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Request made by :	IPUSERCP3396247981 IPUSERCP3396247981
Request made on:	Monday, 29 June, 2009 at 10:26 BST
Client ID:	ukadvlegal-245
Content Type:	Journals
Title :	The challenge of "defamation of religions" to freedom of expression and the international human rights
Delivery selection:	Current Document
Number of documents delivered:	1

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## European Human Rights Law Review

2009

### The challenge of "defamation of religions" to freedom of expression and the international human rights

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**Subject:** Human rights. **Other related subjects:** Defamation. International law

**Keywords:** Defamation; Freedom of expression; Religions; United Nations resolutions

***\*E.H.R.L.R. 353** This article examines the series of resolutions adopted by UN human rights bodies--specifically the UN Human Rights Council and its predecessor, the Commission on Human Rights--over the past decade on the subject of combating "defamation of religions". These resolutions have been proposed on behalf of the Organisation of Islamic Conference and have gained broader support, but have been condemned by Western states and human rights organisations on freedom of expression grounds. The article situates the most recent UN Human Rights Council resolution on "defamation of religions" within the context of earlier resolutions on the subject, as well as recent national, regional and global controversies involving issues of freedom of expression, religion and equality. It assesses the evolution of these resolutions over the years by identifying their common characteristics and tracing certain shifts in their approach. The article goes on to critique the "defamation of religions" resolutions from the perspective of international human rights law on freedom of expression while highlighting some apparent tensions within relevant international and regional human rights law on anti-religious hate speech. The author argues that the accumulation of the "defamation of religions" resolutions has dangerous implications for the international protection of freedom of expression, but that it also risks undermining the international human rights system, and in particular the Human Rights Council.*

#### I. Introduction

Sixty years ago the Universal Declaration of Human Rights (UDHR) hailed "the advent of a world in which human beings shall enjoy freedom of speech and belief and freedom from fear and want ... as the highest aspiration of the common people".<sup>1</sup> The freedoms **\*E.H.R.L.R. 354** of speech and belief were thus placed side by side at the birth of the international human rights system. Today those two freedoms--or, more specifically, the right to freedom of expression and the right to freedom of religion--often seem in irreconcilable conflict with one another. From the viewpoint of a freedom of expression advocate, the right to freedom of expression, as protected by art.19 UDHR, seems under particular pressure, if not sustained attack, from arguments purportedly based upon freedom of belief or religion and the right to non-discrimination.<sup>2</sup> At the global level, the most serious threats to freedom of expression have come from the initiatives of UN human rights bodies themselves, in particular resolutions on "combating defamation of religions".<sup>3</sup> In March 2009, the 10th session of the Human Rights Council (HRC) adopted the latest of these resolutions on defamation of religions upon a proposal by Pakistan, on behalf of the Organisation of Islamic Conferences (OIC), 10 years after the HRC's predecessor, the Commission on Human Rights, first adopted a UN resolution on the subject.<sup>4</sup> The international response to resolutions on combating defamation of religions has been sharply divided: while Western states,<sup>5</sup> human rights organisations and other civil society groups have vociferously opposed such resolutions on freedom of expression grounds, such resolutions have been historically supported by a range of states beyond the OIC and the proposal of similar resolutions in the future appears inevitable.<sup>6</sup>

The purpose of this article is threefold: to analyse some of the key characteristics of the resolutions on defamation of religions of the HRC and Commission on Human Rights; to examine them from the perspective of international human rights law on freedom of expression; and to consider their consequences for the international human rights **\*E.H.R.L.R. 355** system more broadly. It is argued that the accumulation of the "combating defamation of religions" resolutions has dangerous implications for the protection of freedom of expression under international human rights law as well as interrelated normative and institutional consequences for the international human rights system. The structure of the article is as follows: Part II situates the most recent resolution on defamation of religions in its wider context; Part III considers the evolution of these resolutions over the years; Part IV critiques the resolutions on defamation of religions from the point of view of relevant international

human rights law on freedom of expression and also highlights some often-overlooked inconsistencies and tensions within relevant international and regional human rights law; Part V discusses the normative and institutional consequences of the resolutions for the international protection of freedom of expression specifically and speculates as to their impact upon the international human rights system.

## II. The context of defamation of religions

The context in which the March 2009 HRC resolution on combating defamation of religions emerges has three, clearly identifiable dimensions. The first aspect is the immediate context of earlier resolutions on combating defamation of religions adopted by UN human rights bodies. The resolution is the latest development in a series of resolutions on the subject adopted by the HRC, the Commission on Human Rights before it and also the UN General Assembly. Such resolutions have been adopted by UN human rights bodies since 1999 when the concept of “defamation of religions” was first introduced to the Commission on Human Rights by Pakistan on behalf of the OIC.<sup>7</sup> In its original form, the draft resolution was introduced under the title “defamation of Islam” but, following negotiations, the OIC agreed to make the title inclusive of all religions, even though the text focused on Islam.<sup>8</sup> The apparent rise in Islamophobia following the events of 9/11 and terrorist attacks since then appears to have increased the political impetus within the UN human rights bodies to adopt further resolutions on combating defamation of religions. Since that first resolution, draft resolutions on defamation of religions have been tabled before the Commission on Human Rights and the HRC under the agenda item on “racism, discrimination, xenophobia and related intolerance”.<sup>9</sup> The UN General Assembly has also adopted resolutions on defamation of religions since 2005.<sup>10</sup> It seems that the proposal of draft resolutions on defamation of religions at UN bodies forms part of a long-term strategy for the OIC that includes the drafting and adoption of a treaty as its ultimate objective. Pakistan has publicly acknowledged such a proposal as an “an annual initiative of the OIC”, and it seems one that may be reinforced through other initiatives.<sup>11</sup> For example, at the HRC's 7th session \*E.H.R.L.R. 356\* in March 2008, the OIC successfully argued for a change to the mandate of the Special Rapporteur on Freedom of Opinion and Expression, requiring that mandate-holder to “report on instances where the abuse of the right to freedom of expression constitutes an act of racial or religious discrimination”.<sup>12</sup>

Secondly, UN debates between states on draft resolutions on combating defamation of religions reflect and are clearly informed by various complex controversies at the regional and national levels on whether and how the protection of religions can function as a ground for limiting freedom of expression. Following the violent protests across the Muslim world in the aftermath of the publication of cartoons of the Prophet Mohammed in the Danish newspaper, *Jyllands-Posten*,<sup>13</sup> the media have spotlighted the hostile or anticipated hostile responses from Muslim groups to various forms of expression.<sup>14</sup> Growing calls for national hate speech laws to be extended, or at least applied more forcefully to penalise expression which is offensive or insulting to religious believers, have drawn support because of an apparent increase in Islamophobia.<sup>15</sup> Blasphemy prohibitions remain in place in many countries across the world, not only in Islamic countries where they “are very much alive”.<sup>16</sup> European states have \*E.H.R.L.R. 357\* rallied publicly and behind closed doors against proposed resolutions on defamation of religions at the United Nations. However, laws across European states demonstrate their ambivalent approach towards deciding issues of freedom of expression and religion in practice. A wide range of specific offences “with a religious aspect” exist across Europe, as the Council of Europe's advisory body on constitutional matters, the Venice Commission, reported in October 2008.<sup>17</sup> Such offences include: the disturbance of religious practice, blasphemy, religious insult, negationism, discrimination (including on religious grounds) and incitement to hatred. The Council of the European Union has also recently adopted a sweeping framework decision on combating certain forms and expressions of racism and xenophobia by means of criminal law,<sup>18</sup> which requires EU Member States to take,

“measures necessary ... to punish certain forms of ‘intentional conduct’ including ‘publicly condoning, denying or grossly trivialising crimes of genocide, crimes against humanity and war crimes’ and ‘the crimes defined in Article 6 of the Charter of the International Military Tribunal appended to the London Agreement of 8 August 1945’...”.<sup>19</sup>

Policy decisions at the national level also show a certain lack of coherence or consistency with states' diplomatic positions. For instance, in February 2009, the UK Government excluded Geert Wilders, a controversial Dutch MP, from the United Kingdom on the grounds that “his statements about Muslims and their beliefs, as expressed in [his] film *Fitna* and else where, would threaten community harmony

and therefore public security in the UK".<sup>20</sup> Just six months earlier, the United Kingdom abolished blasphemy, 20 years after the publication of and subsequent furore over the *Satanic Verses*.<sup>21</sup>

Thirdly, global controversies involving issues of freedom of expression, religion and equality form part of ongoing geopolitical struggles on the spectrum of human rights issues--involving both civil and political rights and economic, social and cultural rights--that are fought at a variety of meetings of international actors. The UN Durban *\*E.H.R.L.R. 358* Review Conference, held from April 20-24 2009 in Geneva, is a relevant forum.<sup>22</sup> Indeed, the preparations to the conference were dominated by controversies concerning the criticism of Israel's policies in the Occupied Palestinian Territories in parts of an early draft of the conference outcome document, as well as those concerning the inclusion of limitations on defamation of religions proposed by several Islamic states.<sup>23</sup> At one stage in the process, the United States had cited the introduction of a clause prohibiting defamation of religions in the rolling text of the draft outcome document as a justification for its potential withdrawal from the conference.<sup>24</sup> Italy and Canada had made the strongest indications that they would boycott the process of the Durban Review Conference, whilst the United Kingdom, France, the Netherlands and Australia had also at various times threatened to withdraw if the text was not suitably amended. Although, at the time of writing, reference to "defamation of religions" had been omitted in the latest version of the rolling text, concerns that such language might be reintroduced at a later stage or during the conference itself lingered.<sup>25</sup> For both opponents and supporters of the inclusion of such references, the stakes at the Durban Review Conference remained high.

### III. The evolution of "defamation of religions"

In order to understand the "defamation of religions phenomenon" that has gripped UN human rights bodies in recent years, this section analyses UN resolutions on the subject--in particular, the resolutions of the Commission on Human Rights and the HRC--by distinguishing their common characteristics, as well as tracing any *\*E.H.R.L.R. 359* evolving trends in their approach.<sup>26</sup> The first and most obvious defining feature of the resolutions--10 in all as there was no resolution adopted in the year the HRC was established, 2006--is, of course, their subject. From the first resolution in 1999, "defamation of religions" is projected as a human rights issue that warrants action by the international community. Indeed, defamation of religions is viewed not only as inconsistent with the protection of human rights, but also as incompatible with broader UN "objectives of a truly globalized world and the promotion and maintenance of international peace and security".<sup>27</sup> "Defamation of religions" does not actually appear in text of the resolution until the third Commission of Human Rights in 2001.<sup>28</sup> Yet not one of the resolutions of the Commission on Human Rights or the HRC to date defines the concept of defamation of religions, which appears as a term of art to infer a distinct phenomenon that is a "serious affront to human dignity" itself.<sup>29</sup> Instead, the term gains its meaning from the negative consequences to which it apparently gives rise: "social disharmony and ... violations of human rights"<sup>30</sup>; "negative" and "deliberate stereotyping of religions"<sup>31</sup>; "instances of intolerance, discrimination and acts of violence against followers of certain faiths occurring in many parts of the world" and "the negative projection of certain religions in the media and the introduction and enforcement of laws and administrative measures that specifically discriminate against and target persons with certain ethnic and religious backgrounds".<sup>32</sup> This lack of definition of the concept echoes the approach taken by countries which refer to defamation of religions in their domestic laws.<sup>33</sup> Notwithstanding the absence of a definition, the actions required by the resolutions drive further and ongoing work by UN human rights bodies on the subject.<sup>34</sup> In a style typical of earlier resolutions, the *\*E.H.R.L.R. 360* latest resolution of March 2009 requests the High Commissioner to report to the HRC at its twelfth session "on the implementation of the present resolution, including on the possible correlation between defamation of religions and the upsurge in incitement, intolerance and hatred in many parts of the world". The Special Rapporteur on contemporary forms of racism, racial discrimination and related intolerance is also tasked "to report on all manifestations of defamation of religions, and in particular on the serious implications of Islamophobia, on the enjoyment of all rights by their followers" at the twelfth session.<sup>35</sup>

A second characteristic of the resolutions is the legal basis they find in the right to non-discrimination and freedom of religion and belief. This reflects the goals underlying the resolutions, namely to promote equality and intercultural dialogue, which are laudable of course.<sup>36</sup> The opening paragraph of the preamble to all resolutions recalls that,

"all States have pledged themselves, under the Charter of the United Nations, to promote and encourage universal respect for and observance of human rights and fundamental freedoms for all without distinction as to race, sex, language or religion".

Subsequent paragraphs reaffirm that “discrimination against human beings on the grounds of religion or belief constitutes an affront to human dignity” as well as a “disavowal of those principles”.<sup>37</sup> The resolutions also appear grounded in the right to freedom of religion and belief and seek to promote “understanding, tolerance and respect in matters relating to the freedom of religion or belief”.<sup>38</sup> At the same time, there seems much less positive reinforcement or promotion of the exercise of the individual right to freedom of religion or belief through the resolutions, which instead place more negative emphasis on the targeting of the phenomenon of defamation of religion and related practices.<sup>39</sup>

A third feature of all the resolutions is the spotlight they shine on Islam and Muslims. This is unremarkable given that the resolutions were initiated and have continued *\*E.H.R.L.R. 361* to be justified by the OIC largely on the basis of “manifestations of intolerance and misunderstanding, not to say hatred, of Islam and Muslims in various parts of the world”.<sup>40</sup> Unsurprisingly, this has been a point of particular debate within the Commission on Human Rights and the HRC also. In a sign of the diplomatic debates to come, the representative of Pakistan in 1999 argued that “no other religion received such constant negative media coverage”<sup>41</sup> whereas the representative of Germany indicated that the then draft resolution’s overall design was “not balanced, since it referred exclusively to the negative stereotyping of Islam ...”.<sup>42</sup> Although the title of the resolutions was changed from “defamation of Islam” to encompass all religions, the focus on Islam within the texts has remained even as the resolutions have grown more elaborate. References to the targeting of Islam and Muslims reached a high point in the 2002 resolution which expressed alarm,

“at the impact of the events of 11 September 2001 on Muslim minorities and communities in some 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>43</sup>

There were numerous references to Islam in the text of the resolution which noted for the first time “the intensification of the campaign of defamation of religions and the ethnic and religious profiling of Muslim minorities” in the aftermath of 9/11.<sup>44</sup> It is noteworthy that all the resolutions’ “deep concern that Islam is frequently and wrongly associated with human rights violations and terrorism” predates 9/11.<sup>45</sup> The focus on Islamophobia has continued to be a major point of criticism from states opposing the resolutions for a number of years. At the debates on the 2007 resolution, for example, the representatives of India, Guatemala, Japan, Peru, Brazil, Canada and Germany on behalf of the European Union all expressed concern that the resolution focused excessively on one religion, Islam.<sup>46</sup>

A fourth theme that runs through the resolutions is their identification with various, mainly UN, meetings and sources including: the conclusions of the World Conference on Human Rights<sup>47</sup>; the UN Millennium Declaration<sup>48</sup>; the Durban Declaration and *\*E.H.R.L.R. 362* Programme of Action<sup>49</sup>; the Global Agenda for Dialogue among Civilisations<sup>50</sup>; the reports of Special Rapporteurs on contemporary forms of racism, racial discrimination, xenophobia and related intolerance<sup>51</sup>; a report of the High Commissioner for Human Rights on the subject of “combating defamation of religions”<sup>52</sup>; General Comment 15 of the Committee on the Elimination of Racial Discrimination<sup>53</sup>; and the UN Global Counter-Terrorism Strategy.<sup>54</sup> While initiatives organised jointly by the OIC and the Office of the High Commissioner for Human Rights (OHCHR)<sup>55</sup> and also those between the OIC and the European Union are also recalled by the resolutions,<sup>56</sup> the 2007 and 2008 resolutions also draw upon entirely independent sessions of the OIC which had expressed concerns about discrimination against Muslims.<sup>57</sup> In a break from the past, the latest resolution of March 2009 refrains from making any references to OIC sources or meetings, co-organised or completely independent. This shift in approach arguably suggests a conscious attempt to distance the text of the resolution away from the organisation of the OIC. In contrast, the March 2009 resolution does attach particular importance to recent initiatives of the High Commissioner for Human Rights “on the compilation of existing legislation and jurisprudence concerning defamation of and contempt for religions” and “for holding a seminar on freedom of expression and advocacy of religious hatred that constitutes incitement to discrimination, hostility and violence” in October 2008.<sup>58</sup>

A fifth and final feature of most of the resolutions is their glaring neglect or otherwise misrepresentation of the most relevant international human rights provisions on the subject--arts 19 and 20 of the International Covenant on Civil and Political Rights *\*E.H.R.L.R. 363* (ICCPR) concerning the right of freedom of expression and anti-religious hate speech.<sup>59</sup> It is recalled that art.19 of the ICCPR states that the right to freedom of expression includes the “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” (art.19(2)). Article 19 also recognises that this right carries “with it special duties and responsibilities” and “may therefore be subject to certain restrictions” (art.19(3)). However, “these shall only be such as are provided by law and are necessary for respect of the rights or reputations of others or for the protection of national security, public order, public health or morals”. Article 20(2), the key international provision on hate speech provides: “Any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law”. That these provisions are only expressly referenced for the first time in the latest March 2009 resolution is somewhat surprising, not least because the subject of the resolutions is *defamation* of religions and they have expressly included the language of “the incitement to discrimination, hostility and violence” within their substantive provisions previously.<sup>60</sup> The latest resolution refers to “incitement of religious hatred”, however, no less than nine times.<sup>61</sup> It is notable that when the 2007 resolution acknowledged for the first time the relevance of the right to freedom of expression, it distorted the international standards radically. Paragraph 10 of the 2007 resolution includes “the respect for religions and beliefs” as a permissible restriction on freedom of expression in addition to other grounds actually mentioned in art.19.<sup>62</sup> This is to be understood as the clearest indication yet that, for the proponents of these series of resolutions, defamation of religions is a distinct ground for limiting freedom of expression. The March 2009 resolution also makes reference to freedom of expression, *\*E.H.R.L.R. 364* though again somewhat misleadingly.<sup>63</sup> Paragraph 10 of the March 2009 resolution adds “general welfare”, derived from art.29 UDHR, as grounds for a permissible restriction to those included in art.19. “General welfare” is a term used presumably to cover efforts against defamation of religions. Despite reference to art.20 of the ICCPR, there is no further consideration of the standard that that provision sets for restricting freedom of expression in order to protect against religious hatred.

#### IV. International perspectives

This section seeks to offer a critique of the defamation of religions resolutions from a freedom of expression perspective. It also attempts to show the internal tensions and inconsistencies of international and European legal approaches to anti-religious hate speech. Whilst the former includes arguments often raised by states and non-governmental organisations (NGOs) opposing the adoption of such resolutions, the latter are overlooked in arguments made against the resolutions in the UN human rights bodies.

##### *A freedom of expression critique*

Critiques of the defamation of religions resolutions have taken the form of detailed statements of prominent human rights organisations, such as ARTICLE 19, the Cairo Institute for Human Rights Studies and the Egyptian Initiative for Personal Rights’ response to proposed resolutions.<sup>64</sup> They also encompass a petition of 186 organisations calling on the HRC to reject the draft resolution proposed in March 2009,<sup>65</sup> submissions to the OHCHR from such organisations as the Becket Fund for Religious Liberty<sup>66</sup> and the European Centre for Law and Justice,<sup>67</sup> and scholarly articles in law journals.<sup>68</sup> Most significantly, in December 2008, the key UN and regional mandate holders on freedom of expression--the UN Special Rapporteur on Freedom of Opinion and Expression, the OSCE Representative on Freedom of the Media, the OAS Special Rapporteur on Freedom of Expression and the African Commission on Human and Peoples’ Rights Special Rapporteur on Freedom of Expression and Access to Information--focused their annual Joint Declaration on the subject of defamation of religions as well as anti-terrorism legislation.<sup>69</sup> In doing so, they opined that defamation of religions does *\*E.H.R.L.R. 365* not accord with international standards and emphasised, inter alia, that restrictions on freedom of expression to prevent intolerance should be limited in scope to advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence.

Why are the resolutions problematic from a human rights perspective more specifically?<sup>70</sup> The concept of defamation of religions does not find any basis in international human rights law on hate speech. Terms such as “deliberate” or “negative stereotyping” and the “frequent and wrong association of Islam with human rights violations and terrorism” used in the resolutions fall far short of the threshold of incitement put forward in art.20(2). Numerous references in the March 2009 resolution to “incitement to religious hatred” alongside defamation of religions and the reference to arts 19 and 20 appear at once confusing and strategic in connecting defamation of religion to recognised terms within established international human rights law. Moreover, the concept goes *beyond* the scope of international human rights provisions on the freedom of expression and the regulation of hate speech. Despite recent recognition within the resolutions of freedom of expression

and (misleading) references made to arts 19 and 20 of the ICCPR, the continued reliance on the concept of defamation of religions as the subject of the resolutions undermines and threatens to distort international human rights on freedom of expression in a number of ways. Most significantly, the resolutions endeavour to protect religions and religious ideas per se. For example, para.14 of the March 2009 resolution notes the “need to adopt a comprehensive and non-discriminatory approach to ensure respect for all races and religions”. However, neither international nor regional human rights instruments recognise that a religion or religious ideas can be the subject of a defamatory attack.

Can the concept of defamation of religions find any legal basis in the freedom of religion or belief? The Special Rapporteurs on freedom of religion or belief and on contemporary forms of racism, racial discrimination, xenophobia and related intolerance have agreed that it does not. They jointly noted that “the right to freedom of religion protects primarily the individual and, to some extent, the collective rights of the community concerned, but it does not protect the religions or beliefs per se”.<sup>71</sup> Recently, the UN Working Group on Arbitrary Detention stated that “defamation of religions may offend people and hurt their feelings but it does not directly result in a violation of their rights to freedom of religion”. It went on: “[i]nternational law does not permit restrictions on the expression of opinions or beliefs which diverge from the religious beliefs of the majority of the population or from the State prescribed one”.<sup>72</sup> It is also interesting to note that the 1981 Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief does not contain a prohibition of incitement to religious discrimination similar to art.20. Moreover, from a theoretical perspective, the concept of defamation of religions is extremely difficult *\*E.H.R.L.R. 366* as religions differ on their understanding of divine authority and make rival claims to absolute truth. One religion may therefore be viewed as a “defamation” of another.

Besides religions, the March 2009 resolution also covers within its scope “the targeting of ... *venerated personalities of all religions*” and the targeting of “religious *symbols* and *venerated persons*” through the media and internet (emphasis added).<sup>73</sup> It also deplores “deliberate stereotyping of religions, their adherents and *sacred persons*” and calls upon states to “exert the utmost efforts ... to ensure that religious ... symbols are fully respected and protected”.<sup>74</sup> However, any limits on the scope of the terms “venerated personalities of all religions” or “sacred persons” would be deeply contested by individuals and groups within and across religions. The meaning of the word “symbol” in this context is also unclear. It could easily be given an extremely broad scope to cover, for example, not only the Muslim headscarf or the Jewish yarmulke, but also satirical images of religious figures.<sup>75</sup> But the case against the inclusion of such protections of religions and religious symbols and persons is based on more than an argument of practicality. Calling for the respect and protection of religions and religious symbols in rather similar terms to existing human rights protections goes against the very nature of the international human rights system's protection of human rights, whether on an individual or on a group basis.<sup>76</sup> There is no good reason for according venerated or sacred persons specific protection as if they were a vulnerable group in international human rights law.

If defamation of religions does not find support in international human rights treaty law, could its protection be premised upon civil law notions of defamation?<sup>77</sup> Defamation is the communication of a statement that, in the circumstances, would be likely to make reasonable people think less of a claimant. In English law, the test is described as “lowering the claimant in the estimate of right-thinking people generally” or “injuring the claimant's reputation by exposing him to hatred, contempt or ridicule”.<sup>78</sup> It is a question of the respect for the reputation of an individual, specified groups or the business reputation of a company.<sup>79</sup> Article 19(3) of the ICCPR allows restrictions to be placed on the right to freedom of expression to respect the reputation of others, a provision which is echoed in regional human rights texts.<sup>80</sup> Such texts do not protect the “reputation” of religions--which are essentially ideas or ideologies. The Special Rapporteur on the right to freedom of expression and opinion has stated that limitations on the right to freedom of expression in international law “are not designed *\*E.H.R.L.R. 367* to protect belief systems from external or internal criticism”.<sup>81</sup> From a practical point of view, the protection of the reputation of religions per se assumes that they are capable of being protected, as if they are monolithic and internally uncontested systems of belief. Yet all religions have a spectrum of interpretations.

A final argument that is put forward against the resolutions is that they will be harmful to their purported aims--the promotion of diversity and “tolerance”.<sup>82</sup> Despite their titular neutrality, with their overriding focus on Islamophobia, the resolutions controversially focus on one religion. The Special Rapporteur on freedom of religion and belief has noted that the penalising of defamation of religions can “be counterproductive, since it may create an atmosphere of intolerance and fear and may even increase the chances of a backlash”.<sup>83</sup> At their most damaging, the resolutions may be used to bolster domestic laws, such as those on blasphemy, and practices which penalise minority and dissenting

religious views and criticism “wholly in the name of defending human rights”.<sup>84</sup> They could be used to justify, for example, a broad range of provisions on “Offences Relating to Religions” in Pakistan. These offences include the wilful defiling of the Qur’an, Mohammed or other Islamic personages and are punishable with life imprisonment, death or imprisonment.<sup>85</sup> In this regard, the UN Working Group on Arbitrary Detention sent a positive message to other parts of the UN human rights system by deciding that the conviction of Egyptian blogger, Kareem Amer, for insulting the religious Al Azhar Institute and Head of State, was in violation of art.19 of the ICCPR. More broadly, the resolutions on defamation of religions might be used to prevent critical inter-religious and intercultural evaluation and debate, which can justifiably claim to be the best remedy against religious discrimination and hatred within a society. As the Special Rapporteur on freedom of religion or belief has recently stated:

“Interreligious dialogue constitutes one of the principal means of countering sectarian attitudes and enhancing religious tolerance worldwide. It is a precious tool for preventing misunderstanding and violations in the area of freedom of religion or belief ...”<sup>86</sup>

### ***Dissonance in human rights protection***

Defamation of religions is neither a violation of international human rights nor the grounds for a permissible restriction on freedom of expression. Yet it would be a **\*E.H.R.L.R. 368** mistake to assume that international and European human rights law and authorities present a clear and consistent approach towards penalising anti-religious hate speech.<sup>87</sup> The legal landscape is more complicated, and perhaps less hostile to the protection of religious sensibilities than European states would have the supporters of the resolutions believe.<sup>88</sup>

There lies a tension between arts 19 and 20 of the ICCPR because of their alternative objectives of protecting expression and protecting against hate speech. The UN Human Rights Committee, however, has specifically stated that this is not an irresolvable tension and that art.20(2) is compatible with art.19.<sup>89</sup> The Human Rights Committee has had limited opportunity to examine jurisprudence under art.20, partly due to problems relating to the communications procedure and the committee's inconsistent approach in its early case law towards determining complaints under arts 19 and 20.<sup>90</sup> In *JRT and the WG Party v Canada*, the committee held that application was inadmissible under art.19(3), but reasoned that,

“the opinions which [the applicant] seeks to disseminate through the telephone system clearly constitute the advocacy of racial or religious hatred which Canada has an obligation under Article 20(2) of the Covenant to prohibit”.

Although the committee held that laws prohibiting denial of the Holocaust may comply with art.19, it has also expressed a concern that such laws might be excessively broad **\*E.H.R.L.R. 369** and may be abused to limit freedom of expression unduly.<sup>91</sup> Significantly, in *Ross v Canada*, the committee recognised the overlapping nature of arts 19 and 20, stating that it considered that,

“restrictions on expression which may fall within the scope of Article 20 must also be permissible under Article 19, paragraph 3, which lays down requirements for determining whether restrictions on expression are permissible”.<sup>92</sup>

This reflects the conclusion that any law seeking to implement the provisions of art.20(2) of the ICCPR must not overstep the limits on restrictions to freedom of expression set out in art.19(3). At the same time, art.19(3) must be interpreted in a manner that respects the terms of art.20(2). It has been argued that,

“a law properly designed to implement Article 20(2) would automatically serve the aim of protecting the rights of others, specifically to equality, thereby satisfying the ... test for restrictions on freedom of expression”.<sup>93</sup>

Another tension exists within international human rights law between art.20 of the ICCPR and art.4 of the International Convention on the Elimination of Racial Discrimination (ICERD) which imposes a more exacting standard than art.20 in relation to hate speech.<sup>94</sup> Article 4 of the ICERD requires states parties to,

“condemn all propaganda and all organisations which are based on ideas or theories of superiority of race or group .... or which attempt to justify or promote racial hatred and discrimination in any form, and undertake to adopt immediate and positive measures designed to eradicate all incitement to, or acts of, such discrimination”.

Under art.4(a) states are required to “declare as punishable by law” a number of offences including “the dissemination of ideas based on racial superiority or racial hatred, incitement to discrimination” and incitement to acts of racially motivated violence. Article 4(b) then obliges states to declare illegal and prohibit organisations and activities which promote and incite racial discrimination and to make it an offence punishable by law to participate in such organisations and/or activities.<sup>95</sup> Whilst the *\*E.H.R.L.R. 370* ICERD, by virtue of its special focus on racial discrimination, does not guarantee the right to freedom of expression, it does require that measures taken pursuant to art.4 have due regard for the principles set out in the UDHR--which include equality and non-discrimination as well as freedom of expression--and in art.5 which provides for equality before the law in the enjoyment of a range of rights, including freedom of expression.<sup>96</sup> The Committee on the Elimination of Racial Discrimination has adopted several General Comments insisting and expanding on the obligatory nature of art.4 for all states parties.<sup>97</sup> At the same time, the Committee did not succumb to arguments that it adopt a General Comment on the prohibition of oral or print manifestations considered blasphemous to any religion in the aftermath of the Danish cartoons controversy in 2006--even though it did criticise the hate speech of some Danish politicians in the scheduled periodic report on Denmark.<sup>98</sup> The essential differences between art.20 of the ICCPR and art.19 of the ICERD on hate speech concern: (1) whether advocacy of hatred is a necessary component (it is not for the ICERD, but is for the ICCPR); (2) whether the speech in question must incite a proscribed result or is it sufficient for it merely to fall within a category of prohibited statements (the ICERD and the ICCPR prohibit incitement to discrimination and violence, the ICCPR additionally refers to hostility and ICERD to hatred); and (3) whether a state of mind, without reference to any specific act, can serve as a proscribed result.<sup>99</sup>

The system of the European Convention on Human Rights (ECHR) does not offer a clear line on anti-religious hate speech.<sup>100</sup> As there is no equivalent provision to art.20 of the ICCPR in the ECHR banning hate speech, the European Court of Human Rights is not directly tasked with assessing whether statements qualify as “incitement”. The Court has however held that certain comments do *not* constitute hate speech, without *\*E.H.R.L.R. 371* defining the precise meaning of “hate speech”.<sup>101</sup> Anti-religious hate speech targeting religions generally falls to be considered under art.10 of the ECHR which provides that restrictions on such expression must conform to the three-part test similar to that found in art.19 of the ICCPR: restrictions must be provided by law, serve a prescribed legitimate aim and must be necessary in a democratic society. Applying this three-part test, the European Court has repeatedly asserted that speech that “offends, shocks or disturbs” is protected.<sup>102</sup> The Court has sometimes excluded complaints concerning the most extreme forms of expression<sup>103</sup> as well as Holocaust-denial speech from the scope of art.10 of the ECHR altogether, by relying on art.17 of the ECHR.<sup>104</sup> Article 17 stipulates that the rights guaranteed by the Convention may not be interpreted as granting the right to engage in any activity aimed at the destruction of any of the rights it proclaims, or at limiting them further than is provided for in the ECHR. In its jurisprudence on extreme forms of expression, the Court has employed a case-by-case approach. Oetheimer has determined that:

“Whenever the Court is confronted with a clearly racist, xenophobic or Holocaust denial type of speech, it refuses to apply the guarantees of Article 10(I). If on the other hand, the Court entertains any doubts as to the hatred-related aspects of the impugned speech, it will apply the test strictly and will thoroughly examine the type of speech in issue as well as the context in which it was formulated (II).”<sup>105</sup>

In some cases, art.10 has been found to apply to racist expression, and art.17 has been simply referred to as an additional reason for holding the interference to be “necessary in a democratic society”.<sup>106</sup> Yet, despite its own commitment to “pluralism, tolerance and broad-mindedness”, upon closer inspection, the Court’s approach shows inconsistencies towards speech that may risk offending religious believers. As has been recently been argued in this journal, the Court has accepted an exemption to freedom of expression based on the protection of the religious feelings of believers. Referring to *\*E.H.R.L.R. 372* the cases of *Otto-Preminger Institute v Austria*,<sup>107</sup> *Wingrove v United Kingdom*,<sup>108</sup> and the more recent case of *IA v Turkey*,<sup>109</sup> Nathwani has argued that the Court has accepted that the religious feelings of believers may be in need of protection. He states,

“the manner in which religious beliefs and doctrines may be opposed or denied is not unlimited, allowing the prohibition of ‘provocative’ portrayals of objects of religious veneration and abusive attacks on prophets and other leading figures of a religion, who are considered sacred by that religion”.<sup>110</sup>

Such cases suggest that the Court privileges majoritarian values and sensibilities, and in so doing

fails to afford the same protection to adherents of minority religions or beliefs.<sup>111</sup> In this regard, it is a pity that the Court decided that it had no competence to decide and therefore declared inadmissible an application by Moroccan nationals complaining under arts 9 (freedom of religion or belief), 14 (right to non-discrimination), 10 and 17 that they had been discriminated against by Denmark through the publication of what they considered offensive caricatures of the Prophet Mohammed.<sup>112</sup> Consideration of the case could have led the Court to revisit its problematic jurisprudence on the issue of the protection of religious feelings.

## V. Normative and institutional consequences

Since the HRC picked up the issue of defamation of religions in 2007, there has been a sense of momentum surrounding the resolutions on the subject. This has reverberated through the UN human rights system and within states--those seeking to rely on defamation of religions to support their domestic blasphemy and religious *\*E.H.R.L.R. 373* insult laws as well as those with large constituencies that passionately counter the concept. The likelihood of future proposals for resolutions, initiatives and perhaps even a draft treaty on the subject is enhanced by the successful adoption of resolutions on an apparently yearly basis since 1999. It is clear that the international protection and general understanding of freedom of expression as a fundamental human right is diminished by the cumulative effect of a decade of resolutions on defamation of religions and repeated references made to them by UN bodies (the HRC and General Assembly, but also the OHCHR and the Special Rapporteurs) tasked with their "implementation". The accretion of such resolutions and references in other UN documents has begun to deliver a sense of legitimacy to the notion of defamation of religions within the international human rights system that was lacking previously. As argued above, the sense of legitimacy of the resolutions has increased over recent years through textual references to arts 19 and 20 and initiatives of the OHCHR. Though not legally binding and mainly recommendatory in nature, the series of General Assembly and HRC resolutions does have a normative value, even if the resolutions do not and should not be taken to represent *opinio juris* on the issue of defamation of religions.<sup>113</sup> The overall effect is the embedding of a discourse on defamation of religions that is deeply at odds with the protection of the right to freedom of expression, freedom of religion or belief and the principle of non-discrimination in international human rights law.

The HRC's adoption of resolutions which do not fit with international human rights law also gives rise to questions as to its proper functioning as the principal UN(Charter based) body for the protection and promotion of human rights. The adoption of the resolutions survived the demise of the Commission on Human Rights and continued after the establishment of the Human Rights Council, whose political authority eclipses that of its predecessor.<sup>114</sup> But the politicisation that beset the Commission especially in its later years has come to burden the HRC through the issue of defamation of religions, arguably more than any other thematic issue.<sup>115</sup> The highly polarised global debates on defamation of religions reveal deep conceptual divergences between states on the universality, indivisibility and interdependence of human rights<sup>116</sup> --divergences that threaten to distort the existing normative framework of international human rights law, as well as the institutional credibility of the international human rights system with the still relatively new structure of the HRC at its heart. If reform of the UN human rights machinery in 2006 did not dispel such pre-existing divergences within the international community, it showed them in sharper relief. It may be rash to dismiss the possibilities for a change of approach towards the issue of defamation of religions given that the *\*E.H.R.L.R. 374* HRC is still in its early years. Moreover, inasmuch as the "credibility" of the HRC may be justifiably questioned, such an argument poses problems from the perspective of human rights advocacy directed towards effecting change at the HRC. Any sense of inevitability about the future adoption of the resolutions should be replaced with a positive engagement and persuasion of Member States within the body and the General Assembly that defamation of religions deserves to be finally rejected. In this spirit, human rights NGOs, including those based in Islamic countries, have lobbied governments of states on the HRC to vote against or at least abstain in a vote on draft resolutions on defamation of religions.<sup>117</sup>

Not all the attention should be focused on the HRC, however. One of the reasons for the entrenched positions in the defamation of religions debate is an apparent inability and/or unwillingness on the part of states, especially in Europe, to recognise the ambivalence of their own legal systems towards the protection of anti-religious hate speech. States who have led the campaign against the resolutions in the HRC and the General Assembly should avoid any charges of double standards by reflecting on their own laws and, at least, abolishing any blasphemy prohibitions. At the UN level, in order to address the lack of clarity within international human rights law itself, the Human Rights Committee

ought to consider issuing a General Comment on the interpretation of both art.19 and art.20 of the ICCPR, which should address the dissonance between art.20 of the ICCPR and art.4 of the ICERD.<sup>118</sup> Attention paid by the treaty bodies could serve to defuse at least some of the hotly contested discussions on anti-religious hate speech religions within the Charter bodies.

## VI. Conclusion

The preceding analysis of HRC/Commission on Human Rights resolutions on combating defamation of religions has highlighted some fascinating trends in their evolution, as well as their significant shortcomings from an international human rights, in particular freedom of expression, perspective. Such resolutions have been seen to undermine directly international guarantees on freedom of expression by protecting religions and potentially lending support to the state suppression of religious or dissenting voices. Attempts to derive legitimacy for the resolutions from a range of other UN human rights sources simply serve to expose further the contradictions between the resolutions and international human rights approaches. The burgeoning number of HRC and the General Assembly resolutions on combating defamation of religions stands against the less-publicised but compelling criticisms of the concept made by the Special Rapporteur on freedom of religion or belief, Asma Jahangir for some years, and the UN Working Group on Arbitrary Detention more recently. From an institutional perspective, the *\*E.H.R.L.R. 375* credibility and legitimacy of the HRC is undermined by the adoption of resolutions, as well as the form they have taken. The strategic manipulation of arts 19 and 20 of the ICCPR that is evident in the later resolutions, for instance, is extremely alarming. Whilst it is understood that the HRC is probably necessarily an organisation of states, it is arguably its very "Statist" nature which prevents the entry of other types of politics that may be better at exercising a kind of "quality control" function in the case of such proposed resolutions which distort or contravene so starkly international human rights protections.<sup>119</sup> The institutional challenges of the HRC, however, should not dissuade engagement with the international system; there seems to be no other serious option. Indeed, the international human rights movement of NGOs should proactively encourage the HRC Member States to reject future proposals for resolutions on combating defamation of religions, and promote a more accurate and coherent understanding of international human rights law in which freedom of expression plays its full part.

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1. In doing so, the second paragraph of the UDHR echoes the Four Freedoms which were famously articulated by President Franklin D. Roosevelt in his State of the Union address to the US Congress of January 6, 1941: freedom of speech and expression, freedom of religion, freedom from want and freedom from fear. Text of speech available at <http://www.fdrlibrary.marist.edu/od4freed.html> [Accessed May 6, 2009].
  2. The inclusion of the right to freedom of expression was undoubtedly inspired by the free speech guarantees contained within early liberal constitutional documents, notably the US Bill of Rights, which were the precursors to modern international human rights instruments, and was recognition of the fact that censorship has long been used to advance "ideal", often discriminatory, causes and almost always serves to constrict debate and stifle dissent. The First Amendment to the US Constitution, which came into effect in 1791, states: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." See also the French Déclaration des Droits de l'Homme et du Citoyen of 1789.
  3. Maxim Grinberg, "Defamation of Religions v Freedom of Expression: Finding the Balance in a Democratic Society" (2006) 18 *Sri Lanka Journal of International Law* 197; Jeroen Temperman, "Blasphemy, Defamation of Religions and Human Rights Law" (2008) 26 *Netherlands Quarterly of Human Rights* 517; John Cerone, "Inappropriate renderings: the danger of reductionist resolutions" (2008) 33 *Brooklyn Journal of International Law* 357.
  4. A/HRC/10/L.2/Rev 1, March 26, 2009. At the same session of the HRC, Egypt, on behalf of the African Group, also submitted a draft resolution on freedom of opinion and expression, which emphasises the potential for abuse of freedom of expression. This resolution is not examined in this article. See further ARTICLE 19, "Statement: HRC: ARTICLE 19 urges amendment of proposed resolution on freedom of expression" March 17, 2009.
  5. "US says some states curb free speech in name of religion", *Reuters*, March 12, 2009.
  6. Among the non-OIC supporters of the resolution adopted on March 26, 2009 were: Angola, Bolivia, Cameroon, China, Cuba, Philippines, Russian Federation and South Africa.
  7. Draft resolution E/CN.4.1999/L.40.
  8. Commissioner for Human Rights of the Council of Europe, Viewpoint, January 22, 2007.

9. During the negotiations on the first UN Commission on Human Rights resolution, India argued that the draft resolution more appropriately belonged to the agenda item on "civil and political rights" under the sub-item on "religious intolerance".
10. GA Res 60/150 of December 16, 2005; GA Res 61/164 of December 19, 2006; GA Res 61/154 of December 18, 2007; GA Res 63/170 of December 18, 2008.
11. Introduction by Pakistan on behalf of the OIC of resolution A/HRC/7/L.15 on "Combating defamation of religion", March 27, 2008.
12. HRC Res 7/36 of March 28, 2008. ARTICLE 19, "Press Release: UN Human Rights Council undermines freedom of expression", March 31, 2008.
13. The publication in a Danish newspaper, *Jyllands-Posten*, in September 2005 of cartoons proved to be offensive to a number of Muslim countries and led in January 2006 to popular demonstrations and violent protests in these countries. The cartoons included unflattering and mocking images of Muslims and caricatures of the Prophet Mohammed, including a cartoon portraying Mohammed wearing a turban in the shape of a bomb ready to explode. Images, let alone caricatures, of the Prophet are often viewed as blasphemous by Muslims. The controversy led in some instances to the breakdown in diplomatic relations between Arab states and Denmark, attacks on Danish embassies and death threats made to those responsible for the publication. The cartoons were republished by newspapers in several other European countries, including France and Germany, and were also available on the internet. For reports of the protests see: Dan Bilefsky, "Denmark is Unlikely Front in Islam-West Culture War", *New York Times*, January 8, 2006; Craig Smith and Ian Fisher, "Temperatures Rise over Cartoons Mocking Mohammed", *New York Times*, February 3, 2006; Carlotta Gall and Craig Smith, "Muslim Protests against Cartoons Spread", *New York Times*, February 7, 2006. For a commentary on the controversy see Agnès Callamard, "Prophetic Fallacy", *Guardian*, February 2, 2006. At the time of the controversy, the eminent liberal philosopher, Ronald Dworkin, wrote "free speech is a condition of legitimate government ... Religion must be tailored to democracy, not the other way around ... No one's religious convictions can be thought to trump the freedom that makes democracy possible." See "Even bigots and Holocaust deniers must have their say", *Guardian*, February 14, 2006.
14. Cerone, "Inappropriate renderings" (2008) 33 *Brooklyn Journal of International Law* 357. The UN Human Rights Committee decided that a communication brought by two Danish nationals under inter alia arts 19 and 20 ICCPR was inadmissible for failure to exhaust domestic remedies. Communication No.1487/2006 CCPR/C/92/D/1487/2006 *Kasem Said Ahmad and Asmaa Abdol-Hamid v Denmark* April 18, 2008.
15. See, e.g. the debates that led up to the adoption of the Racial and Religious Hatred Act 2006 in the UK. See Anthony Lester, "Free speech and religion: The eternal conflict in the age of selective modernization", Keynote speech, 14th Annual Conference on the "Individual vs The State", Central European University, Budapest, May 12-13, 2006.
16. See Temperman "Blasphemy, Defamation of Religions and Human Rights Law" (2008) 26 *Netherlands Quarterly of Human Rights* 517, 22-525. Pakistan, Iran, Bahrain, Morocco, the Maldives, Afghanistan, Algeria, Jordan, Kuwait, Malaysia, Oman, Saudi Arabia and Yemen all have laws which restrict freedom of expression in the interest of respect for Islam. Blasphemy remains an offence in Australia, Austria, Canada, New Zealand, Ireland, Greece, Finland and Norway. In Germany there is a provision in the Penal Code penalising both insulting religions as well as insults aimed at secular beliefs.
17. European Commission for Democracy through Law ("the Venice Commission"), *Report on the relationship between freedom of expression and freedom of religion: the issue of regulation and prosecution of blasphemy, religious insult and incitement to religious hatred*, Adopted by the Venice Commission at its 76th Plenary Session, CDL-AD(2008)026, October 23, 2008; see paras 2, 22-40.
18. EU Council Framework Decision 2008/913/JHA on combating certain forms and expressions of racism and xenophobia by means of criminal law [2008] OJ L328/55.
19. See also GA Res 61/255, UN Doc A/RES/61/255 January 26, 2007, condemning "without any reservation any denial of the Holocaust".
20. ARTICLE 19, "Statement: ARTICLE 19 calls upon UK Government to lift travel ban on Dutch MP", February 13, 2009.
21. The abolition of blasphemy in England and Wales entered into force on July 8, 2008. See the Criminal Justice and Immigration Act 2008 s.79.
22. According to the website of the Durban Review Conference, it "will evaluate progress towards the goals set by the World Conference against Racism, Racial Discrimination, Xenophobia and Related Intolerance in Durban, South Africa, in 2001. The Review Conference will serve as a catalyst to fulfilling the promises of the Durban Declaration and Programme of Action agreed at the 2001 World Conference through reinvigorated actions, initiatives and practical solutions, illuminating the way toward equality for every individual and group in all regions and countries of the world". See <http://www.un.org/durbanreview2009/> [Accessed May 6, 2009].
23. "High Commissioner Makes Concrete Proposals to Combat Racism", February 23, 2009, [http://www.un.org/durbanreview2009/pr\\_23-02-09\\_shtml](http://www.un.org/durbanreview2009/pr_23-02-09_shtml) [Accessed May 6, 2009].
24. "US may boycott racism conference", BBC News, February 28, 2009, <http://news.bbc.co.uk/2/hi/americas/7916191.stm> [Accessed May 6, 2009]; Colum Lynch, "US may boycott conference over document", *Washington Post*, February 28, 2009, <http://www.washingtonpost.com/wp-dyn/content/article/2009/02/27/AR2009022702826.html> [Accessed May 6, 2009]. Human Rights Watch had argued against the inclusion of defamation of religions in the Durban Review Process in early 2009. See Human Rights Watch, "Position Paper on the Current Status of the Durban Review Process", January 13, 2009.
25. Rolling text based on the revised version of the technically reviewed text (A/CONF.211/PC/WG.2/CRP.2) submitted by the Chairperson-Rapporteur of the intersessional open-ended working group mandated to continue and finalise the process of negotiations on and drafting of the outcome document, reflecting the status of the text on March 17, 2009. "Diplomats amend UN text to draw in West", *Reuters*, March 17, 2009, <http://www.reuters.com/article/worldNews/idUSTRE52G5NP20090317?feedType=RSS&feedName=worldNews> [Accessed May 6, 2009]. See Fédération internationale des ligues de droits de l'Homme/International Federation for Human Rights, Durban Review Conference Position Paper, March 20, 2009.
26. The focus is on the resolutions of the Commission on Human Rights and HRC, even though the resolutions of the General Assembly are also considered, because of their status as products of the principal UN human rights body. The resolutions of the General Assembly strongly reflect the approach taken by resolutions of the Commission on Human Rights and the HRC.
27. Commission Resolutions 2002/9 of April 15, 2002, para.15 of preamble; 2003/4 of April 14, 2003, para.13 of preamble; 2004/6 of April 13, 2004, para.13 of preamble.
28. 2001/4 of April 18, 2001.
29. HRC Resolution of March 26, 2009, para.10 of preamble.
30. Commission Resolution 2005/3 of April 12, 2005, para.14 of preamble; HRC Resolutions 4/9 of March 30, 2007, para.9 of preamble; 7/19 of March 27, 2008, para.14; HRC Resolution of March 26, 2009, para.11 of preamble.
31. e.g. HRC Resolution 7/19 of March 27, 2008, paras 1 and 4.

32. HRC Resolution of March 26, 2009, para.9 of preamble.
33. For Mauritius, the criminal code outlaws "outrage on religious worship" and "outrage against public and religious morality", while for Turkey it is an offence under the penal code to "attack" or "impugn" a person's "honour, dignity or prestige" on, inter alia, a matter that is deemed "sacred to that person's religion", or to publicly "degrade" the religious values of a section of the public on the grounds of religion, social class, gender, and so on. In the case of Egypt, with regard to state-approved religions, it is an offence under the penal code to print and publish distorted religious texts or publicly to "mock and ridicule" religious ceremonies. See Report of High Commissioner for Human Rights on the Implementation of HRC Resolution 7/19 entitled "Combating Defamation of Religions" A/HRC/97 (September 2008), para.58.
34. In terms of action required by states, earlier resolutions "encourage states ... to provide adequate protection against all human rights violations resulting from defamation of religions"; Commission Resolutions 2001/4 of April 18, 2001, para.3; 2002/9 of April 15, 2002, para.8; 2003/4 of April 14, 2003, para.10; 2004/6 of April 13, 2004, para.12. In later resolutions, states are urged to provide "within their respective legal and constitutional systems, adequate protection against acts of hatred, discrimination, intimidation and coercion resulting from defamation of religions". See Commission Resolution 2005/3 of April 12, 2005, para.10; HRC Resolutions 4/9 of March 30, 2007, para.8; Resolution 7/19 of March 27, 2008, para.9; Resolution of March 26, 2009, para.13.
35. HRC Resolution of March 26, 2009, para.19.
36. HRC Resolution of March 26, 2009 for instance refers to the promotion of "tolerance", "the respect for cultural, ethnic, religious and linguistic diversity" and "dialogue among civilisations".
37. Commission Resolutions 1999/82 of April 30, 1999, para.2 of preamble; 2000/84 of April 26, 2000, para.3 of preamble; 2002/9 of April 15, 2002, para.3 of preamble; 2003/4 of April 14, 2002, para.3 of preamble; 2004/6 of April 13, 2004, para.3 of preamble.
38. Commission Resolutions 1999/82 of April 30, 1999, para.4; 2000/84 of April 26, 2000, para.4. See also HRC Resolutions 4/9 of March 30, 2007, para.9 of preamble and 7/19 of March 27, 2008, para.8 of preamble.
39. The Declaration on the Elimination of All Forms of Intolerance and Discrimination Based on Religion or Belief is only mentioned in the 2008 resolution. HRC Resolution 7/19 of March 27, 2008, para.3 of preamble.
40. Summary of Record of 61st meeting, Commission on Human Rights 55th session, E/CN.4/1999/SR.61 October 19, 1999.
41. Summary of Record of 61st meeting, Commission on Human Rights 55th session, E/CN.4/1999/SR.61 October 19, 1999.
42. Summary of Record of 61st meeting, Commission on Human Rights 55th session, E/CN.4/1999/SR.61 October 19, 1999.
43. Commission Resolution 2002/9 of April 15, 2002, para.9 of preamble.
44. Commission Resolution 2002/9 of April 15, 2001, para.3.
45. Such wording is used in all 10 resolutions.
46. UN Press Release, March 30, 2007.
47. Commission Resolution 1999/82 of April 30, 1999, para.3 of preamble
48. Commission Resolutions 2001/4 of April 18, 2001, para.4 of preamble; 2002/9 of April 15, 2002, para.5 of preamble; 2003/4 of April 14, 2002, para.5 of preamble; 2004/6 of April 13, 2004, para.5 of preamble; 2005/3 of April 12, 2005, para.3 of preamble; HRC Resolution of March 26, 2009, para.5 of preamble.
49. Commission Resolutions 2002/9 of April 15, 2002, para.7 of preamble; 2004/6 of April 13, 2004, para.5 of preamble; 2005/3 of April 12, 2005, para.5 of preamble; HRC Resolutions 4/9 of March 30, 2007, para.2 of preamble; 7/19 of March 27, 2008, para.2 of preamble; HRC Resolution of March 26, 2009, para.6 of preamble.
50. Commission Resolutions 2000/84 of April 26, 2000, para.8 of preamble; 2002/9 of April 15, 2002, para.4 of preamble; 2003/4 of April 14, 2002, para.6 of preamble; 2004/6 of April 13, 2004, para.6 of preamble; 2005/3 of April 12, 2005, para.4 of preamble; HRC Resolution of March 26, 2009, para.5 of preamble.
51. HRC Resolution of March 30, 2007 recalls the report on "Situation of Muslims and Arabs in various parts of the world" E/CN.4/2006/17 and the report of the Special Rapporteur on defamation of religions; Resolution of March 26, 2009, para.1.
52. HRC Resolution 4/9 of March 30, 2007, para.5.
53. HRC Resolution 7/19 of March 27, 2008 para.13; Resolution of March 26, 2009, para.11.
54. HRC Resolution of March 26, 2009, para.8.
55. Commission Resolutions 1999/82 of April 30, 1999, para.7 of preamble; 2000/84 of April 26, 2000, para.9 of preamble.
56. Commission Resolutions 2002/9 of April 15, 2002, para.8 of preamble; 2003/4 of April 14, 2002, para.8 of preamble; 2004/6 of April 13, 2004, para.8 of preamble; 2005/3 of April 12, 2005, para.6 of preamble; HRC Resolution 7/19 of March 27, 2008, para.7 of preamble.
57. HRC Resolutions 4/9 of March 30, 2007, para.4 of preamble (recalling the final communiqué of the Third Extraordinary Session of the Islamic Summit Conference); 7/19 of March 27, 2008, para.5 of preamble (recalling the Declaration of the Islamic Conference at its 34th session which "condemned the growing trend of Islamophobia and systematic discrimination against adherents of Islam") and para.6 (noting the final communiqué by the OIC at its 11th summit).
58. HRC Resolution of March 26, 2009, paras 1 and 17.
59. Hate speech is a broad term which has been used to mean expression which is abusive, insulting, intimidating, harassing and/or which incites to violence, hatred or discrimination against groups identified by characteristics such as national or ethnic origin, race, colour, descent and religion. There is no clear definition of what constitutes "hate speech" as such in international law. The International Criminal Court for Rwanda defined hate speech as "stereotyping of ethnicity combined with its denigration" in *Nahimana, Barayagwiza and Ngeze*, (Trial Chamber), December 3, 2003, paras 1020-1021. The Council of Europe Committee of Ministers has indicated that the term includes "all forms of expression which spread, incite, promote or justify racial hatred, xenophobia, anti-Semitism or other forms of hatred based on intolerance, including intolerance expressed by aggressive nationalism and ethnocentrism, discrimination and hostility towards minorities, migrants and people of immigrant origin". Committee of Ministers Recommendation, October 30, 1997. This definition was referred to by the European Court of Human Rights in *Gündüz v Turkey* (2003) 41 E.H.R.R. 5 ECtHR at [22]. For considerations of hate speech generally see Michel Rosenfeld, "Hate Speech in Comparative Perspective" (2003) 24 *Cardozo Law Review* 1523; John C. Knechtie, "When to Regulate Hate Speech" (2005/06) 110 *Penn State Law Review* 539; Sandra Coliver, Kevin Boyle and Frances D'Souza (eds), *Striking A Balance: Hate Speech, Freedom of Expression and Non-discrimination* (ARTICLE 19 and Human Rights Centre, University of Essex, 1992).

60. Commission Resolution 2005/3 of April 12, 2005, para.9; HRC Resolutions 4/9 of March 30, 2007, para.7; 7/19 of March 27, 2008, para.7; Resolution of March 26, 2009, para.17.
61. HRC Resolution of March 26, 2009.
62. HRC Resolution 4/9 of March 30, 2007. The reference to "respect for religions and beliefs" was removed in HRC Resolution 7/19 of March 27, 2008.
63. HRC Resolution of March 26, 2009, para.10.
64. See ARTICLE 19, "Statement, Human Rights Council: Article 19 Calls on HRC Members to Vote Against Proposed Resolution on Defamation of Religions", March 25, 2009; ARTICLE 19, Cairo Institute for Human Rights Studies and the Egyptian Initiative for Personal Rights, "Joint Written Statement to the Human Rights Council Ninth Session", September 11, 2008.
65. Contrary to earlier reports, ARTICLE 19 and the Cairo Institute on Human Rights Studies had not signed this petition, <http://www.ifex.org/en/content/view/full/101872/> [Accessed May 6, 2009].
66. Submitted to the OHCHR, June 2, 2008.
67. Submitted June 2008.
68. Such as Temperman "Blasphemy, Defamation of Religions and Human Rights Law" (2008) 26 *Netherlands Quarterly of Human Rights* 517.
69. December 10, 2008, <http://www.article19.org/pdfs/other/joint-declaration-on-defamation-of-religions-and-anti-terrorism-and-anti-ext.pdf> [Accessed May 6, 2009].
70. Grinberg argues that the resolutions also serve to insulate Muslim states from international scrutiny: Grinberg, "Defamation of Religions v Freedom of Expression" (2006) 18 *Sri Lanka Journal of International Law* 197.
71. Report to the Second Session of the HRC A/HRC/2/3, September 29, 2006, para.38.
72. Opinion No.35/2008 (Egypt), Communication addressed to the Government on December 6, 2008, para.38.
73. HRC Resolution of March 26, 2009, paras 5 and 6.
74. HRC Resolution of March 26, 2009, paras 4 and 14.
75. A recent Human Rights Watch report revealed that German state bans on religious symbols and clothing for teachers and other civil servants discriminate against Muslim women who wear the headscarf. "Discrimination in the Name of Neutrality", February 26, 2009, <http://www.hrw.org/en/news/2009/02/26/germany-headscarf-bans-violate-rights> [Accessed May 6, 2009].
76. See UN Declaration on the Rights of Indigenous Peoples (2007).
77. "Defamation is an issue of civil law, not a violation of human rights", Asma Jahangir to the UN Non-governmental organisation committee for freedom of religion or belief, October 25, 2007.
78. Geoffrey Robertson Q.C. and Andrew Nicol Q.C., *Media Law* (Penguin, 2008), p.105.
79. Robertson and Nicol, *Media Law* (2008), pp.114-120.
80. See, e.g. art.10(2) of the ECHR.
81. Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, Ambeyi Ligabo, to the Human Rights Council, February 28, 2008, A/HRC/7/14, para.85.
82. ARTICLE 19, "Statement: HRC: ARTICLE 19 urges amendment of proposed resolution on freedom of expression" March 17, 2009.
83. Interim Report of the Special Rapporteur on freedom of religion or belief, A/62/280, August 20, 2007, para.77.
84. Cerone, "Inappropriate renderings" (2008) 33 *Brooklyn Journal of International Law* 357, 378.
85. Pakistan Penal Code arts 295-B, C and 298-A. See Temperman "Blasphemy, Defamation of Religions and Human Rights Law" (2008) 26 *Netherlands Quarterly of Human Rights* 517, 522-523.
86. Report of the Special Rapporteur on freedom of religion or belief, Asma Jahangir, Tenth Session of the HRC A/HRC/10/8, January 6, 2009, para.18.
87. The focus here is on the European system, partly because of its well developed case law on freedom of expression. The American Convention on Human Rights (ACHR) and the African Charter on Human and Peoples Rights (ACHPR) provide for non-discrimination in the enjoyment of rights (arts 1 and 2, respectively) and include various other provisions relating to equality and non-discrimination, as well as guarantees of the right to freedom of expression (arts 19 and 13, respectively). The only regional instrument that specifically provides for the banning of hate speech is the ACHR which obliges states to declare punishable by law "any advocacy of national, racial or religious hatred that constitute incitements to lawless violence or to any other similar illegal action against any persons on any grounds including those of race, colour, religion, language or national origin" (art.13(5)). The ACHPR requires that rights should be exercised with due regard to the rights of others (art.27) and to maintain relations aimed at promoting respect and tolerance (art.28), provisions that could be relied upon to justify hate speech laws.
88. See also Part II on the controversial context in which the resolutions emerge.
89. Human Rights Committee, General Comment 11 on the Prohibition of propaganda for war and inciting national, racial or religious hatred (Article 20), July 29, 1983.
90. Compare the reasoning in *JRT and Western Guard Party v Canada* Communication No.104/1981 (in which the Committee declared inadmissible a communication which alleged that restrictions on the use of public telephone services to warn of "the dangers of ... international Jewry" were contrary to art.19(3)) to *Faurisson v France* Communication No.550/1993 (in which the Committee decided a case concerning a denial of the existence of the Nazi gas chambers on the basis of art.19(3) without reference (in the majority opinion) to art.20(2)). The Committee concluded that there had been no violation of the ICCPR in the light of the content of the expression. They observed that the French Government saw "the denial of the existence of the Holocaust as the principal vehicle for anti-Semitism" and for this reason the prosecution was considered "necessary" within the balanced rights scheme of the ICCPR. See Manfred Nowak, *UN Covenant on Civil and Political Rights: CCPR Commentary*, 2nd edn (NP Engel, 2005), pp.477-478.
91. In concluding that art.20 had not been violated, the Committee considered a number of factors, including the broader social context in which the expression was made.

92. Communication No.736/1997, UN Doc CCPR/C/70/D/736/1997, 2000.
93. T. Mendel, *Study on International Standards Relating to Incitement to Genocide or Racial Hatred* prepared for the UN Special Advisor on the Prevention of Genocide, April 2006, p.31.
94. Both art.20 of the ICCPR and art.4 of the ICERD have a significant number of reservations entered against them basically on the grounds of freedom of expression.
95. For analysis of the Committee on the Elimination of Racial Discrimination's approach to issues of freedom of expression and hate speech see Patrick Thornberry, "Forms of Hate Speech and the Convention on the Elimination of All Forms of Racial Discrimination", Conference Room Paper 11 presented at OHCHR Expert seminar on the links between articles 19 and 20 of the International Covenant on Civil and Political Rights (ICCPR): Freedom of expression and advocacy of religious hatred that constitutes incitement to discrimination, hostility or violence, October 2-3, 2008, Geneva, [http://www2.ohchr.org/english/issues/opinion/articles1920\\_iccpr/experts\\_papers.htm](http://www2.ohchr.org/english/issues/opinion/articles1920_iccpr/experts_papers.htm) [Accessed May 6, 2009]; José A. Lindgren Alves, "Race and Religion in the United Nations Committee on the Elimination of Racial Discrimination" (2008) 41 *University of San Francisco Law Review* 941, 970.
96. While the ICERD and the ICCPR contain prohibitions on hate speech aimed at racial or ethnic groups, the International Convention on the Elimination of All Forms of Discrimination Against Women (ICEDAW) and the ICCPR do not contain similar prohibitions on harmful speech aimed specifically at women. See Hilary Charlesworth and Christine Chinkin, *The Boundaries of International Law: A Feminist Analysis* (Manchester University Press, 2000), pp.201-249.
97. General Comment XV on organised violence based on ethnic origin, March 23, 2003.
98. See Lindgren Alves "Race and Religion" (2008) 41 *University of San Francisco Law Review* 941, 972-973. See UN Doc CERD/C/DEN/CO/17, October 19, 2006.
99. The Human Rights Committee and the Committee on the Elimination of Racial Discrimination have said that proscribed result can include a state of mind in which hostility towards a target group is harboured, even though this is not accompanied by any urge to take action to manifest itself. See Mendel, *Study on International Standards Relating to Incitement to Genocide or Racial Hatred*, April 2006, p.14.
100. Niraj Nathwani, "Religious cartoons and human rights--a critical legal analysis of the case law of the European Court of Human Rights on the protection of religious feeling and its implications in the Danish affair concerning cartoons of the Prophet Muhammed" [2008] E.H.R.L.R. 488.
101. See *Da#tekin v. Turkey* (App. No.36215/97), judgment of January 13, 2005 ECtHR; *Gümü# v Turkey* (App. No.40303/98), judgment of March 15, 2005 ECtHR; *Han v Turkey* (App. No.50997/99), judgment of September 15, 2005 ECtHR; *Koç and Tamba# v Turkey* (App. No.50934/99), judgment of March 21, 2006 ECtHR; *Düzgören v Turkey* (App. No.56827/00), judgment of November 9, 2006 ECtHR; *Ulusoy v Turkey* (App. No.52709/99), judgment of July 31, 2007 ECtHR; *Birdal v Turkey* (App. No.53047/99), judgment of October 2, 2007 ECtHR.
102. *Handyside v United Kingdom* (1976) 1 E.H.R.R. 737 ECtHR.
103. *Norwood v United Kingdom* (2004) 40 E.H.R.R. SE11 ECtHR.
104. This approach has been criticised because it automatically excludes the consideration of the severity of the penalty imposed and of a complaint of discrimination in conjunction with art.10. *Chauvy v France* (2004) 41 E.H.R.R. 29 ECtHR; *Günduz v Turkey* (2003) 41 E.H.R.R. 5 ECtHR. Adrian Marshall Williams and Jonathan Cooper, "Hate speech, holocaust denial and international human rights law" [1999] E.H.R.L.R. 593.
105. Mario Oetheimer, "Protecting Freedom of Expression: the Challenge of Hate Speech at the European Court of Human Rights" (Strasbourg, 2006); "La Court Européene de Droits de L'Homme Face Au Discours de Haine" (2007) *Revue Trimestrielle des Droits de L'Homme* 63.
106. e.g. *Kühnen v Germany* (App. No.12194/86), judgment of May 12, 1988 ECtHR; *H, W, P and K v Austria* (App. No.12774/87), judgment of October 12, 1989 ECtHR.
107. *Otto-Preminger Institute v Austria* (1994) 19 E.H.R.R. 34 ECtHR. In this case, Austria's censorship of a satirical film that mocked Christian religious beliefs was upheld by the Court, which based its decision on the absence of a European consensus on the regulation of religious speech.
108. *Wingrove v United Kingdom* (1996) 24 E.H.R.R. 1 ECtHR. The Court deferred to the state in relation to a video *Visions of Ecstasy* which was said to constitute blasphemy. The Court held that "a wider margin of appreciation is generally available to Contracting States when regulating freedom of expression in relation to matters liable to offend intimate personal convictions within the sphere of morals, or especially, religion." See at [58].
109. *IA v Turkey* (2005) 45 E.H.R.R. 30 ECtHR. The Court held that there was no violation in the case of a conviction for blasphemy for the publication of a novel, *Forbidden Phrases*, which contained a section on the Prophet Mohammed.
110. Nathwani "Religious cartoons and human rights" [2008] E.H.R.L.R. 488, 495.
111. Teitel stated that "minimal rule of law guarantees require that constitutional principles should be applied equally to diverse religions in the public sphere": Ruti Teitel, "Militating Democracy: Comparative Constitutional Perspectives" (2007) 20 *Michigan Journal of International Law* 49, 57.
112. *Mohammed Ben El Mahi v Denmark* (App. No.5853/06), decision of December 11, 2006 ECtHR. The Court rejected the application on the basis that there was no jurisdictional link between any of the applicants (two Moroccan associations and a Moroccan national resident) and Denmark and did not consider that the applicants could come within the jurisdiction of Denmark on account of any extra-territorial act.
113. Advisory Opinion of the International Court of Justice on the Legality of the Threat or Use of Nuclear Weapons, July 8, 1996. See also Andrew Clapham, *Human Rights Obligations of Non-State Actors* (Oxford University Press, 2006), p.104.
114. GA Resolution 60/251 of April 3, 2006, A/RES/60/251; Christian Tomuschat, *Human Rights: Between Idealism and Realism*, 2nd edn (Oxford University Press, 2008), p.134. See also Françoise J. Hampson, "An Overview of the UN Human Rights Machinery" [2007] H.R.L. Rev. 7.
115. NGOs have particularly criticised the HRC for being too timid in recent years over the specific issue of Darfur: Human Rights Watch, "UN: Unacceptable Compromise by Rights Council on Darfur", December 13, 2007.
116. Henry J. Steiner, Philip Alston and Ryan Goodman, *International Human Rights In Context: Law, Politics, Morals* (Oxford University Press, 2007), pp.517-665.
117. See, e.g. ARTICLE 19, "Statement: HRC: ARTICLE 19 urges amendment of proposed resolution on freedom of expression", March 17, 2009. Agnes Callamard, "Protect the believers, not the belief", *Guardian*, March 18, 2009.

118. See Report of the Special Rapporteur on freedom of religion or belief, Asma Jahangir, and the Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance, Doudou Diène, further to Human Rights Council decision 1/107 on incitement to racial and religious hatred and the promotion of tolerance, September 20, 2006, A/HRC/2/3, para.61.
119. Balakrishnan Rajagopal, "Lipstick on a Caterpillar: Assessing the New Human Rights Council through Historical Reflection" (2007) 13 *Buffalo Human Rights Law Review* 7.

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