach of the peace a criminal offense punishable by up to two years in prison; making any statement, other than those made in private conversation, that “willfully promotes hatred against any identifiable group” a criminal offense punishable by up to two years in prison; and providing a defense to such offenses if the person can establish the truth of the statements, if the statements were made in a good faith argument to assert a religious opinion or belief, if the person had reasonable ground to believe the statements were true and engaged in a discussion for the public benefit, or if the person was acting in good faith to point out matters “producing or tending to produce feelings of hatred toward an identifiable group in Canada”).

207. *Id.*

208. *Regina v. Keegstra*, [1990] 3 S.C.R. 697, (Can.) available at <http://csc.lexum.umontreal.ca/en/1990/1990scr3-697/1990scr3-697.pdf>.



found that in his classes, the teacher had described Jews as “treacherous,” “communists,” “manipulative,” and “deceptive”<sup>209</sup>. The teacher also taught that Jews as a people were “sadistic,” “barbaric,” “money-loving,” and “power hungry”<sup>210</sup>. Chief Justice Brian Dickson noted that the “relationship between Canadian and American approaches to the ... protection of free expression”<sup>211</sup> was important to the case, but concluded that, although “there is much to be learned from First Amendment jurisprudence [in the United States]”<sup>212</sup>,

*the international commitment to eradicate hate propaganda and, most importantly, the special role given equality and multiculturalism in the Canadian Constitution necessitate a departure from the view ... that the suppression of hate propaganda is incompatible with the guarantee of free expression*<sup>213</sup>.

Canadian Human Rights jurisprudence also supports the OIC’s assertions that Islam needs singular protection against defamatory speech and that limitations on the right of expression are justified by a right not to be offended. Mohamed Elmsary, a Canadian Muslim and President of the Canadian Islamic Conference, brought suit against Mark Steyn claiming the publication of Steyn’s work in a magazine was discriminatory, defamatory, and thereby prohibited by Canadian hate law statutes<sup>214</sup>. The Ontario Human Rights Commission did not proceed with the complaint because the Ontario Human Rights Code (the “OHRC”) does not grant the Commission jurisdiction over complaints about periodical content. However, the Commission did express concern that “Islamophobic attitudes are becoming more prevalent in society and Muslims are increasingly the target of intolerance” and that Steyn’s writings as published were one example of this<sup>215</sup>. The Commission went on to “strongly condemn the targeting of Muslims, Arabs, South Asians and ... *any racialized community* by the media as being inconsistent with the [OHRC]”<sup>216</sup>. The Commission

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209. *Id.* at 104.

210. *Id.*

211. *Id.* at 46.

212. *Id.* at 51.

213. *Id.*

214. ONTARIO HUMAN RIGHTS COMMISSION, COMPLAINT NO. LHOR-72JP9D <http://www.steynonline.com/images/macleans%20hr%20on%20elmasry.pdf>.

215. Ontario Human Rights Commission, COMMISSION STATEMENT CONCERNING ISSUES RAISED BY COMPLAINTS AGAINST MACLEAN’S MAGAZINE, <http://www.ohrc.on.ca/en/resources/news/statement> (last visited Nov. 26, 2009).

216. *Id.* (emphasis added).



ultimately recognized that freedom of expression is important to democracy, has social value and contributes to self-fulfillment and the pursuit of truth, but warned that

with rights come responsibilities ... [T]he media has a responsibility to engage in fair and unbiased journalism. Bias includes . . . prejudicial attitudes towards individuals and groups . . . Freedom of expression should be exercised through careful reporting and not used as a guise to target vulnerable groups and to further increase the marginalization or stigmatization in society<sup>217</sup>.

Finally, the Commission reiterated that freedom of expression is a limited, rather than an absolute right, noting that one such limitation can be found in the Canadian Criminal Code provision on hate speech<sup>218</sup>.

*d. The United Kingdom.* David Wilson was charged with distributing "written material which is threatening, abusive or insulting [with the intent] to stir up racial hatred"<sup>219</sup> under sections 17 and 19 of the Public Order Act of 1986<sup>220</sup>. The lower tribunal found that within a community, Wilson had delivered leaflets that were threatening, likely to provoke fear, had racist overtones, and contained insulting, abusive, and inaccurate information that was an affront to the dignity of Muslims in the community and likely to cause a breach of the peace<sup>221</sup>. Wilson appealed his conviction, claiming that the tracts he distributed were political tracts not containing abusive material<sup>222</sup>. Additionally, he argued that section 17 of the Public Order Act focused on racial hatred and that such hatred had to be defined as against a group distinguished by color, race, nationality, ethnic, or national origins<sup>223</sup>. His request for appeal was refused and the court concluded that, as to the first question, Wilson failed to provide any evidence to refute the lower court's finding that the leaflet was threatening and so the initial finding was affirmed. As to Wilson's distinction between race and religion, the court sided with the lower court and held that the determination of

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217. *Id.*

218. *Id.*; see also Canadian Criminal Code, *supra* note 202.

219. Wilson v. Procurator Fiscal, [2005] J.C. 97, available at [http://www.bailii.org/scot/cases/ScotHC/2005/HCJAC\\_97.html](http://www.bailii.org/scot/cases/ScotHC/2005/HCJAC_97.html).

220. See Public Order Act, 1986, c.64 (Eng.), available at <http://www.statutelaw.gov.uk/content.aspx?activeTextDocId=2236942>.

221. Wilson, *supra* note 215 ¶ 4.

222. *Id.* ¶ 12.

223. *Id.*; see also Public Order Act, *supra* note 216..



whether a group fits in the definition of the act is a question of fact and that, in this case, the lower tribunal found that the terms “Pakistani” and “Muslim” were commonly used interchangeably<sup>224</sup>. Thus, the leaflets “were abusive to persons defined by reference to national origins and also colour,” and were not a permissible expression under the Act<sup>225</sup>.

*e. The United States.* The United States affords strong protection to speech, even speech that is hateful, offensive, or threatening. Critics believe that the United States is far too lenient in the amount and type of speech protected under constitutional standards. For example, as noted above, although incitement falls outside the category of protected speech, in order for speech to qualify as incitement under First Amendment jurisprudence, it must be both intended to incite or produce imminent lawless action and likely to incite or produce such an action<sup>226</sup>. This strong protection of speech was demonstrated when Saad Noah filed suit in the U.S. District Court of the Eastern District of Virginia against AOL Time Warner asking for damages and injunctive relief because AOL failed to prohibit anti-Islamic comments and insults in online chat rooms<sup>227</sup>. In his complaint, Noah listed more than twenty pages of vulgar insults, disrespectful epithets, and violent threats he had suffered from other AOL members while visiting Islam and Qur’an chat rooms<sup>228</sup>. The case was dismissed on the grounds that Noah, acting *pro se*, was not capable to represent other’s claims in a class action suit. However, the court held that Noah’s claim as to himself failed on all three legal theories Noah asserted. Importantly, Noah had no claim as to respecting hate speech, blasphemy, or defamation as no such laws exist in the United States. Neither did he have a First Amendment free speech claim because though the government in the United States is permitted to regulate incitement, it is not required to regulate incitement and in this case there was no attempt at such government regulation.

The wide spectrum of current treatment of statements and actions that fall under the defamation of religions theory is evident even in the small sampling of instances above. From the liberal protection of

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224. *Wilson, supra* note 215, ¶ 15.

225. *Id.*

226. *See* *Brandenburg v. Ohio*, 395 U.S. 444 (1969).

227. *See* *Noah v. AOL Time Warner, Inc.*, 261 F. Supp. 2d 532, (E.D. Va. 2004).

228. *Complaint, Noah v. AOL Time Warner, Inc.*, 261 F. Supp. 2d 532, (E.D. Va. 2004), *available at* <http://news.findlaw.com/hdocs/docs/aoltimewarner/noahao183001cmpt.pdf>.





freedom of expression under the First Amendment to the liberal punishment of even inadvertent offenses against Islam in the OIC member States like Pakistan, the range of possible interpretations and application of defamation of religions is almost unlimited and endows state actors with an enormous power of regulation and enforcement.

In addition to these examples, scholars and professionals have put forth numerous possible applications of defamation of religions, which pose increasing danger to the right of expression and increasing authority for tyrannical governments that would silence dissenters and for majoritarian religions that would infringe on others' rights to exercise their beliefs through witnessing and teaching.

#### **5.d - Possible Future Statutes and Enforcement Under Defamation of Religions Theory**

Adoption of the theory of defamation of religions as created by the OIC and proliferated in continuing U.N. Resolutions will allow enlarging the limitations on the right of expression—a discriminatory act in and of itself that is “the handmaiden of power [and] an instrument to assist in the attainment, preservation or continuance of . . . power, whether exercised by an individual, an institution, or a state. It is the extension of physical power into the realm of the mind and the spirit”<sup>229</sup>.

As late as November of 2008, a meeting on the “Culture of Peace” requested by Saudi Arabia and hosted by the U.N. was criticized by the chair of the U.S. Commission on International Religious Freedom as being

“a cooperative effort between Muslim nations to reinforce the defamation of religions resolution they’re sponsoring before the General Assembly ...” and “part of an attempt to legitimize sharia law ... acting as a shield for countries that persecute any insult to Islam and intimidate Western nations that may attempt to criticize them”<sup>230</sup>.

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229. Agnes Callamard, CONFERENCE ROOM PAPER, OFFICE OF THE UNITED NATIONS HIGH COMMISSIONER FOR HUMAN RIGHTS, EXPERT SEMINAR ON THE LINKS BETWEEN ARTICLES 19 AND 20 OF THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS 7 (quoting Michael Scammell, *Censorship and its History—A Personal View*, 1988 Article 19 World Report 5).

230. Jennifer Lawinski, FOX NEWS, Nov. 6, 2008, <http://www.foxnews.com/story/0,2933,448104,00.html> (last visited Jan. 2 2010).



This extension of power would reach new heights as States would be assuming responsibility to determine what type of expression qualifies as blasphemous or defamatory to religion as opposed to non-violative expression. This is obviously problematic in countries with a recognized state religion because of the danger to the limits of the rights of minority religions, but this venture into defining the indefinable is also dangerous in pluralistic countries with mostly secular, democratic governments. For example, the Danish government would be forced to decide what, if anything, might be defamatory or insulting to Islam in the now infamous cartoons. This is a nearly impossible task and opens the door to major abuses of discretion by governments, limiting expression as it is determined to offend a religion or set of beliefs.

Moreover, risks are high that would-be defamers will often commit their crimes unawares. For example, advertisements and marketing leading up to the 2010 World Cup has offended some Muslims. The Council of Muslim Theologians of South Africa stated that Souvenir soccer balls with images of the flags of Saudi Arabia, Iran, and Iraq, which include Islamic statements that Muslims hold as sacred, “[have] the potential of offending adherents of the Islamic faith”<sup>231</sup>. Though it is possible that no offense was intended or even foreseen, this act could be made punishable under the broad concept of defamation of religions. The U.N. must look for a more legitimate way to sensitively address the injustices suffered by multiple religious adherents and encourage actions to create an atmosphere of dialogue with respect and thus protect the freedom of expression as well as the freedom to believe and practice religion.

## **6 - Alternatives to Defamation of Religions in the U.N. Resolutions**

Attempts to define an alternative to the OIC resolutions on defamation of religions require a careful look at the interests to be balanced. Namely, the right to hold and express an opinion on one side balanced against the desire to encourage a respectful dialogue and eliminate discriminatory expressions and action on the other. The appropriate standard should include a notion of incitement that is considerably broader than the current U.S. standard but that is narrow enough to allow for some regulation, possibly even criminalization. However, the

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231. Organisation of the Islamic Conference, Cultural and Social Affairs Department OIC Islamophobia Observatory, MONTHLY BULLETIN – Nov. 2008 at 1(c), [http://www.oic-oci.org/english/article/MB\\_Nov-08.pdf](http://www.oic-oci.org/english/article/MB_Nov-08.pdf) (last visited Jan. 2, 2010).



standard cannot be so broad as to eliminate robust discussion that sometimes shocks and offends.

Some assert that the United States' First Amendment jurisprudence is the proper model and should be summarily adopted by the international legal community<sup>232</sup>. This approach is overly simplistic, ignores the pluralistic nature of international law, and is overtly imperialistic. It is short-sighted and fails to acknowledge compelling interests in preventing massacres like the Holocaust or Rwanda, which many scholars determine were rooted first in hateful or inciting speech<sup>233</sup>. As noted, above, no other country had embraced the broad protections that the United States provides pursuant to its First Amendment jurisprudence. Assertions, then, that this should be adopted without question as the international standard for freedom of expression appear inherently flawed. At the same time, the broad protections against defamation of religions proposed by the OIC and its member states impermissibly infringe on the basic human right of freedom to hold autonomous opinions and freedom to express those opinions as well as the freedom to exercise religious mandates to witness one's beliefs to others.

In response to the conflict between these important interests, the U.N. should follow the recommendation made by the Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance and move away from the "sociological notion of the defamation of religions" and towards the established "human rights concept of incitement to racial and religious hatred"<sup>234</sup> thus coming closer to an appropriate balance between freedom of expression and the need to eliminate hate speech<sup>235</sup>. Any permissible limitations under Article 19 of the ICCPR "should be clearly and narrowly defined" so as to be the "least intrusive means" of limiting expression and should not be allowed to justify prior

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232. See, e.g., Foster, *supra* note 136; Groves, *supra* note 38.

233. See, e.g., William A. Schabas, *Hate Speech in Rwanda: The Road to Genocide*, 46 MCGILL L.J. 144 (2000) ("Mugesera himself did not commit genocide, although his speech sparked a series of atrocities directed against Tutsi in the Gisenyi region of the country ... [H]is remarks constituted direct and public incitement to commit genocide. Mugesera's speech has been cited ... as one of the defining moments in the buildup to genocide. The road to genocide in Rwanda was paved with hate speech").

234. See UNITED NATIONS HUMAN RIGHTS COUNCIL, *Racism, Racial Discrimination, Xenophobia and Related Forms of Intolerance: Follow-up to and Implementation of the Durban Declaration and Programme of Action* ¶ 5, (Jul. 1, 2009), [http://www2.ohchr.org/english/bodies/hrcouncil/docs/12session/A-HRC-12-38\\_E.pdf](http://www2.ohchr.org/english/bodies/hrcouncil/docs/12session/A-HRC-12-38_E.pdf) (hereinafter S.R. Report 2009).

235. *Id.* ¶ 19.



ensorship on speech<sup>236</sup>. thus encouraging a robust debate within the community. This “free flow of information [will increase] the capacity of all to participate” in the nation or community and contribute to the understanding of law and policy therein<sup>237</sup>. Though this standard may conflict with Islamic religious requirements, it is not equitable that one group should have basic rights categorically enforced at the expense of others’ equally fundamental human rights. In order for all to enjoy and exercise such basic rights, all must endure occasional encroachments by those who do not share their beliefs until such encroachments reach a level of actual incitement to violence.

Rather than encouraging the vague defamation of religions theory as asserted by the OIC, thereby allowing States broad limitation on expression, the U.N. should encourage permissible limitations on speech that can include regulation and even criminalization for incitement or for hate speech that are sufficiently narrow. Ideally, statutory regulations would provide protection for individuals rather than for ideas and would lean towards punishing actions rather than expressions of ideas or opinions. Thus, an expression may seem offensive to the Islamic religion as a whole, but only an individual who experiences the effects of violence or discrimination or who would suffer the effects of violence or discrimination were it carried out could make a claim. This would do away with the shapeless victim or plaintiff of “a religion.” For example, a statute may require that the speaker or publisher intend that his or her expression will lead to discriminatory actions or exclusions of another group based on some type of classification—be it racial, ethnic, or religious. Another way to limit the limitations on expression might be to provide that the audience has to demonstrate intent to act on the inciting expression. Obviously, there will be some balancing involved regardless of the standard adopted because determining a hard-line rule for what type of speech incites hatred or discrimination is a nearly impossible task without considering the speaker, the audience, and the circumstances of the speech or

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236. UNITED NATIONS HUMAN RIGHTS COUNCIL, Report OF THE SPECIAL RAPPORTEUR on the Promotion and Protection of the Right to Freedom of Opinion and Expression ¶65, (March 7, 2008), <http://www2.ohchr.org/english/bodies/hrcouncil/docs/7sesion/A-HRC-7-14.pdf>.

237. Agnes Callamard, Conference Room Paper #2, OFFICE OF THE UNITED NATIONS HIGH COMMISSIONER FOR HUMAN RIGHTS, Expert Meeting on the Links Between Articles 19 and 20 of the ICCPR: Freedom of Expression and Advocacy of Religious Hatred that Constitutes Incitement to Discrimination, Hostility or Violence,(Oct. 2, 2008), [http://www2.ohchr.org/english/issues/opinion/articles1920\\_iccpr/experts\\_papers.htm](http://www2.ohchr.org/english/issues/opinion/articles1920_iccpr/experts_papers.htm).



speech act. However, with good principles and relying on established international legal foundations, a narrower protection can be enforced that will avoid indiscriminate infringement of the essential freedom to hold and express autonomous ideas and opinions.

Additionally, the U.N. must encourage that such statutes be designed to protect all religions from expressions that incite hatred or violence regardless of whether countries embrace a state religion and regardless of what that state religion is. States can thereby avoid favoring one group or sect over another and allow all to practice and contribute equally. Thus, countries will most likely encourage discussion in a respectful and civil atmosphere while avoiding “the peculiar evil of silencing the expression of an opinion” which could ultimately lead to “the [lost] opportunity of exchanging error for truth [or] the clearer perception and livelier impression of truth, produced by its collision with error”<sup>238</sup>.

## 7 - Conclusion

The legal theory of “Defamation of Religions” is a vague, overbroad principle designed to provide protection specifically for Islam and to allow Islamic nations to impermissibly limit the expressions of others within their countries. The U.N. should not continue to adopt the resolutions on defamation of religions as they encourage overbroad statutes giving governments the power to arbitrarily decide what constitutes defamation and should therefore be regulated or even criminalized. The negative effects of such broad-reaching statutes have already been demonstrated in multiple countries.

Rather than encourage the promulgation of defamation of religions legislation, the U.N. must use established international law principles and guidelines of incitement to discrimination and violence to encourage States to enforce religious rights, limit discrimination, and create an atmosphere of mutual respect through a suitably narrow notion of incitement that will allow some regulation and even criminalization, but that will continue to allow robust discussion that sometimes shocks and offends.

The motives behind the promulgation of the defamation of religions theory likely include an honest desire to prevent the type of discriminatory treatment Muslims have endured in multiple areas of

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238. John Stuart Mill, *ON LIBERTY* (1869), *reprinted in ON LIBERTY AND OTHER ESSAYS*, at 21 (Oxford Univ. Press 1998).



the world. However, sufficient protection can be afforded to individuals without embracing a doctrine that is so broad it substantially threatens the human right of freedom of expressions. It is imperialistic and inappropriate to suggest that the international legal community should merely adopt U.S. First Amendment jurisprudence as the model for the U.N. guidance on the matter. There may be broader impositions on expressions internationally than would be permissible in the United States, but limitations should be based on protecting individuals rather than religions and should be narrowly defined to avoid overbroad legislation that could be nothing more than a tool for governments with state religions to quash ideas with which they do not agree. Only then will we be able

“[t]o maintain international peace and security, ... [t]o develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, ... [t]o achieve international co-operation in solving international problems ... [and to] promot[e] and encourag[e] respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion”<sup>239</sup>.

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239. U.N. Charter art. 1, paras. 1–3.