"DEFAMATION OF RELIGION": A CRITIQUE OF THE UNITED NATIONS AND ARAB CO-AUTHORSHIP OF THE BALANCE BETWEEN EXPRESSION AND RELIGIOUS RIGHTS

Georgia Alida du Plessis[*]

ABSTRACT

The past decade has seen numerous resolutions on "defamation of religion" presented before the United Nations by Islamic countries. These resolutions have undoubtedly been controversial, particularly because of the tension that they have created between freedom of religion and freedom of expression. As the movement appeared to quiet down and the language of "defamation of religion" was removed from the resolutions and replaced by Resolution 16/18, many believed that "defamation of religion" belongs to the past and that freedom of expression had prevailed. Perhaps such a view was naïve. This article considers the definition, history, and development of the "defamation of religion" movement. The resulting tensions between freedom of expression and religious freedom will be addressed, specifically within the context of the International Covenant on Civil and Political Rights (ICCPR) and the Universal Declaration on Human Rights (UDHR), before moving on to a critique of the "defamation of religion" movement. It is argued that "defamation of religion" presents overly expansive, arbitrary, and vague limitations to religious freedom and freedom of expression.

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[*] Mrs. Du Plessis is a Lecturer at the University of the Free State, South Africa. This article was written as part of an internship granted by the Blackstone Legal Fellowship, 2012. The author would like to thank Professor Shaun A. de Freitas, Mr. Benjamin Bull and Mr. Paul Coleman for their assistance and leadership.

INTRODUCTION

The past decade has seen numerous resolutions on "defamation of religion" presented before the United Nations (UN).[1] These resolutions have undoubtedly been controversial, particularly because of the tension they have created between freedom of religion and freedom of expression. However, as the movement supporting these resolutions appeared to quiet down and the language "defamation of religion" was removed from UN resolutions, many believed that "defamation of religion" belonged to the past and that freedom of expression had prevailed.[2] Perhaps such a view was naïve.

The tragic events that recently took place in Benghazi, Libya, once again re-ignited the debate on freedom of expression and "defamation of religion."[3] On 11 September 2012, Islamists throughout the Middle East launched violent protests against Americans, apparently in response to a thirteen minute YouTube video entitled *The Innocence of Muslims* that was said to insult the Islamic Prophet Mohammed.[4] The United States embassies in Egypt and Libya were stormed and U.S. Ambassador Christopher Stevens and three others were killed. In the fallout from the violence many people once again called for international law to protect religion from being defamed, in order to prevent future acts of violence.[5]

At a press conference addressing the attacks, UN Secretary-General Ban Ki-moon was asked the following:

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[1] *E.g.*, Human Rights Council Res. 4/9, U.N. Doc. A/HRC/RES/4/9 (Mar. 30, 2007); s*ee also* Commission on Human Rights Res. 2001/4, U.N. Doc. E/CN.4/RES/2001/4 (Apr. 18, 2001); Commission on Human Rights Res. 2002/9, U.N. Doc. E/CN.4/RES/2002/9 (Apr. 15, 2002); Commission on Human Rights Res. 2003/4, U.N. Doc. E/CN.4/RES/2003/4 (Apr. 14, 2003); Commission on Human Rights Res. 2004/6, U.N. Doc. E/CN.4/RES/2004/6 (Apr. 13, 2004); Commission on Human Rights Res. 2005/3, U.N. doc. E/CN.4/RES/2005/3 (Apr. 12, 2005); G.A. Res. 60/150, U.N. Doc. A/RES/60/150 (Dec. 16, 2005); G.A. Res. 61/164, U.N. Doc. A/RES/61/164 (Dec. 19, 2006); G.A. Res. 62/154, U.N. Doc. A/RES/62/154 (Dec. 18, 2007); Human Rights Council Res. 7/19, U.N. Doc. A/HRC/RES/7/19 (Mar. 27, 2008); G.A Res. 63/171, U.N. Doc. A/RES/63/171 (Dec. 18, 2008); Human Rights Council Res. 10/22, U.N. Doc. A/HRC/RES/10/22 (Mar. 26, 2009); G.A. Res. 64/156, U.N. Doc. A/RES/64/156 (Dec. 18, 2009).

[2] *See* Press Release, U.S. Comm'n on Int'l Religious Freedom, USCIRF Welcomes Move Away from 'Defamation of Religions' Concept (Mar. 24, 2011), http://uscirf.gov/news-room/press-releases/3570-uscirf-welcomes-move-away-from-defamation-of-religions-concept.html; *UN: Rights Body Acts Decisively on Iran, Cote d'Ivoire,* HUM. RTS. WATCH (Mar. 25, 2011), http://www.hrw.org/news/2011/03/25/un-rights-body-acts-decisively-iran-cote-divoire.

[3] *See* Press Statement, Sec'y of State Hillary Rodham Clinton, Statement on the Attack in Benghazi (Sept. 11, 2012), http://www.state.gov/secretary/rm/2012/09/197628.htm.

[4] *See* Sam Bacile, *The Innocence of Muslims*, YOUTUBE (Sept. 16, 2012), http://www.youtube.com/watch?v=Vh5LEJNE70c&bpctr=1364191752.

[5] Competitive Enterprise Institute, *Professors, Journalists, U.S. Diplomats, Call For Censorship In America In Response To Mohammed Film*, OPPOSING VIEWS (Sept. 13, 2012), http://www.opposingviews.com/i/politics/disturbing-calls-censorship-america-professors-journalists-us-diplomats-and-egyptian.

> On this issue of violence erupting after the controversial film, can you please speak to the argument of freedom of expression that has been raised too? There is obviously the agenda issue here at the United Nations of defamation of religion, and there is a lot of dispute over that. Maybe weigh in on this in terms of your perspective on how to move forward in some concrete ways, where you can have a balance of freedom of expression, yet at the same time obviously respect various religions.[6]

The UN Secretary-General responded by stating:

> All human beings have the inalienable right to freedom of expression, freedom of assembly. These are very fundamental rights. But, at the same time, this freedom of expression should not be abused by individuals. Freedom of expression should be and must be guaranteed and protected, when they are used for common justice, common purpose. When some people use this freedom of expression to provoke or humiliate some others' values and beliefs, then this cannot be protected in such a way. So, my position is that freedom of expression, while it is a fundamental right and privilege, should not be abused by such people, by such a disgraceful and shameful act.[7]

Similarly, a *Joint Statement on Peace and Tolerance* by the European Union (EU) High Representative, Organization of Islamic Cooperation (OIC) Secretary-General, Arab League Secretary-General, and African Union (AU) Commissioner for Peace and Security condemned the violent attacks, but also stated, "[w]hile fully recognizing freedom of expression, we believe in the importance of respecting all prophets, regardless of which religion they belong to."[8]

As long as there are calls to remove protection from expressions that may "provoke or humiliate some others' values and beliefs,"[9] as well as calls

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[6] U.N. Secretary-General, Full Transcript of Secretary-General's Press Conference (Sept. 19, 2012), http://www.un.org/sg/offthecuff/?nid=2476.

[7] *Id.*

[8] *Joint statement on Peace and Tolerance by European Union High Representative, OIC Secretary General, Arab League Secretary General, and African Union Commissioner for Peace and Security*, EU-UN.EUROPA.EU (Sept. 20, 2012), http://www.eu-un.europa.eu/articles/en/article_12602_en.htm.

[9] U.N. Secretary-General, *supra* note 6.

to "respect[] all prophets,"[10] the "defamation of religion" movement cannot be said to have ended. As will be explained in this article, the advocates of the movement have simply adopted different methods. The language of "defamation" may have been omitted from the latest UN resolutions, but the aims of the movement nevertheless remain.

Furthermore, this article will consider the definition, history, and development of the "defamation of religion" movement. The resulting tensions between freedom of expression and religious freedom will be addressed, specifically within the context of the International Covenant on Civil and Political Rights (ICCPR) and the Universal Declaration on Human Rights (UDHR), before moving on to a critique of the "defamation of religion" movement. Lastly, the future of the "defamation of religion" movement will be addressed—particularly now that the "defamation" language has been replaced.

I. DEFINITION, HISTORY, AND DEVELOPMENT OF THE "DEFAMATION OF RELIGION" MOVEMENT

A. *"Defamation of religion"*

In order to present a critique of the "defamation of religion" movement, it is important to understand what it means. The main historical basis for "defamation of religion" is the resolutions passed by the UN. Within these resolutions broad reference is made to defamation, negative stereotyping, intolerance,[11] xenophobia,[12] and several other concepts.[13] Yet no clear attempt is made to define "defamation of religion," nor any of the descriptive words used for it. Resolution 2000/84 on "defamation of religions"[14] suggests that the concept includes or can be equated to negative stereotyping of religions,[15] inciting acts of violence,[16] and "xenophobia or related intolerance and discrimination towards Islam . . . ."[17] "Defamation of religion" further includes ethnic and religious profiling of Muslim

[10] *Joint statement*, *supra* note 8.
[11] *See, e.g.*, H.R.C. Res. 10/22, *supra* note 1, at 2.
[12] *See, e.g.*, G.A. Res. 65/225, ¶ 2, U.N. Doc. A/RES/65/225 (Dec. 21, 2010).
[13] *E.g.*, H.R.C. Res. 10/22, *supra* note 1 (using words such as stigmatizing and discrimination).
[14] Commission on Human Rights Res. 2000/84, U.N. Doc. E/CN.4/2000/84 (Apr. 26, 2000).
[15] *Id.* ¶ 1.
[16] *Id.* ¶ 3. Subsequently, the Human Rights Council expressed concern that "defamation of religions and incitement to religious hatred in general could lead to social disharmony and violations of human rights . . . ." H.R.C. Res. 10/22, *supra* note 1.
[17] C.H.R. Res. 2000/84, *supra* note 14, ¶ 3.

minorities,[18] economic and social exclusion,[19] and limitations of freedom of expression "as provided by law" and as "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."[20]

Resolution 16/18, passed in 2011, is the first resolution concerning this issue that does not contain the language "defamation of religion."[21] However, Resolution 16/18 is similar to previous resolutions on "defamation of religion" because it too presents broad and sweeping statements. For example, 16/18 is entitled "Combating intolerance, negative stereotyping and stigmatization of, and discrimination, incitement to violence and violence against, persons based on religion or belief," without any of these actions being objectively defined.[22] Paragraph 1 condemns any advocacy of religious hatred,[23] and paragraph 5(f) calls for the criminalization of incitement to imminent violence and denigration of persons.[24] Such declarations present similar undefined wording found in the previous resolutions on "defamation of religion."

The indefinite actions and undefined words stated in the above mentioned resolutions make it difficult to determine exactly when a religion can be deemed "defamed." These uncertainties present challenges to international human rights law as discussed below.

B. *"Religion"*

Resolutions concerning "defamation of religion" and Resolution 16/18 do not define "religion." It is important to establish the views of the UN and Islam, as this was the religion mainly responsible for the acceptance of these resolutions[25] regarding the meaning of religion, to determine whether Resolution 16/18 and "defamation of religion" concern the same concept and not two separate intentions.

The civilization that used to be described by the word "Christendom" has undergone secularization and has now been extended to include names such as "Europe" and the "West."[26] On the other hand, the Islamic world is

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[18] H.R.C. Res. 4/9, *supra* note 1, ¶ 3.

[19] *Id.* ¶ 4.

[20] *Id.* ¶ 10.

[21] *See* Human Rights Council Res. 16/18, U.N. Doc. A/HRC/RES/16/18 (Mar. 24, 2011).

[22] *See id.*

[23] *See id.* ¶ 1.

[24] *Id.* ¶ 5(f).

[25] Leonard A. Leo, Felice D. Gaer & Elizabeth K. Cassidy, *Protecting Religions from 'Defamation': A Threat to Universal Human Rights Standards*, 34 HARV. J.L. & PUB. POL'Y 769, 771-72 (2011).

[26] BERNARD LEWIS, ISLAM AND THE WEST vii (1993).

still known by the word Islam.[27] The word "religion" as used by the West is derived from the Latin religio.[28] The Islamic term for the same is dīn.[29] The equivalent word to dīn in other Semitic languages means law.[30] As Bernard Lewis explains, for Muslims, Islam is not simply a "system of belief and worship," it is the "whole of life," and its rules include civil, criminal, and constitutional law.[31] In classical Islamic history there is no equivalent to separation between church and state or "clash between pope and emperor."[32] The head of the Islamic state has both political and religious authority.[33] The law is divine and revealed and cannot be repealed, abrogated, changed, or supplanted.[34] This is also evident from the motto of the Muslim Brotherhood[35] which states that the worldly affairs of Muslims are exclusively governed on the basis of the Quran and the model of the Prophet Mohammed.[36] In short, this means that Sharia law is applied to all aspects of life and ensures "political empowerment of Islam in all its dimensions."37 On the contrary, the idea of religion within the West includes at least some separation between church and state, and no religion has the authority to dictate national laws or international human rights laws.[38]

The term "religion" as understood by the West cannot be equated with the Islamic definition of religion. They are two very different notions. Islam encompasses more than the Western understanding of religion and includes a political, legal, and religious structure. This political, legal, and religious structure cannot be changed or displaced by any other—such as international human rights laws. This is demonstrated by the Cairo Declaration of Human

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[27] *Id.*

[28] *Id.* at 3.

[29] *Id.*

[30] *Id.*

[31] *Id.* at 4.

[32] *Id.*

[33] *Id.*

[34] *Id.* at 43.

[35] After World War 2, Egypt's democratic system was unable to recover. Traumatized by British intervention, they were unable to implement effective policies to solve social and economic problems. Non-governmental opposition movements then grew in popularity—amongst these being the Muslim Brotherhood. BARGARA ZOLLNER, BROTHERHOOD: HASAN AL-HUDAYBI AND IDEOLOGY 11 (2009).

[36] *See Muslim Brotherhood Fact Sheet,* STANDWITHUS.COM (Feb. 4, 2011), http://www.standwithus.com/app/inews/view_n.asp?ID=1757.

[37] HILLEL FRADKIN, *The History and Unwritten Future of Salafism*, 6 INSTITUTE: CURRENT TRENDS IN ISLAMIST IDEOLOGY 5, 5-19 (Hillel Fradkin et al. 2008).

[38] *See generally* ROBERT LOUIS WILKEN, CHRISTIANITY: FACE TO FACE WITH ISLAM (2010) (explaining more about the difference between the West and Islam).

Rights in Islam[39] which introduces concepts similar to "defamation of religion" resolutions.

For example, Article 22 of the Declaration provides for the freedom of expression but prohibits any expression against the principles of Sharia, thereby placing restrictions on freedom of expression insofar as it is contrary to Islam.[40] Articles 24 and 25 also establish Sharia as above any of the rights in the Cairo Declaration and as the only source for its interpretation.[41] The elevation of Sharia above human rights in the Cairo Declaration and its justification of restrictions on freedom of expression illustrate the Islamic approach to human rights and freedom of expression: human rights are permitted, provided they do not conflict with Sharia. Where there is a conflict, the international human rights provisions must give way.

C. *The Organization of Islamic Cooperation*

In 1969, the first steps were taken towards the formation of the Organization of Islamic Cooperation.[42] The OIC is the second largest intergovernmental organization after the UN with 57 member States.[43] However, from its earliest beginnings, the OIC suffered from internal conflict, due to its composition of very diverse countries, causing it to be largely irrelevant in its earlier years.[44] From around the turn of the twenty-first century the demand for reform at the OIC began,[45] together with increased unity.

Currently the OIC serves as a collective Muslim voice to "safeguard and protect the interests of the Muslim world in the spirit of promoting international peace and harmony among various people of the world."[46] The OIC also promotes Muslim solidarity in economic, social, and political affairs,[47] and has the status of permanent observer to the UN.[48] Several

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[39] Preparatory Committee, World Conference on Human Rights, *Contribution of the Organisation of the Islamic Conference*, U.N. Doc. A/CONF. 157/PC/62/Add.18 (June 9, 1993), *available at* http://www.arabhumanrights.org/publications/regional/islamic/cairo-declaration-islam-93e.pdf.

[40] *Id.* art. 22.

[41] *Id.* arts. 24-25.

[42] LEWIS, *supra* note 26, at 148.

[43] MARIE JUULE PETERSEN, DIIS REPORT, ISLAMIC OR UNIVERSAL HUMAN RIGHTS? THE OIC'S INDEPENDENT PERMANENT HUMAN RIGHTS COMMISSION 9 (2012), *available at* http://www.diis.dk/graphics/Publications/Reports2012/RP2012-03-Islamic-human-rights_web.pdf.

[44] *Id.* at 12.

[45] *Id.* at 13.

[46] *About OIC*, ORGANIZATION OF ISLAMIC COOPERATION, http://www.oic-oci.org/page_detail.asp?p_id=52 (last visited Mar. 16, 2012).

[47] WILKEN, *supra* note 38, at 21.

[48] *See* G.A. Res. 61/49, at 1, U.N. Doc. A/61/49 (Dec. 04, 2006).

resolutions also reaffirm cooperation between the UN and the OIC,[49] which is also evident from the OIC's *Ten-Year Programme of Action*. The OIC aims to:

> Participate and coordinate effectively in all regional and international forums, in order to protect and promote the collective interests of the Muslim Ummah, including UN reform, expanding the Security Council membership, and extending the necessary support to candidatures of OIC Member States to international and regional organizations.[50]

The OIC's commitment to the adoption of resolutions at the UN is equally clear from its *Programme of Action*. The *Programme* states that the cooperation between the OIC and UN also:

> [d]emonstrate strong commitment and credibility in Joint Islamic Action by effective implementation of OIC resolutions, and to focus on the adoption of implementable resolutions until the Ummah reaches its objectives. In this context, the Secretary General should be enabled to fully play his role in following up the implementation of all OIC resolutions.[51]

The OIC's commitment to preventing "defamation of religion" is also clear from the *Programme,* which states that it wishes to "ensure respect for all religions and combat their defamation."[52] The UN and OIC adoption of resolutions concerning "defamation of religion" and Resolution 16/18 is evidence of two things: 1) Cooperation between the OIC and the UN, and 2) the OIC's commitment to presenting resolutions at the UN has been realized. But for the OIC, these resolutions would likely not have existed, as it has principally been the OIC and its member states who have consistently advocated for them at the UN.

In 2011, the OIC gained further influence at the UN by way of the establishment of the Muslim Independent Permanent Human Rights Commission (the Commission).[53] The Commission will not hear human rights violations, but rather act as advisory organ to the Human Rights

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[49] *See, e.g.*, G.A. Res. 65/140, U.N. Doc. A/RES/65/140 (Dec. 16, 2010).
[50] *Ten-Year Programme of Action*, ORGANIZATION OF ISLAMIC COOPERATION, pt. 1, §2, ¶ 3, http://www.oic-oci.org/english/conf/is/ex-3/TYOAP_Makkah_2005.pdf (last visited Mar. 27, 2013).
[51] *Id.* pt. 1, § II, ¶ 1; *see also id.* § II, ¶ 3.
[52] *Id.* pt. 1, § VII, ¶ 1.
[53] PETERSEN, *supra* note 43.

Council.[54] Whether the new Commission will be used as a tool to influence the UN and promote a "defamation of religion" agenda remains to be seen; it will depend on the "amount of pressure from OIC member states" and the "independence and expertise" of the specialists on the Commission.[55]

D. *Development and history of "defamation of religion" and Resolution 16/18 at the UN*

The main developments concerning "defamation of religion" at the UN occurred through the OIC and its sponsorships.[56] In 1999 the OIC introduced its first draft resolution on combating "defamation of Islam" in the UN Human Rights Commission.[57] However, a revised 1999, draft resolution encompassing all religions was introduced while still emphasizing the vulnerability of Islam.[58] Over time, the resolutions were broadened to include all religions, but continued to specifically mention Islam. The Human Rights Commission adopted similar resolutions every year from 2000 until 2005.[59] From 2006, the Human Rights Council followed in its footsteps.[60]

The 2006 resolution was the first one to be adopted by the General Assembly, the main body of the UN.[61] However, support for such resolutions diminished every year and, by 2008, they were passed only by plurality.[62] A 2010 resolution was passed with a three-vote margin and in 2011, fearing defeat as a result of the assassinations of Pakistan's Minister, Shahbaz Bhatti, and Governor, Slaman Taseer, Pakistan decided not to introduce a resolution on "defamation of religion" again.[63]

OIC efforts towards creating "defamation of religion" also integrated the Special Rapporteur on Contemporary forms of Racism, Racial

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[54] *See Statute of the OIC Independent Permanent Commission on Human Rights*, ORGANISATION OF ISLAMIC COOPERATION, art. 12 (July 6, 2012), http://www.oicun.org/75/20120607051141117.html.

[55] PETERSEN, *supra* note 43, at 35.

[56] *See* Leo, *supra* note 25.

[57] *See* Commission on Human Rights Res. 1999/82, ¶ 3, U.N. Doc. E/CN.4/1999/82 (Apr. 30, 1999).

[58] Lorenz Langer, *The Rise (and Fall?) of Defamation of Religions*, 35 YALE J. INT'L L. 257, 258 (2010).

[59] C.H.R. Res. 2001/4, *supra* note 1; C.H.R. Res. 2002/9, *supra* note 1; C.H.R. Res. 2003/4, *supra* note 1; C.H.R. Res. 2004/6, *supra* note 1; C.H.R. Res. 2005/3, *supra* note 1.

[60] *E.g.*, C.H.R. Res. 2000/84, *supra* note 14; C.H.R. Res. 2001/4, *supra* note 1; G.A. Res. 61/164, *supra* note 1; G.A. Res. 62/154, *supra* note 1.

[61] *See* G.A. Res. 60/150, *supra* note 1.

[62] L. Bennett Graham, *Defamation of Religions: The End of Pluralism?*, 23 EMORY INT'L L. REV. 69, 72 (2009).

[63] PAUL MARSHALL & NINA SHEA, SILENCED: HOW APOSTASY AND BLASPHEMY CODES ARE CHOKING FREEDOM WORLDWIDE 216 (2011).

Discrimination, Xenophobia and Related Intolerance, Doudou Diène, [64] and the Special Rapporteur on Freedom of Religion or Belief, Asma Jahangir.[65] Differing accounts of "defamation of religion" were given by the Rapporteurs. Diène mentioned acts of discrimination against Muslim people and the anti-Muslim ideology "in the form of explicit and public defamation of Islam."[66] On the contrary, reports by Asma Jahangir condemn "defamation of religion" as undermining the pillars of a civilized society.[67]

Instances such as the release of a newspaper article containing several caricatures of Mohammed,[68] tragic occurrences like 11 September 2001 (9/11), and publications such as Salman Rushdie's novel *The Satanic Verses*,[69] created fertile soil for the OIC to intensify the cultivation of "defamation of religion" at the UN. For example, the report of Special Rapporteur Abid Hussain condemned the events of 9/11,[70] but continued to caution against intolerance of religions.[71] Resolution 60/150, and various resolutions before it, continued to emphasize the "negative impact of the events of 11 September 2011 on Muslim minorities . . . ."[72]

In 2010, the Secretary-General of the OIC gave a speech "signaling a willingness on the part of the OIC member states to move away from the term 'defamation.'"[73] In 2011, "defamation of religion" was replaced by the arguably more acceptable Resolution 16/18. This shift in language was the clear result of collaboration between the Obama administration and the OIC.[74] It was also the first resolution supported by the OIC that did not include the concept "defamation of religion."

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[64] Special Rapporteur on Contemporary Forms of Racism, Racial Discrimination, Xenophobia and Related Intolerance, *Racism, Racial Discrimination, Xenophobia and All Forms of Discrimination,* Commission on Human Rights, U.N. Doc. E/CN.4/2003/23 (Jan. 3, 2003) (by Doudou Diene) [hereinafter U.N. Doc. E/CN.4/2003/23].

[65] Special Rapporteur on Freedom of Religion or Belief and Special Rapporteur on Contemporary Forms of Racism, Racial Discrimination, Xenophobia and Related Intolerance, *Implementation of General Assembly Resolution 60/251 of 15 March 2006 Entitled "Human Rights Council"*, ¶ 6, Human Rights Council, U.N. Doc. A/HRC/2/3 (Sept. 20, 2006) (by Asma Jahangir and Doudou Diene) [hereinafter U.N. Doc. A/HRC/2/3].

[66] U.N. Doc. E/CN.4/2003/23, *supra* note 64, at 2.

[67] U.N. Doc. A/HRC/2/3, *supra* note 65, ¶ 6.

[68] Flemming Rose, *Muhammeds ansigt*, KULTURWEEKEND (Sept. 30, 2005), http://multimedia.jp.dk/archive/00080/Avisside_Muhammed-te_80003a.pdf.

[69] Salman Rushdie, THE SATANIC VERSES (2000).

[70] Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression, *Civil and Political Rights, Including the Question of Freedom and Expression*, ¶ 71, Commission on Human Rights, U.N. Doc. E/CN.4/2002/75 (Jan. 17, 2002) (by Abid Hussain).

[71] *Id.* ¶ 76.

[72] G.A. Res. 60/150, *supra* note 1, at 2.

[73] PETERSEN, *supra* note 43, at 31.

[74] *See U.N. Human Rights Council Resolution 16/18: Respect for Religions or Anti- Freedom of Expression?*, HERITAGE FOUNDATION (Apr. 30, 2012), http://www.heritage.org/events/2012/04/un-resolution-16-18?ac=1.

Undoubtedly, the influence of the OIC on the UN with its introduction of "defamation of religion" and the new concepts contained in Resolution 16/18 urge questions and critique regarding freedom of religion and freedom of expression at the UN.

II. A CRITIQUE OF THE "DEFAMATION OF RELIGION" MOVEMENT

Clear challenges emanate from the definition and background analysis of the concept "defamation of religion," as well as the seemingly neutral Resolution 16/18. In reality, both contain serious challenges to freedom of expression and the traditional understanding of freedom of religion, as the following critique will demonstrate.

A. *Negating freedom of expression*

The right to freedom of opinion and expression is provided for in Article 19 of the UDHR[75] and also in Article 19 of the ICCPR,[76] but freedom of expression has never been understood as being absolute. Perhaps, if judged favorably, that is all that UN General Secretary-General Ban Ki-moon meant when he stated that the "inalienable right to freedom of expression" cannot be protected when it is used to "provoke or humiliate some others' values and beliefs."[77] However, while all accept that there are sometimes valid restrictions on freedom of expression, such restrictions must be well defined and legally valid. It cannot be said that "defamation of religion"—as a limitation on freedom of expression—can meet these well-established international legal standards.

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[75] Universal Declaration of Human Rights, art. 19, G.A. Res. 217 (III) A, U.N. Doc. A/RES/217(III) (Dec. 10, 1948) [hereinafter UDHR] ("Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers.").

[76] International Covenant on Civil and Political Rights art. 19(2)-(3), Dec. 16, 1966, 999 U.N.T.S. 171 [hereinafter ICCPR] ("2. Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice. 3. The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary: (a) For respect of the rights or reputations of others; (b) For the protection of national security or of public order . . . or of public health or morals.").

[77] U.N. Secretary-General, *supra* note 6.

1. *The ambit of Articles 19(3) and 20*

Although it is not the aim of this article to determine the ambit of restrictions to freedom of expression, this article serves as a critique to the fact that the OIC and the UN defined these limitations too broadly. What the exact limitations on freedom of expression should be (for example, whether cartoons may be limited, etc.) does not fall within the scope of this article. What is shown and justified in this article is that such limitations should be more narrowly construed. Thus, this article serves as a starting point for further determinations regarding a narrower and more exact scope of limitations to freedom of expression.

Article 19(3) of the ICCPR provides for instances where freedom of expression can be limited. The question is whether "defamation of religion" can be included as one of those restrictions and, consequentially, limit freedom of expression. Article 19(3) states that freedom of expression may be subject to certain restrictions such as respect of the rights or reputations of others and protecting national security, public order, public health, or morals.[78] Article 20 of the ICCPR states that "[a]ny advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law."[79] These articles were drafted following the atrocities of the Second World War—when fears of rising fascism were at their highest.[80] Therefore, the threshold of these articles is very high,[81] supporting the notion that these limitations should be narrowly and clearly defined for them to be the "least intrusive means" of limiting expression.[82] Robert Blitt agrees that article 20(2) "is intended to target only the most extreme purposeful advocacy of incitement to imminent forms of discrimination, hostility, and violence."[83] In a legal article written concerning this topic, Blitt mentions that permitting the dilution of the high threshold of article 20(2) may "cheapen[] the coin" and "give rise to other states disregarding their obligation to prohibit genuine advocacy of hostility . . . ."[84]

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[78] ICCPR, *supra* note 76, art. 19(3).
[79] *Id.* art. 20.
[80] U.N. Doc. A/HRC/2/3, *supra* note 65, ¶ 35.
[81] *Id.*
[82] Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression, *Promotion and Protection of All Human Rights, Civil, Political, Economic, Social and Cultural Rights, Including the Right to Development*, Human Rights Council, ¶ 65, U.N. Doc. A/HRC/7/14 (Feb. 28, 2008) (by Ambeyi Ligabo).
[83] Robert C. Blitt, *Defamation of Religion: Rumors of its Death are Greatly Exaggerated*, 62 CASE W. RES. L. REV. 347, 358-59 (2011).
[84] *Id.* at 360.

The *Johannesburg Principles on National Security, Freedom of Expression and Access to Information*[85] "promote a clear recognition of the limited scope of restrictions on freedom of expression . . . ."[86] Principle 1.1 states that any restriction of expression must be prescribed by law that is "accessible, unambiguous, drawn narrowly and with precision . . . ."[87] Thus, the individual should be able to foresee whether a particular action is unlawful. The resolutions concerning "defamation of religion" and Resolution 16/18 are so broadly defined that they do not make it clear to the individual when his/her expression will be contrary to the resolutions—they are not "drawn narrowly and with precision."[88]

Article 20 presents a two-part requirement to be met for freedom of expression to be justifiably limited; 1) advocacy of religious hatred, together with such advocacy 2) *causing* or *constituting* incitement to discrimination, hostility or violence.[89] Mere "advocacy of religious hatred" on its own, or mere "incitement to discrimination or violence," is not sufficient. Advocacy of religious hatred must cause incitement to discrimination, hostility, or violence. Previous resolutions on "defamation of religion" refer to "incitement to . . . violence" and "advocacy of . . . religious hatred" without recognizing that limitations of freedom of expression require these two concepts to be mutually dependent.[90] Resolution 16/18 mentions the two-part requirement in paragraph three, stating that it "condemns any advocacy of religious hatred that constitutes incitement to discrimination, hostility, or violence."[91] However, it is not clear whether there has been an actual realization that this presents a two-part requirement. From Resolution 16/18's heading it seems as if the resolution does not recognize a two-part requirement as it appears to aim towards combating "intolerance," "negative

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[85] ARTICLE 19, THE JOHANNESBURG PRINCIPLES ON NATIONAL SECURITY, FREEDOM OF EXPRESSION AND ACCESS TO INFORMATION (1996), *available at* http://www.article19.org/data/files/pdfs/standards/joburgprinciples.pdf.

[86] *Id.* at 6.

[87] *Id.* at 7.

[88] *Id.* For example, Resolution 62/154 mentions its concern with the "intensification of the campaign of defamation of religions and the ethnic and religious profiling of Muslim minorities" without qualifying or identifying this "campaign" as causing insult to Islam. G.A. Res. 62/154, *supra* note 1, ¶ 6.

[89] *See* ALLIANCE DEF. FUND ET AL., CONSULTATION ON THE INTERRELATIONSHIP BETWEEN ICCPR ARTICLE 19 AND 20 WITH RESPECT TO FREEDOM OF EXPRESSION AND ADVOCACY OF NATIONAL, RACIAL OR RELIGIOUS HATRED THAT CONSTITUTES INCITEMENT TO DISCRIMINATION, HOSTILITY OR VIOLENCE (2010), *available at* http://www.ohchr.org/Documents/Issues/Expression/ICCPR/NGOs2011/AllianceDefenceFund.pdf.

[90] *E.g.*, G.A. Res. 62/154, *supra* note 1, ¶ 11.

[91] H.R.C. Res. 16/18, *supra* note 21, ¶ 3.

stereotyping," "stigmatization," "discrimination" and "incitement to violence" as mutually independent actions.[92]

Also, determining what "incitement" means can be very problematic. One can incite hatred without either the intention to do so or the effect of doing so.[93] Incitement, although sometimes easy to identify, carries an inherent risk of subjectivity.[94]

Failing to identify what instances fall within Articles 19(3) and 20 opens the door to justification of laws prohibiting "defamation of religion" that will limit freedom of expression altogether.

2. *"Defamation of religion" defined too broadly*

As stated above, "defamation of religion" and the parallel concepts contained within Resolution 16/18 are not defined, but rather described in broad and sweeping statements. According to Blitt, the aim of this was to present "incitement" and "defamation of religion" as one concept.[95] Specifcally, "the OIC embarked upon an increasingly contrived campaign to equate criticism of Islam with incitement to religious hatred."[96] This represents "an effort to 'reclassify' defamation of religion within the legal framework of incitement" and also "make it more palatable . . . ."[97]

According to this article, one way of equating incitement and "defamation of religion" was to omit a definition of "incitement" and to leave it open to broad interpretation. This is contrary to the narrowly enforced definition of incitement in countries such as the United States where the present-day test for incitement includes intent, imminence, and likelihood.[98] Additionally, many international law specialists agree that intent is regarded as one of the requirements of incitement.[99] The resolutions on "defamation of religion" and Resolution 16/18 nowhere define "incitement" narrowly enough to include the requirement of intent. The wider the definition of a concept such as incitement, the easier it is to define it as one of the restrictions contained in Articles 19(3) and 20, thereby limiting freedom of expression.

Resolution 16/18 refers directly to "intolerance" and "incitement to . . . violence" towards persons adhering to a religion—thereby possibly limiting

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[92] *Id.* at 1.
[93] MARSHALL & SHEA, *supra* note 63, at 236.
[94] *Id.* at 226.
[95] Blitt, *supra* note 83, at 355.
[96] *Id.*
[97] *Id.*
[98] Allison G. Belnap, *Defamation of Religions: A Vague and Overbroad Theory that Threatens Basic Human Rights*, 2010 BYU L. REV. 635, 650 (2010).
[99] Leo, *supra* note 25, at 779-80.

the broad scope of "defamation of religion."[100] Nevertheless, are the concepts "intolerance" or "incitement to violence" as used in Resolution 16/18 narrow enough to be included as restriction to freedom of expression as contained in articles 19(3) and 20? It is not certain, as none of these concepts are defined objectively. D oes "intolerance" include criticism of lack of equality between men and women in Islamic countries? Does "intolerance" include cartoons depicting Mohammed? The seemingly more neutral Resolution 16/18 still threatens freedom of expression because concepts remain undefined.

B. *Distorting freedom of religion*

Article 18 of the UDHR provides for freedom of thought, conscience and religion,[101] as does Article 18 of the ICCPR.[102] This right encompasses the freedom to *have* or *adopt* a religion or belief and the freedom to *manifest* that religion or belief.[103]

However, freedom of religion as understood in international law does not include freedom from offence,[104] nor does it protect religions and beliefs *per se*.[105] On the contrary, freedom of religion does protect the right to some form of dissent from a particular religion or belief.[106] The "defamation of religion" concept reverses these positions, seeking to create freedom from offence, protection for a particular religion and removal of the freedom to dissent. The inclusion of "defamation of religion" or Resolution 16/18 within the right to religious freedom must be considered arbitrary and unjustifiable.

1. *Freedom from offence*

The "defamation of religion" creates a *de facto* right to "freedom from offence" where no such right exists.

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[100] H.R.C. Res. 16/18, *supra* note 21, ¶ 2-3.

[101] UDHR, *supra* note 75, art. 18 ("Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief, and freedom . . . to manifest his religion of belief . . . .").

[102] ICCPR, *supra* note 76, art. 18 ("Everyone shall have the right to freedom of thought, conscience and religion. This right shall include freedom to have or to adopt a religion . . . and freedom . . . to manifest his religion . . . .").

[103] Jeroen Temperman, *Blasphemy, Defamation of Religions and Human Rights Law*, 26 NETHERLANDS Q. HUM. RTS. 517, 527 (2008); *see also* M. Todd Parker, *The Freedom to Manifest Religious Belief: An Analysis of the Necessity Clauses of the ICCPR and the ECHR*, 17 DUKE J. COMP. & INT'L L. 91, 93-94 (2006).

[104] Temperman, *supra* note 103.

[105] *See* Leo, *supra* note 25, at 770.

[106] U.N. Doc. A/HRC/2/3, *supra* note 65, ¶ 35.

Historically, Muslims have received criticism of Islam very personally. This can arguably be traced to Mohammed and his responses to criticism from Arabs and the Jews of Medina.[107] Such criticism was equated with the persecution of Muslims.[108] Given that the life of Mohammed forms the background of Islam, such resistance to criticism can still be seen within Islam today.[109] This sensitivity to criticism is evident in the OIC's *Ten-Year Programme of Action* aiming to protect Islam by combating its "defamation."[110]

In contrast, the right to religious freedom as contained in the ICCPR and the UDHR does not protect individuals from any *criticism* or *offence* regarding their actual religion. Only the right to adopt and manifest a religion is protected. There is no duty to have respect at all times for everyone's religion or belief.[111]

Some fundamental religious doctrines may flatly condemn the doctrines of other religions, possibly creating offence. If this is prohibited by religious freedom, it will produce "a vicious spiral of increasing limits to freedom of expression."[112] In March 2008, several Non-Governmental Organizations (NGO) referenced Sharia law and its implications for gender equality.[113] At the reference to Sharia, both Egypt and Pakistan interrupted and declared that such references are an insult to their faith.[114] In effect, this silenced any valid debate and questioning concerning human rights violations against women.

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[107] Mark Durie, *Sleepwalking into Sharia: Hate Speech Laws and Islamic Blasphemy Strictures*, 15 INT'L TRADE & BUS. L. REV. 394, 397 (2012).

[108] *Id.*

[109] *Id.* at 394 (mentioning that there has always been a special sensitivity by Muslims to critique—for example, the freedom of speech monologue in the Marriage of Figaro. Figaro comments that if he were to write a play passing critical comments about Mohammed he would receive warnings that he had offended the Ottoman Empire, Persia, India, Egypt, etc.); *see also* Andrew G. Bostom, *Beaumarchais'* Marriage of Figaro *Free Speech Monologue*, FRONTPAGE MAGAZINE (Mar. 2, 2009), http://www.freedomisknowledge.com/marriageoffigaro.html.

[110] *Ten-Year Programme of Action*, *supra* note 50, pt. 1, § VII.

[111] *See* Temperman, *supra* note 103.

[112] MATT CHERRY & ROY BROWN, INT'L HUMANIST AND ETHICAL UNION, SPEAKING FREELY ABOUT RELIGION: RELIGIOUS FREEDOM, DEFAMATION AND BLASPHEMY 9 (2009), *available at* http://iheu.org/files/Speaking%20Freely%20about%20 Religion_0.pdf.

[113] AZAM KAMGUIAN, LEAVING ISLAM: APOSTATES SPEAK OUT 213, 218 (Ibn Warraq ed., 2002) (explaining how the rights of women living in Iran would be violated in the following ways: women are stoned to death for voluntary sexual relations; do not have the right to choose their clothing; are barred from taking up employment in certain occupations; not free to choose their own field of study; legally allowed to marry at the age of 9; and no rights to property, amongst other things).

[114] *See generally* Joint Written Statement Submitted by the International Humanist and Ethical Union (IHEU), the Association for World Education (AWE) and the Association of World Citizens (AWC), *Promotion and Protection of All Human Rights Civil, Political, Economic, Social and Cultural Rights, Including the Right to Development*, Human Rights Council, ¶ 9, U.N. Doc. A/HRC/7/NGO/96 (Mar. 4, 2008) [hereinafter U.N. Doc. A/HRC/7/NGO/96].

Causing offence to Islam was also condemned by the Muslim Brotherhood on account of the film *Fitna* by Geert Wilders.[115] The Brotherhood stated that it "value[s] freedom . . . . However, there is a difference between freedom and deliberate offence."[116] There is also the possibility of strangling innocent actions that unintentionally offend a religion. For example, the Council of Muslim Theologians of South Africa stated that souvenir soccer balls for the 2010 soccer World Cup, displaying Islamic symbols that Muslims hold as sacred, had the potential to cause offence.[117]

2. *Protection of ideas or religions*

The "defamation of religion" concept seeks to protect religion and belief, as opposed to people. However, international law principles do not protect ideas or religions *per se*.[118]

Special Rapporteurs Jahangir and Diene stated that individuals belonging to a majority religion are not always free from at least some kind of pressure to adopt and adhere to a certain interpretation of that religion and "should therefore not be viewed as parts of homogenous entities."[119] Because adherents to the same religion cannot agree on all matters, international human rights law should be viewed as primarily protecting individuals in the exercise of their freedom of religion.

Moreover, "[a]n allegation of discrimination must always be connected to the denial of some recognized legal interest."[120] Legal interests will include, amongst others, property, marriage, and work. "[M]ere combating of 'discrimination' . . . without . . . relevant interest, does not warrant state intervention."[121] "Defaming" a religion does not involve the loss of a legal interest, as a religion is not a person that can hold a legal

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[115] Geert Wilders, *Fitna*, LIVE LEAK (Apr. 6, 2008), http://www.liveleak.com/view?i=216_1207467783 (updating original version released by LiveLeak on Mar. 27, 2008).

[116] Miriam Ali, *Muslim Brotherhood denounces Geert Wilders' film,* IKHWANWEB (Mar. 28, 2008, 1:40 PM), http://ikhwanweb.com/article.php?id=16465.

[117] Belnap, *supra* note 98, at 681. Using offense as criteria to restrict freedom of expression will also result in restriction of academic and general expression on matters such as homosexuality or abortion. Attempts to restrict expression criticizing homosexuality have already occurred in cases such as Sweden's Åke Green, who was prosecuted for presenting a sermon with some content concerning homosexual behavior. *See generally*, Pastor Åke Green's Sermon, AKEGREEN.ORG, http://www.akegreen.org/en-2-left/en-2-9.htm (last visited Mar. 29, 2013).

[118] S*ee* Leo, *supra* note 25, at 770.

[119] U.N. Doc. A/HRC/2/3, *supra* note 65, ¶ 27.

[120] Julian Rivers, *The Question of Freedom of Religion or Belief and Defamation*, 2 RELIGION & HUM. RTS. 113, 116 (2007).

[121] *Id.* at 117.

interest. It is merely directed towards a religion; the religion itself does not have a legal interest.

Furthermore, it is impossible for international human rights law to protect a religion as this will require the UN to make truth claims concerning religions. This will set the traditional concept of defamation against the question of determining which *ideas are acceptable* as opposed to which *facts are true*.[122] "Defamation of religion" also empowers the UN to decide what constitutes religion and what qualifies as an insult to that religion.[123] Expecting the UN to determine which ideas are acceptable will require it to prove objectively something that can only be proven subjectively. If the UN cannot make these decisions, who determines whether "defamation of religion" has occurred? If it is the religion itself, undefined power will be given to that religion to determine the scope of religious freedom and freedom of expression—as indicated by several broadly framed resolutions drafted by the OIC.

If international law does not protect ideas or religions, does it protect communities adhering to a religion? Furthermore, if it does protect communities, will it automatically protect the collective religion of that community? In considering the case of *Malcolm Ross v. Canada*,[124] the Human Rights Committee stated that the phrase "rights or reputations of others" in article 19(3) of the ICCPR—one of the justifiable restrictions on freedom of expression—relates to persons or community as a whole.[125] However, in cases such as *Malcolm Ross* care must be taken not to assume that criticizing or insulting a religion automatically presents a threat to a community and its legal interests, [126] thereby justifying restrictions concerning religious freedom under article 19(3) of the ICCPR.[127] The protection of a community cannot automatically be equated with the protection of the religion to which the community adheres.

Resolution 16/18 replaced "defamation of religion" with "intolerance, negative stereotyping and stigmatization of . . . *persons*

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[122] GREGOR PUPPINCK & SHAHERYAR GILL, EUR. CTR. FOR LAW & JUSTICE, REPORT IN PREPARATION FOR SECRETARY GENERAL'S REPORT TO THE GENERAL ASSEMBLY ON RESOLUTION 65/224, at 3 (May 31, 2011), *available at* http://eclj.org/pdf/DOR-Comments-for-UN-20110531.pdf.

[123] *See* Temperman, *supra* note 103.

[124] Ross v. School District No. 15 in New Brunswick, [1996] 1 SCR 825 (Can.).

[125] Human Rights Committee, *Views of the Human Rights Committee Under Article 5, Paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights*, ¶ 11.5, ICCPR, U.N. Doc. CCPR/C/70/D/736/1997 (Oct. 26, 2000) [hereinafter U.N. Doc. CCPR/C/70/D/736/1997]; *see also* U.N. Doc. A/HRC/2/3, *supra* note 65 (communities are protected to an extent).

[126] U.N. Doc. CCPR/C/70/D/736/1997, *supra* note 125, ¶ 2.1 (noting that Ross published several books and pamphlets concerning the defense of unborn children and made public statements reflecting alleged controversial religious opinions).

[127] *See Catch the Fire Ministries Inc v Islamic Council of Vic,* [2006] VSCA 284 (Austl.).

based on religion or belief."[128] Resolution 16/18 has therefore moved from the protection of a religion to the protection of adherents to that religion. However, it is argued that this new approach attempts to present the same aims contained in "defamation of religion," but at the same time supersedes the arguments against it by introducing the individual, and not religion, as the object of discrimination. Due to the personal nature of the right to religious freedom, acts of criticism towards a religion can easily be subjectively interpreted or extended—especially by adherents to that religion—as acts of criticism or intolerance towards the individual adherents to that religion. The possibility of such an extension is not prohibited by Resolution 16/18 because the ambit of concepts such as "incitement," "intolerance" and "discrimination" are undefined and left open to subjective personal interpretations of adherents to that religion.

3. *Freedom to dissent*

Lastly, the prohibition against criticizing a religion will undoubtedly limit the freedom to actively *dissent* from a religion—thus indirectly infringing on the right to *manifest* a religion of one's choice guaranteed by the right to religious freedom.

By implication, the right to manifest a religion includes the right to actively dissent from or reject religions that do not support the manifested religion. Freedom of religion allows for a person to subjectively transcend his/her chosen religion as superior. Laws against "defamation of religion" will render any critical expression claiming a religion to be superior to another as contrary to religious freedom.

Furthermore, internal obligations that may exist within a religious community are not binding on, nor applicable to, those who do not form part of the religious group.[129] Preventing persons from expressing opinions on the internal obligations of another religion will place an undue burden on such person's right to expressively dissent from accepting the internal obligations of that religion. Such expressive dissent may even be required by that individual's religion, which means that preventing such expressive dissent would potentially violate the freedom of religion and conscience.[130]

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[128] H.R.C. Res. 16/18, *supra* note 21, at 1 (emphasis added).

[129] U.N. Doc. A/HRC/2/3, *supra* note 65, ¶ 36.

[130] *See* UDHR, *supra* note 75, art. 18 (providing for freedom of conscience); ICCPR, *supra* note 76, art. 18 (also providing for freedom of conscience).

C. *Distorting traditional defamation*

The "defamation of religion" concept is unlike traditional legal understandings of defamation. Proving the truth of a statement is an absolute defense to a defamation charge, but judicial standards of truth will be extremely difficult to apply to questions of faith and belief.[131] Enforcing "defamation of religion" will require a judgment based on the subjective ideas of the recipient rather than "objectively ascertainable speech" by the speaker.[132]

Irrespective of this requirement, the OIC has been condemning statements on Islam, not based upon whether they are true or false, but whether or not the statement is offensive. For example, Pope Benedict XVI, in a lecture given at Regensburg in 2006, quoted from a dialogue of the fourteenth-century Byzantine emperor and a Muslim Persian stating, "Show me just what Mohammed brought that was new, and there you will find things only evil and inhuman, such as his command to spread by the sword the faith he preached."[133] Benedict used this quote to explain the need of reason when acting and had no intention to insult or violate Islam.[134] However, the OIC "approved a statement urging the Vatican to 'retract or redress'" the comments.[135]

It is clear that "defamation of religion" contains serious challenges to freedom of expression and to the traditional understanding of freedom of religion. Moreover, the new approach taken under Resolution 16/18 does little to alleviate these concerns. Far from being a defeated movement, the "defamation of religion" concept is continuing to develop at the UN, albeit in modified language. The future implications of the movement are discussed below.

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[131] CHERRY & ROY, *supra* note 112, at 10.

[132] BECKET FUND, DEFAMATION OF RELIGIONS: SUBMISSION TO OSCE HUMAN DIMENSIONAL MEETING 5 (2008), *available at* http://www.osce.org/odihr/34182.

[133] Benedict XVI, *Faith, Reason and the University Memories and Reflections*, APOSTOLIC JOURNEY OF HIS HOLINESS BENEDICT XVI TO MÜNCHEN, ALTÖTTING & REGENSBURG, VATICAN.VA (Sept. 12, 2006), http://www.vatican.va/holy_father/benedict_xvi/speeches/2006/september/documents/hf_ben-xvi_spe_20060912_university-regensburg_en.html.

[134] *See id.*

[135] Reuters, *Islamic Envoys Add to Call for Full Apology From Pope*, N.Y. TIMES, Sept. 27, 2006, http://www.nytimes.com/2006/09/27/world/europe/27pope.html?_r=0.

III. THE FUTURE OF "DEFAMATION OF RELIGION" AND THE OIC

A. *Resolution 16/18*

It is argued that Resolution 16/18 is merely a different name for the concept "defamation of religion." Resolution 16/18 seemingly rebuts any criticism of "defamation of religion" discussed above because: a) Resolution 16/18 is directed towards individuals; b) the concept "defamation of religion" is defined more narrowly by the terms "combating intolerance, negative stereotyping and stigmatization, discrimination and incitement to violence"; and c) as a result, this narrow definition can form part of the limitations in Articles 19(3) and 20 of the ICCPR and therefore limit the freedom of expression.[136] The validity of these presumptions has been dealt with in part III above.

However, both the resolutions on "defamation of religion" and Resolution 16/18 were introduced by the OIC, and the objectives in its *Ten-Year Programme of Action* have remained the same. Principle VII, paragraph 1 of the *Programme* emphasizes the "responsibility of the international community, including all governments, to ensure respect for all religions and combat their defamation."[137] If the aims of the OIC have not changed, it is likely that the aims of its resolutions would not have changed either. It is unlikely that an organization will introduce measures that are not in line with its objectives. This is also evident from the Istanbul Process intended to implement Resolution 16/18. The OIC reported, "[t]he upcoming . . . meetings . . . [will] help in enacting domestic laws for the countries involved in the issue, as well as formulating international laws preventing . . . *defamation of religions*."[138] Clearly, although the tactics of the OIC have changed, its objectives concerning "defamation of religion" have not.

Furthermore, Saudi Arabia, where Sunni Islam, the largest orthodox branch of Islam, is the official religion and Sharia is the primary source of law, is currently considering new regulations to criminalize any insult to Islam after a Saudi blogger tweeted comments about what he liked and disliked about Mohammed.[139]

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[136] *See e.g.,* H.R.C. Res. 16/18, *supra* note 21, ¶ 3 ("[C]ondemn[ing] any advocacy of religious hatred that constitutes incitement to discrimination, hostility or violence, whether it involves the use of print, audio-visual or electronic media or any other means.").

[137] *Ten-Year Programme of Action*, *supra* note 50, pt. 1, § VII, ¶ 1.

[138] Nina Shea, *A Perverse 'Process'*, N.Y. POST, Dec. 17, 2011, http://www.nypost.com/p/news/opinion/opedcolumnists/perverse_process_orKksIN05i0UKsRMCs6r0J (emphasis added).

[139] Asma Alsharif, *Saudi Arabia considers law against insulting Islam*, REUTERS (July 15, 2012, 11:28 AM), http://www.reuters.com/article/2012/07/15/saudi-islam-law-idUSL6E8IF2CY20120715.

According to Blitt, Resolution 16/18 is merely sidestepping an explicit rejection of "defamation of religion."[140] Resolution 16/18 uses substitute language allowing the negotiating parties to "extrapolate diametrically opposed messages from its content."[141] Blitt further states that support for this new "international consensus" in Resolution 16/18 represents a "cynical and strategic decision to continue the campaign for the ban on defamation of religion by other means."[142] In the absence of additional clarification and "decisive repudiation" of "defamation of religion," any further efforts by the UN to combat intolerance as indicated in Resolution 16/18 only enables an alternative framework allowing continued promotion of "defamation of religion."[143]

This demonstrates that "defamation of religion" is still alive and well in Islamic countries, despite the more neutral Resolution 16/18.

1. The mark already left

Human Rights Council Resolution 7/19 declares that "defamation of religion" has to be protected on a national and international level.[144] Resolution 16/18 echoes this by stating that it "urges States to take effective measures . . . to address and combat such incidents."[145] State practice is one of the requirements of customary law, and national laws can be indicative of State practice.[146] The potential effect of these resolutions is that several States will implement them in their national laws, consequentially but slowly, creating the State practice and the possibility of "defamation of religion" as customary international law.

The effect of "defamation of religion" can already be seen as it has seeped into the legal systems and daily life of several nations. For example, the EU and former UN Secretary-General Kofi Annan issued a joint statement with the OIC recognizing the need to show sensitivity in treating issues of religion.[147] Subsequently, "[a]fter Italian Minister Roberto

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[140] Blitt, *supra* note 83, at 350.
[141] *Id.*
[142] *Id.* at 351.
[143] *Id.*
[144] H.R.C. Res. 7/19, *supra* note 1, at 3.
[145] H.R.C. Res. 16/18, *supra* note 21, ¶ 2.
[146] *International Committee of the Red Cross*, CUSTOMARY IHL, http://www.icrc.org/customary-ihl/eng/docs/v1_rul_in_asofcuin (last visited Mar. 21, 2013).
[147] U.N. Secretary-General, *Joint UN, European Union, Islamic Conference Statement Shares 'Anguish' of Muslim World at Mohammed Caricatures, but Condemns Violent Response*, U.N. Doc. SG/2105 (July 2, 2006).

Calderoli publicly wore a T-shirt depicting Mohammed, he was forced to resign."[148]

Customary international law can also be created by passing several non-binding resolutions on "defamation of religion,"[149] which is possibly one of the reasons for the continuous and repeated introduction of resolutions by the OIC.

2. *Creating a two-tiered system*

As indicated above, the concept of "religion" as understood by the West cannot be equated with the Islamic understanding of religion. Islam encompasses more than the Western understanding of religion: It encompasses a political and legal as well as religious structure.[150] These two worldviews of the meaning of religion produce the possibility of the OIC undermining UN principles on international human rights laws by creating a two-tiered system of law.

The effect of a two-tiered system would be the creation of a set of norms and principles governing adherents to Islam and a set of norms and principles governing everyone else. These two systems will undoubtedly come into conflict with each other—especially concerning the right to freedom of expression.

The Islamic worldview of religion has also manifested in the *Cairo Declaration on Human Rights in Islam* (*Cairo Declaration*). The *Cairo Declaration* reaffirms "the civilizing and historical role of the Islamic Ummah which [Allah] made the best nation that has given mankind a universal and well-balanced civilization" and that "fundamental rights and universal freedoms in Islam are an integral part of the Islamic religion and that no one . . . has the right to . . . violate or ignore them in as much as they are binding divine commandments . . . ."[151] Article 22 provides for freedom of expression but prohibits any expression against the principles of Sharia,[152]

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[148] Brooke Goldstein & Aaron Eitan Meyer, *'Legal Jihad': How Islamist Lawfare Tactics are Targeting Free Speech*, 15 ILSA J. INT'L & COMP. L. 395, 401 (2009).

[149] JOHN DUGARD, INTERNATIONAL LAW: A SOUTH AFRICAN PERSPECTIVE 483 (2006).

[150] LEWIS, *supra* note 26, at 4.

[151] World Conference on Human Rights, *The Cairo Declaration on Human Rights in Islam*, at 3, U.N. Doc. A/CONF.157/PC/62/Add.18 (Jun. 9, 1993) [hereinafter *Cairo Declaration on Human Rights*], *available at* http://www.arabhumanrights.org/publications/regional/islamic/cairo-declaration-islam-93e.pdf.

[152] *Id.* art. 22 ("(a) Everyone shall have the right to express his opinion freely in such manner as would not be contrary to the principles of the Shari'ah. (b) Everyone shall have the right to advocate what is right, and propagate what is good, and warn against what is wrong and evil according to the norms of Islamic Shari'ah. (c) Information is a vital necessity to society. It may not be exploited or misused in such a way as may violate sanctities and the dignity of Prophets, undermine moral and ethical values or disintegrate, corrupt or harm society or weaken its faith. (d) It is not permitted to

thereby placing restrictions on freedom of expression in so far as it is contrary to Islam. Articles 24 and 25 also establish Sharia as above any of the rights in the *Cairo Declaration* and as the only source for its interpretation.[153]

The *Cairo Declaration* has been invoked in official UN reports, in a resolution, and is repeatedly cited in communications from OIC-member governments to the UN.[154] The *Cairo Declaration* is also included in *Human Rights: A Compilation of International Instruments: Volume II: Regional Instruments*.[155] Statements in Resolution 16/18 "[r]eaffirming the commitment made by all States under the Charter of the United Nations" and universal respect for human rights contradict the *Cairo Declaration* and render the reaffirmation dubious.[156]

As stated in some NGO reports, by signing the *Cairo Declaration* a great number of the OIC signatories broke the obligations they entered into when signing the UDHR and ICCPR.[157] Article 22 of the Cairo Declaration creates restrictions to freedom of expression in addition to those provided for in the UDHR and ICCPR.[158] It also has the effect of providing support for numerous human rights violations in Islamic countries in respect of freedom of expression. Articles 24 and 25 subordinate each of the UDHR's guarantees to undefined Islamic laws, causing Sharia laws to supersede any human rights provided in the UDHR. In effect, the principle of universality is forgotten and fundamental rights are made dependent on "tradition, culture, religion or level of development."[159]

If a concept such as "defamation of religion" is interpreted by the OIC according to Islamic worldviews, it poses challenges to the interpretation of the right to freedom of religion in international human rights laws. It presents the possibility of the extension of the right to freedom of religion to the protection of Islam as law, politics, and religion. This is true especially in light of the large differences in the understanding of "religion" between the OIC and the UN. This will create numerous restrictions on freedom of expression. It also presents a parallel system of international law—one system governing adherents to Islam and the other governing non-adherents

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arouse nationalistic or doctrinal hatred or to do anything that may be an incitement to any form of racial discrimination.").

[153] *Id.* arts. 24-25.

[154] MARSHALL & SHEA, *supra* note 63, at 208-09.

[155] U.N. Doc. A/HRC/7/NGO/96, *supra* note 114, ¶ 4.

[156] H.R.C. Res. 16/18, *supra* note 21, at 1.

[157] U.N. Doc. A/HRC/7/NGO/96, *supra* note 114, ¶ 21.

[158] *See Cairo Declaration on Human Rights*, *supra* note 151, art. 22.

[159] *Id.* ¶ 8.

to Islam. This undermines a notion of universal human rights laws as well as equal protection of all persons under these universal human rights laws.

3. The role of the victim

Several OIC resolutions present Islam as the victim of extremist organizations, drawing attention away from the aggression and actions of Islamic extremist groups. For example, Pakistan's initial draft of Resolution 16/18 (on behalf of the OIC) states that the Human Rights Council "[e]xpresses deep concern at . . . programmes and agendas pursued by extremist organizations and groups aimed at creating and perpetuating negative stereotypes about religious groups . . . ."[160] Groups negatively stereotyping religion, and more specifically Islam, are equated with extremist groups, without any honest acknowledgement of the problem of Islamic extremism. Also, in the first resolution following the 9/11 attacks,[161] and subsequent resolutions, there is no condemnation of the actions of Islamic extremist groups.[162] The only condemnation in these resolutions concerns the negative impact of 9/11 events on Muslim minorities and communities, negative projection of Islam, and attacks on Muslim businesses and places of worship.[163] The OIC does, however, condemn terrorism in the *Convention of the Organization of the Islamic Conference on Combating International Terrorism*.[164] This does not change the fact that references to religious extremism in the resolutions create the objective idea that Islam is the only victim of religious extremism. This can also be seen in the adoption and popular use of the term "Islamophobia."[165] For example, poor treatment of

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[160] Human Rights Council Draft Res. 16/L.38, ¶ 1, U.N. Doc. A/HRC/16/L.38 (March 21, 2011). This aim is also clear from Resolution 64/156, adopted in 2010, which states that the General Assembly is deeply concerned about the "serious instances of intolerance, discrimination and acts of violence based on religion or belief . . . motivated by extremism, religious or otherwise . . . in addition to the negative projection of certain religions in the media . . . particularly Muslim minorities . . . ." G.A. Res. 64/156, at 2, U.N. Doc. A/RES/64/156 (Dec. 18, 2009).

[161] C.H.R. Res. 2002/9, *supra* note 1.

[162] There is also no condemnation of the September 11 attacks in the 2008 *Hate Crime Survey* of the OIC. *See Violence Against Muslims: 2008 Hate Crime Survey*, HUMAN RIGHTS FIRST (2008), *available at* http://www.humanrightsfirst.org/wp-content/uploads/pdf/fd-080924-muslims-web.pdf.

[163] *See, e.g.*, G.A. Res. 63/171, *supra* note 1, ¶ 5.

[164] Organization of the Islamic Conference, *Convention of the Organization of the Islamic Conference on Combating International Terrorism*, Annex to Res. No. 59/26-P (July 1, 2009), *available at* http://www.unhcr.org/refworld/docid/3de5e6646.html.

[165] *E.g.*, G.A. Res. U.N. Doc. A/C.3/65/L.46/Rev.1 (Nov. 19, 2010) (illustrating the OIC's more recent usage of the term 'islamophobia').

Christians who are minority groups in Islamic states is not given nearly as much attention—if any—in Commission on Human Rights resolutions.[166]

Portraying a group of persons as victims to gain advantage is not a new concept in law and politics. In legal systems, attempts are made to respond to injustice by prosecuting the violators and compensating victims—for example, prosecution in the case of murder. Such an approach is sometimes insensitive to situations where some responsibility is shared by both defendant and plaintiff. By transferring all blame to others, one can achieve moral superiority and at the same time reject any responsibility for one's own actions. The violence of the victim is then projected as a last resort of self-defense. "The victim is always morally right, neither responsible nor accountable, and forever entitled to sympathy."[167] Playing the role of the victim has been used in issues concerning racism, homosexuality, and women's rights. For example, feminism has depicted the unborn as an aggressor and the woman as a victim even when the woman's own choices caused her to be pregnant.[168]

It is clear from the various resolutions on "defamation of religion" that there is no sensitivity to shared responsibilities between Islamic and non-Islamic groups for discrimination against one another. This has the potential of presenting Islam as morally superior and subject to the attacks of non-Islamic extremist groups. Such "injustice" will then lead to compensating the victims (Islam) and prosecuting the violators (non-Islam).

4. A self-censored future

"Defamation of religion" and Resolution 16/18 have the potential to create self-censorship in the future out of fear of the reactions free expression might cause. For example, the National Counterterrorism Center issued two documents calling for U.S. officials to stop referring publicly to terrorist

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[166] In Resolutions 2000/84, 2001/4, 2002/9, and 2003/4 alone, there are more than fifteen references to "Islam" or "Muslim," whereas there is no reference to any other specific religion. Later resolutions contain similar specific references to "Islam" and "Muslim."

[167] Ofer Zur, *Rethinking 'Don't Blame the Victim': The Psychology of Victimhood*, ZUR INSTITUTE, http://www.zurinstitute.com/victimhood.html (last visited Mar. 27, 2013).

[168] For example, consider Thomson's violinist thought experiment depicting the mother as a victim of her pregnancy: "You wake up in the morning and find yourself back to back in bed with an unconscious violinist. . . . He has been found to have a fatal kidney ailment, and the Society of Music Lovers . . . have therefore kidnapped you, and last night the violinist's circulatory system was plugged into yours, so that your kidneys can be used to extract poisons from his blood as well as your own." Judith Jarvis Thomson, *A Defense of Abortion*, *in* LIFE AND DEATH: A READER IN MORAL PROBLEMS 240, 241 (Louis P. Pojman ed., 2000).

groups as Islamic, notwithstanding many of those organizations maintain it in their titles.[169]

Violent Islamic response to criticism of Islam has created self-censorship in reactions to combating crime—thus undermining the rule of law. In Britain, nine Muslim men were found guilty of raping several British children. During the trial it came to light that police and social workers had repeatedly refused to investigate the cases due to their fear of being called racist.[170]

CONCLUSION

This article does not attempt to suggest that Islam is a dangerous religion or synonymous with terrorism. All religions have different groups within them with varying degrees of extremity to which certain convictions are adhered. Also, one cannot be over-simplistic and ignore the pluralistic nature of international law, intolerance towards groups, and massacres, such as the Holocaust and the Rwandan Genocide, which many scholars believe "were rooted first in hateful or inciting speech."[171] There are specific instances where hateful and inciting speech is unacceptable under articles 19(3) and 20.[172] There are also other forms of expression that can be limited. The parameters concerning the limitations of freedom of expression do not fall within the scope of this article, however, what is clear is the fact that the trend of "defamation of religion" serves as a limitation to freedom of expression that is left undefined and overly broad.

There are international human rights laws already in place which can be used to protect both Muslim and non-Muslim.[173] Genuine cases meeting all the requirements of the restrictions embodied in Articles 19(3) and 20, as set out above, should be dealt with under those principles. An attempt by the UN to present and define more clearly the existing objective criteria in Articles 19(3) and 20 will help to determine violations of freedom of expression. Whether these will include the publication of blasphemous cartoons, for example, is to be determined by much greater collaboration with various religious and non-religious groups, as well as much more

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[169] Goldstein & Meyer, *supra* note 148, at 409-10.

[170] Soeren Kern, *Britain Ruled by Political Correctness*, GATESTONE INSTITUTE (July 11, 2012, 5:00 AM), http://www.gatestoneinstitute.org/3141/britain-political-correctness.

[171] Belnap, *supra* note 98, at 681-82.

[172] ICCPR, *supra* note 76, arts. 19-20 (evidencing instances where limitations on freedom of expression do exist. Article 19(3) states that freedom of expression may be subject to certain restrictions including, a) respect of the rights or reputations of others and b) to protect national security, public order, public health or morals. Article 20 of the ICCPR states that "[a]ny advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law.").

[173] *See, e.g.*, *id.*

precision and care as has been done by way of the concept "defamation of religion." There are also other ways to sensitively address injustices suffered by multiple religious adherents and create an atmosphere of dialogue and respect. Education by the UN, campaigns, and, protests can be used to combat violations of religious minorities in different countries.

What is troubling is the fact that "defamation of religion" as a restriction to freedom of expression is not only too broad, but the development thereof is very exclusive. Many of the actions cited as "defamation of religion" have been promoted and presented by Islam and accepted by the UN. This presents an unbalanced and biased view towards religion and the equality thereof in international law. It also presents religion as defined by one religious group and therefore, in effect, limits the richness with which religion can be defined, enhanced and protected.

It is also argued that resolution 16/18 does not present a more neutral approach towards "defamation of religion" as the aims of the resolution remain the same and is still promoted by the same religious group without the necessary inclusiveness.

"Defamation of religion" also has the potential to create fears and sensitivities that can undermine the rule of law. For example, as stated above, undefined restrictions to actions against religious persons—such as arrest—may render police officers hesitant to perform their functions due to fear of retribution and being convicted of defaming that religious group. The rule of law cannot exist if the law—and in this case "defamation of religion"—is not clearly circumscribed and defined.

Besides the fact that "defamation of religion" should be clearly defined and the elements thereof determined, the legitimacy of the existence of such a concept is also questioned. First, "defamation of religion" is not included within the right to religious freedom. Second, with regards to the concept of defamation, the truthfulness of a claim is an absolute defense to a defamation charge; however, the standard of truth will be extremely difficult to apply to questions of faith and belief.

Attempts towards creating a two-tiered system of law, where some international rules govern States, but other rules govern the Arab world, will also undermine the rule of law and equality.

Islam has also been very reluctant to accept responsibility for various human rights violations. Rather, the role of the victim is adopted and an unbalanced representation of human rights violations against Islam—especially after 9/11—is presented by way of the mentioned resolutions and other documents. There is rejection of terrorism but without any acceptance of responsibility for various human rights violations.

The UN adoption of undefined doctrines that pose a challenge to the rule of law and freedom of expression, presented by Pakistan, a country where human rights violations of freedom of expression and religion are numerous, does not have a justifiable basis and is subject to severe criticism as described above.