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DEFAMATION OF RELIGION: RUMORS OF ITS DEATH ARE GREATLY EXAGGERATED

Robert C. Blitt[†]

ABSTRACT

This Article explores the recent decisions by the United Nations (“UN”) Human Rights Council and General Assembly to adopt consensus resolutions aimed at “combating intolerance, negative stereotyping and stigmatization of, and discrimination, incitement to violence and violence against, persons based on religion or belief.” These resolutions represent an effort to move past a decade’s worth of contentious roll call votes in favor of prohibiting defamation of religion within the international human rights framework. Although labeled “historic” resolutions, this Article argues that the UN’s new compromise approach endorsed in 2011—and motivated in part by the desire to end years of acrimonious debate over the acceptability of shielding religious beliefs from insult and criticism—is problematic because it risks being exploited to sanction the continued prohibition on defamation of religion and perpetuation of ensuing human rights violations on the ground.

After briefly considering the history of defamation of religion at the UN and the strategies employed by its principal proponent, the Organization of Islamic Cooperation (“OIC”), this Article turns to an

[†] Associate Professor of Law, University of Tennessee College of Law. This Article elaborates on remarks made during a panel discussion titled *Blasphemy, Religious Defamation, and Religious Nationalism: Threats to Civil Speech and Its Suppression* at the 2012 Annual Meeting for The Association of American Law Schools (AALS) in Washington, D.C. The author wishes to thank Jessie Hill and Bernie Meyler for extending the invitation to participate on the panel and also to John M. Murray and the staff of the Case Western Reserve Law Review for their diligent and timely editorial review of the draft manuscript.

assessment of the UN Human Rights Council's 2011 consensus Resolution 16/18. In light of the resolution's objectives, this Article explores the viability of the new international consensus around "combatting intolerance" and tests to what extent, if any, the concept of defamation of religion may be waning in practice. To this end, this Article weighs statements, resolutions, and other undertakings of the OIC and its member states with a particular emphasis on activities that follow the adoption of Resolution 16/18.

Based on this analysis, the Article concludes that the resolutions on combatting intolerance passed in 2011 represent a Clausewitzian moment for many governments, particularly among OIC member states. Essentially, support for the new international consensus on combatting intolerance represents a cynical and strategic decision to continue the campaign to legitimate a ban on defamation of religion by other means. Accordingly, even if defamation of religion per se is on hiatus from the UN, absent additional measures—including a decisive repudiation of the concept's validity—further international efforts to implement measures for combatting intolerance risk enabling an alternative framework in which governments continue justifying, in the name of protecting religious belief, domestic measures that punish the exercise of freedom of expression and freedom of thought, conscience, and religion or belief.

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INTRODUCTION

From 1999 through 2011, the United Nations (“UN”) hosted an annual struggle between one group of states rallying to establish an international norm prohibiting defamation of religion and another group that was staunchly opposed to such a move. Over the course of twelve years, the debate moved from the defunct UN Human Rights Commission to the UN Human Rights Council (“UNHRC”) and even spilled into the General Assembly (“UNGA”) and other UN substructures. These UN bodies passed nearly twenty resolutions that, among other things, “[w]elcom[ed] . . . the enactment or strengthening of domestic frameworks and legislation to prevent the defamation of religions,”¹ “[u]nderscor[ed] the need to combat defamation of religions,”² and purported to authorize limitations on the right to freedom of expression based on “respect for religions and beliefs.”³ In addition to resolutions, these UN bodies also tasked different Special Rapporteurs, the High Commissioner for Human Rights, and even the UN Secretary General with compiling a total of nearly thirty reports dedicated to defamation of religion.⁴

Admittedly, support for the international prohibition of defamation of religion had been dwindling in more recent years, to the point where the combination of abstaining states and states voting against the annual resolutions outnumbered those voting in their favor.⁵ Nevertheless, both the UNHRC and UNGA continued to pass these

¹ G.A. Res. 64/156, ¶ 19, U.N. Doc. A/RES/64/156 (Mar. 8, 2010).

² *Id.* ¶ 21.

³ G.A. Res. 61/164, ¶ 9, U.N. Doc. A/RES/61/164 (Feb. 21, 2007).

⁴ Robert C. Blitt, *The Bottom up Journey of “Defamation of Religion” from Muslim States to the United Nations: A Case Study of the Migration of Anti-Constitutional Ideas*, in 56 STUDIES IN LAW, POLITICS, AND SOCIETY, SPECIAL ISSUE HUMAN RIGHTS: NEW POSSIBILITIES/NEW PROBLEMS, app. A, at 121, 200 (Appendix A) (Austin Sarat ed., 2011).

⁵ Robert C. Blitt, *Should New Bills of Rights Address Emerging International Human Rights Norms? The Challenge of “Defamation of Religion”*, 9 NW. J. INT’L HUM. RTS. 1, 19 (2010).

resolutions successfully by a majority vote.⁶ Thus, the gradual decline in support should not diminish the diplomatic feat represented by UNHRC Resolution 16/18, which was adopted by consensus in March 2011.⁷ Notably, this resolution successfully expunged any mention of defamation of religion by the UN for the first time in over a decade.⁸

More impressively still, by sidestepping explicit rejection of the defamation-of-religion concept, the resolution's substitute language allowed the negotiating parties to extrapolate diametrically opposed messages from its content. Thus, on one side, the U.S. was able to claim an end to an acrimonious era responsible for creating a "false divide that pit[ted] religious sensitivities against freedom of expression."⁹ At the same time, the Organization for Islamic Cooperation ("OIC")¹⁰—the principle backer of defamation of religion resolutions at the UN—was able to declare Resolution 16/18 nothing more than the "exploring [of an] alternative approach[.]"¹¹ In this vein, the OIC continues to advance support for defamation of religion "on bloc" among its member states "in the true spirit of solidarity and joint action on matters of vital concern"¹² Placed in context, these diametrically opposed positions signal a continuing divide between the sides and raise questions concerning the viability of implementing any consensus resolution in a manner that will accord with existing international human rights law.

After briefly considering the tumultuous history of efforts to secure an international prohibition against defamation of religion at the UN, including strategies championed by its proponents, this Article assesses the UN Human Rights Council's 2011 consensus Resolution 16/18, as well as statements made before and immediately

⁶ See, e.g., U.N. Doc. A/RES/64/156, *supra* note 1 (passing a resolution aimed at combating the defamation of religions).

⁷ Human Rights Council Res. 16/18, Combating Intolerance, Negative Stereotyping and Stigmatization of, and Discrimination, Incitement to Violence and Violence Against, Persons Based on Religion or Belief, 16th Sess., Mar. 24, 2011, U.N. Doc. A/HRC/RES/16/18 (Apr. 12, 2011).

⁸ See *id.* ¶ 1 (stating that the concern was "serious instances of derogatory stereotyping, negative profiling and stigmatization of persons based on their religion or belief").

⁹ Hillary Rodham Clinton, U.S. Sec'y of State, Remarks at the Organization of the Islamic Conference (OIC) High-Level Meeting on Combating Religious Intolerance (July 15, 2011), available at <http://www.state.gov/secretary/rm/2011/07/168636.htm>.

¹⁰ This group was formerly known as the Organization for the Islamic Conference. Org. of Islamic Cooperation [OIC], *On Changing the Name of the Organization of the Islamic Conference*, Res. No. 4/38-Org. O.I.C. Doc. OIC/CFM-38/2011/ORG/RES (June 28–30, 2011).

¹¹ OIC, *On Combating Defamation of Religions*, Res. No. 35/38-POL, compiled in *Resolutions on Political Affairs*, at 79, ¶ 15, O.I.C. Doc. OIC/CFM-38/2011/POL/FINAL (June 28–30, 2011) [hereinafter OIC Res. No. 35/38-POL].

¹² *Id.*

following its adoption. In light of the resolution's objectives, this Article moves on to explore several related developments to ascertain to what extent, if any, the concept of defamation of religion may be waning and whether the international consensus around "combatting intolerance" represents a viable alternative strategy moving forward. Among other things, this Article considers OIC statements and resolutions pertaining to defamation—particularly those issued following the adoption of consensus resolutions by the UNHRC and General Assembly, as well activities in other UN bodies, and other related developments on the ground in OIC member states. This analysis demonstrates that the shift to "combatting intolerance" within the UN has suppressed but not resolved a fundamental and ongoing dispute between the "West" and certain other states over the nature of international human rights protections and the value of universalism. By shifting this debate to an ambiguous and under-theorized area of law in the name of pursuing and validating an "international consensus,"¹³ these new resolutions risk creating an opportunity for certain states to prosecute perceived affronts to religious belief with renewed vigor under the imprimatur of international law. The likelihood of such a scenario is only heightened by the fact that the OIC—the world's largest international organization after the UN—continues to actively identify and endorse defamation of religion as a lawful and recognized international norm inexorably and legitimately linked to the goal of combating intolerance.

Faced with this reality, this Article concludes that the resolutions on combatting intolerance represent a Clausewitzian moment for many governments, particularly among OIC member states. In this respect, support for the new international consensus on combatting intolerance represents merely a cynical and strategic decision to continue the campaign to legitimize a ban on defamation of religion by other means. While defamation of religion *per se* might be on hiatus from the UN, absent additional clarification—including a decisive repudiation of the concept's validity—further international efforts directed at combatting intolerance risk enabling an alternative framework for governments to continue justifying domestic measures that punish the exercise of freedom of expression and freedom of religion or belief in the name of protecting one or more select religious beliefs.

¹³ Suzan Johnson Cook, U.S. Ambassador at Large for Int'l Religious Freedom, Remarks for Istanbul Process Conference (Dec. 12, 2011), *available at* <http://www.state.gov/j/drl/rls/rm/2011/178640.htm>.

I. QUO VADIS DEFAMATION OF RELIGION?

A. *Origins and Early History*

For the OIC, the need to prohibit defamation of religion—or, more accurately, defamation of Islam—has grown into an overriding *raison d'être*. In the face of initial controversies at the UN predating the first defamation of religion resolution issued in 1999,¹⁴ OIC member states proclaimed that the motivation for insulting Islam stemmed only from the desire “to generate conflict with Islamic peoples”¹⁵ and flatly asserted that “the right to freedom of thought, opinion and expression could in no case justify blasphemy.”¹⁶

In 1999, the OIC moved to have the UN Commission on Human Rights (“UNCHR”) explicitly validate this perspective. Representing the OIC, Pakistan called for the adoption of a resolution that urged states “to take all necessary measures to combat hatred, discrimination, intolerance and acts of violence, intimidation and coercion” directed at the religion of Islam.¹⁷ Germany’s representative criticized this approach “since it referred exclusively to the negative stereotyping of Islam, whereas other religions had been and continued to be subjected to various forms of discrimination, intolerance and even persecution.”¹⁸ Germany further reported that it “had unfortunately been impossible to find common ground” in initial negotiations because OIC member states “had persisted in making the draft resolution exclusive in nature and had found it necessary to submit sub-amendments to amendments designed to correct the balance of the text.”¹⁹

Ultimately, further negotiation led to the UNCHR’s consensus approval of a resolution entitled “Defamation of religions.”²⁰ At the time, Pakistan hailed the OIC member states’ “considerable

¹⁴ See Blitt, *supra* note 4, at 142–43.

¹⁵ U.N. ESCOR, Comm’n on Human Rights, Subcomm’n On Prevention of Discrimination and Prot. of Minorities, 49th Sess., 35th mtg. ¶ 14, U.N. Doc. E/CN.4/Sub.2/1997/SR.35 (Aug. 27, 1997) (providing testimony of the observer for Indonesia, “speaking on behalf of the member countries of the Organization of the Islamic Conference”).

¹⁶ U.N. GAOR, 49th Sess., 65th mtg. ¶ 44, U.N. Doc. A/C.3/49/SR.65 (Dec. 13, 1994) (providing testimony of the representative from Iran, noting “the opinion expressed by the Organization of the Islamic Conference”).

¹⁷ U.N. ESCOR, Comm’n on Human Rights, 55th Sess., para. 9, U.N. Doc. E/CN.4/1999/L.40 (Apr. 20, 1999) (draft resolution).

¹⁸ U.N. ESCOR, Comm’n on Human Rights, 55th Sess., 61st mtg. ¶ 3, U.N. Doc. E/CN.4/1999/SR.61 (Apr. 29, 1999).

¹⁹ *Id.* ¶ 9.

²⁰ Comm’n on Human Rights Res. 1999/82, U.N. Doc. E/CN.4/1999/82 (Apr. 30, 1999).

flexibility” in agreeing to a compromise resolution.²¹ Germany, on behalf of the European Union (“EU”), stressed that the “last-minute agreement reached should not . . . hide the fact that a high degree of uncertainty remained as to the expediency of the Commission’s continuing to deal with the issue in that way and in that context,” adding that “they did not attach any legal meaning to the term ‘defamation’ as used in the title.”²² Despite this view, the consensus resolution triggered the first mandated UN reporting on the topic and positioned the UNCHR “to remain seized of the matter” moving forward.²³

The term “seized of the matter” captures literally the UN’s preoccupation with defamation of religion over the decade that followed. In addition, to attention morphing beyond the relatively provincial domain of the UN’s specialized human rights body and into the larger (and arguably more important) General Assembly, defamation of religion received frequent references in subsequent annual resolutions to the point where the term was being referenced between ten to fifteen times per resolution.²⁴ Notably, this expansion was accompanied by a shift away from invoking defamation in the relatively harmless context of preambulatory front matter to including it in the more significant operative paragraphs of a given resolution.²⁵

This change was not accidental. Rather, it coincided with the OIC’s stated desire to secure “[o]perative provisions prohibiting blasphemy . . . in the text of [defamation resolutions].”²⁶ Moreover, it is in part because of this subtle yet dramatic shift that the OIC felt sufficiently empowered by 2009 to declare that a norm prohibiting defamation of religion had:

repeatedly been observed to command support by a majority of the UN member states—a support that transcended the confines of the OIC Member States. The succession of UNGA and UNHRC resolutions on the defamation of religions makes it a stand alone concept with international legitimacy. It should not be made to stand out by creating the

²¹ U.N. ESCOR, Comm’n on Human Rights, 55th Sess., 62nd mtg. ¶ 1, U.N. Doc. E/CN.4/1999/SR.62 (Apr. 30, 1999).

²² *Id.* ¶ 9. Indeed, at no point in over ten years did the UN ever put forth a working definition of the chimera term “defamation of religion.” Blitt, *supra* note 5, at 16.

²³ Comm’n on Human Rights Res. 1999/82, *supra* note 20, para. 7.

²⁴ *See, e.g.*, U.N. Doc. A/RES/64/156, *supra* note 1 (using the term “defamation” 12 times).

²⁵ *See* Blitt, *supra* note 4.

²⁶ OIC Secretary-General, *Secretary General’s Report On Cooperation Between the OIC and Regional & International Organizations*, ¶ 23, O.I.C. Doc. OIC/ICFM-33/POL/SG.REP.13 (2006).

impression that it somehow encroaches upon the freedom of expression.

....

[Accordingly, a]ny denial of these facts constitutes a contradiction of the established position of the international community, the international legitimacy and above all the main provisions of international law and international humanitarian law.²⁷

To underscore its vow to secure an international prohibition on the defamation of religion at the UN,²⁸ the OIC regularly passed its own internal resolutions addressing defamation of Islam that called into question existing international norms related to non-discrimination and equality, freedom of expression, and freedom of religion or belief for every individual.²⁹ Beyond these annual resolutions, the OIC saw fit in its revised 2008 charter to establish “combat[ing] defamation of Islam” as one of the organization’s primary objectives.³⁰ To that end, the OIC requires, as a precondition for obtaining observer status, that interested states provide a commitment to prohibit the defamation of Islam.³¹

Despite the OIC’s consistent position, its promulgation of a norm proscribing defamation of Islam remains deeply flawed for several reasons. First, the application and enforcement of such a blasphemy prohibition typically is discriminatory in practice insofar as it protects only the government-sanctioned version of Islam.³² Second, the OIC’s requirement that this offense be

²⁷ Second Rep. of the OIC Observatory on Islamophobia, 36th Sess., May 23–25, 2009, 4–5, O.I.C. Doc. OIC–CS–2ndOBS–REP–FINAL (May 10, 2009).

²⁸ See OIC, *On Combating Islamophobia and Eliminating Hatred and Prejudice Against Islam*, Res. No. 34/34-POL, ¶ 5, O.I.C. Doc. OIC/34-ICFM/2007/POL/R.34 (calling “on the Human Rights Council to adopt a universal declaration to incriminate the defamation of religions”). Masood Khan, Pakistan’s UN ambassador, also reminded the UNHRC that the OIC’s ultimate objective was nothing less than a “new instrument or convention” addressing defamation. Steven Edwards, *UN Anti-Blasphemy Measures Have Sinister Goals, Observers Say*, CANWEST NEWS SERVICE (Nov. 24, 2008), <http://www2.canada.com/theprovince/news/story.html?id=9b8e3a6d-795d-440f-a5de-6ff6e78c78d5>.

²⁹ For a more detailed analysis of the resolutions leading up to 2010, see Blitt, *supra* note 4, at 155.

³⁰ O.I.C. Charter art. 1, para. 12.

³¹ Under Article 6 of the 2011 rules governing observer status at the OIC, an “application for Observer Status . . . shall include the applicant’s commitment to and respect for the principles and objectives of the Charter . . .” *Rules Governing Observer Status at the Organization of the Islamic Conference*, O.I.C. Doc. OIC/4-EGG/2011/RES.OS/FINAL.

³² In certain cases, other select “divine religions” may be afforded protection, at least on paper.

criminalized is at odds with international efforts to limit penalties for conventional defamation offenses to civil liability only. Third, and possibly most problematic, the OIC's impetus for protecting Islam by manipulating the framework of international human rights upends the foundational understanding that rights belong to individuals rather than subjective concepts or beliefs.³³

B. Defamation of Religion Creep: Early Efforts to Blend Defamation into Incitement

The magnitude of the flaws associated with defamation of religion virtually assured the decade of clashes at the UN. Indeed, these flaws may also help explain the OIC's attempt to legitimize the end goal of protecting Islam against criticism or insult by other means. For example, alongside its diplomatic effort to secure an annual defamation of religion resolution, the OIC embarked upon an increasingly contrived campaign to equate criticism of Islam with incitement to religious hatred. This "alternative" approach—embodied in the OIC's position within the UNHRC's Ad Hoc Committee on the Elaboration of Complementary Standards to the International Covenant on the Elimination of All Forms of Racial Discrimination ("Ad Hoc Committee")³⁴—represents nothing more than an effort to "reclassify" defamation of religion within the legal framework of incitement to make it more palatable to states that have either abstained from or voted against the resolutions on defamation.³⁵

³³ For a more detailed exploration of these problems, see Blitt, *supra* note 4.

³⁴ The Ad Hoc Committee is a UNHRC-created body established in 2006 and mandated with elaborating *inter alia* "a convention or additional protocol(s) to the International Convention on the Elimination of All Forms of Racial Discrimination ["CERD"] . . . providing new normative standards aimed at combating . . . incitement to racial and religious hatred." Human Rights Council Dec. 3/103, Global Efforts for the Total Elimination of Racism, Racial Discrimination, Xenophobia and Related Intolerance and the Comprehensive Follow-Up to the World Conference Against Racism, Racial Discrimination, Xenophobia and Related Intolerance and the Effective Implementation of the Durban Declaration and Programme of Action, ¶ (a), U.N. Doc. A/HRC/DEC/3/103 (Apr. 23, 2007). The UNHRC's decision to establish the Ad Hoc Committee was split along voting lines similar to those for the defamation of religion resolutions. See *id.* (showing most countries traditionally considered "western" voting against the decision and many predominantly Muslim countries, including Indonesia, Pakistan, and Saudi Arabia, voting for the decision).

³⁵ Here, it is worth recalling that the UN Special Rapporteur on freedom of expression has called on governments to "refrain from introducing new norms which will pursue the same goals as defamation laws under a different legal terminology such as disinformation and dissemination of false information." Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression, *Implementation of General Assembly Resolution 60/251 of March 2006 Entitled "Human Rights Council,"* ¶ 82, Human Rights Council, U.N. Doc. A/HRC/4/27 (Jan. 2, 2007) (by Ambeyi Ligabo).

The decision to create the Ad Hoc Committee is particularly remarkable given that similar earlier efforts failed to demonstrate the need for either a convention or additional protocol to the CERD as a means of “gap filling” related to incitement to religious hatred. For example, experts appointed by the UNHRC to address the content and scope of substantive gaps in existing international instruments to combat racism, racial discrimination, xenophobia, and related intolerance concluded “that religious intolerance combined with racial and xenophobic prejudices is adequately covered under international human rights instruments.”³⁶ The experts concluded that the gap was not in the international instruments themselves, but only in their application, which the UN treaty bodies could remedy by issuing guidance “as to the interpretative scope . . . [and] threshold of application”³⁷ Reinforcing this conclusion, the 2007 Study of the Committee on the Elimination of Racial Discrimination made no mention whatsoever of measures to prevent defamation of religion or incitement to religious hatred.³⁸

As part of its lobbying efforts within the Ad Hoc Committee, the OIC has sought to blur the critical distinction between defamation of religion and incitement by proposing the following:

[The adoption of] some sort of additional protocol or universal declaration for codifying freedom of expression in the context of human responsibilities. It may be called an additional protocol or universal declaration on “freedom of expression and human responsibilities” . . . a comprehensive framework is needed for analyzing national laws as well as understanding their provisions. *This could then be compiled in a single universal document as guidelines for legislation—*

³⁶ Human Rights Council, Intergovernmental Working Grp. on the Effective Implementation of the Durban Declaration and Programme of Action, *Report on the Study by the Five Experts on the Content and Scope of Substantive Gaps in the Existing International Instruments to Combat Racism, Racial Discrimination, Xenophobia and Related Intolerance*, ¶ 130, U.N. Doc. A/HRC/4/WG.3/6 (Aug. 27, 2007). At most, the experts suggested that the CERD committee “may wish to consider adopting a recommendation stating explicitly the advantages of multicultural education in combating religious intolerance.” *Id.* The group also endorsed “the importance of multicultural education, including education on the Internet, aimed at promoting understanding, tolerance, peace and friendly relations between communities and nations” as a means of combating defamation rather than any criminal sanctions. *Id.* ¶ 149.

³⁷ *Id.* ¶ 152.

³⁸ Human Rights Council, Intergovernmental Working Grp. on the Effective Implementation of the Durban Declaration and Programme of Action, *Study of the Committee on the Elimination of Racial Discrimination on Possible Measures to Strengthen Implementation Through Optional Recommendations or the Update of its Monitoring Procedures*, U.N. Doc. A/HRC/4/WG.3/7 (June 15, 2007).

*aimed at countering “defamation of or incitement to religious hatred and violence.”*³⁹

To further obfuscate the distinction between defamation and incitement, the OIC has continued to advocate that the Ad Hoc Committee endorse prohibitions on “deliberate and premeditated insults and ridiculing,” “malicious and insulting attacks,” and “ridiculing and insulting interpretation” of Islam⁴⁰ backed by sweeping criminal sanctions. Supporting this position, the OIC’s voting allies within the Africa Group (which itself includes OIC member states) have argued that the “scourges” of “Islamophobia,’ ‘Anti-Semitism,’ ‘Christianophobia’ and ‘ideological racism’” should “be criminalized in all their manifestations, and made punishable offences in accordance with international human rights law.”⁴¹ Under the theme “[a]dvocacy and incitement to racial, ethnic, national and religious hatred,” the Africa Group demanded the Ad Hoc Committee endorse criminal punishment for those perpetrating, “*instigating, aiding or abetting*” the following actions:

- (a) Public insults and defamation . . . against a person or group of persons on the grounds of their . . . religion . . . ;
- (b) The public expression of prejudice that has the purpose or effect of denigrating a group of persons on the basis of the above-mentioned grounds;
- (c) The public dissemination or distribution, or the production of written, audio or visual or other material containing

³⁹ Transcript of the Concluding Session of the Seminar on Articles 19 and 20, Organized By the Office of High Commissioner for Human Rights, Geneva, Switz., Oct. 2, 2008, *Remarks by Mojtaba Amiri Vahid, Deputy of the Permanent Observer Missions of the OIC to the UN Office in Geneva*, 3 (emphasis added) (transcript on file with the author). In the same statement, Vahid downplayed the efficacy of education and dialogue without the imposition of additional criminal sanctions.

⁴⁰ These forms of expression are expressly rejected in the text of the ambassador’s letter. Letter from Permanent Mission of Pakistan to the United Nations and Other International Organizations (Oct. 29, 2009), in *Racism, Racial Discrimination, Xenophobia and All Forms of Discrimination: Comprehensive Implementation of and Follow-Up to the Durban Declaration and Programme of Action*, Human Rights Council, Feb. 17, 2010, UN Doc. A/HRC/13/CRP.1 (Annex 1).

⁴¹ Human Rights Council, Ad Hoc Comm. on the Elaboration of Complementary Standards, *Outcome Referred to in Paragraph 2(D) of the Road Map on the Elaboration of Complementary Standards*, ¶ 6(d), UN Doc. A/HRC/AC.1/2/2 (Aug. 26, 2009) [hereinafter UN Doc. A/HRC/AC.1/2/2]. See also *African Group Action Points for the “Outcome” Document on Complementary International Standards* (submitted by Egypt on behalf of the Africa Group) (on file with author) (stating same).

manifestations of racism and racial discrimination . . .
[including defamation of religion].⁴²

Similarly, addressing the theme of “[d]iscrimination based on religion or belief” within the Ad Hoc Committee, the OIC called for, *inter alia*, criminal liability for those “who commit, instigate, or aid and abet . . . directly or indirectly” the following:

(d) . . . *public insults and defamation* threats against a person or a grouping of persons on the grounds of their . . . religion . . . ; [and]

(e) . . . *publication of material that negatively stereotypes, insults, or uses offensive language on matters regarded by followers of any religion or belief as sacred* or inherent to their dignity as human beings, with the aim of protecting their fundamental human rights.⁴³

Nowhere in the OIC’s submissions testing the boundaries of advocacy and incitement to racial, ethnic, national and religious hatred does the organization stipulate or explore the need for normative standards that would balance protection against “defamation” with the right to freedom of expression and freedom of religion or belief. In this context, the OIC fails to acknowledge or address standards that would relate to evidence of actual defamation, the requirement of intent, ascertaining the connection between perceived insult and actual incitement, or the principle of proportionality.

Also missing is any recognition that Article 20(2) of the International Covenant on Civil and Political Rights (“ICCPR”) is intended to target only the most extreme purposeful advocacy of incitement to imminent forms of discrimination, hostility, and

⁴² UN Doc. A/HRC/AC.1/2/2, *supra* note 41, at ¶ 20 (emphasis added). The OIC’s leap towards inclusion of defamation of religion is premised on the finding by a “former Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance . . . that the increasing trend in defamation of religions cannot be dissociated from a profound reflection on the ominous trends of racism [and] racial discrimination . . .” *Id.* ¶ 69. A letter from Iran’s mission to the UN reiterates this position. *See* Letter from Permanent Mission of the Islamic Republic of Iran to the Office of the High Commissioner for Human Rights Anti-Discrimination Unit (May 29, 2009) (on file with author).

⁴³ UN Doc. A/HRC/AC.1/2/2, *supra* note 41, at ¶ 27 (emphasis added). The language in Part (d) indicates that the Ad Hoc Committee may have lost something in translation. The original OIC submission does not require that the offense of defamation be directed at a person: “legal restrictions to public insults and defamation, public incitement to violence, threat against a person or a grouping of persons . . . on the grounds of their race, colour, language, religion, nationality, or national or ethnic origin.” Letter from Permanent Mission of Pakistan to the United Nations and other International Organizations (May 30, 2009).

violence.⁴⁴ This high threshold prompted the UN Special Rapporteur on freedom of religion or belief to conclude that “expressions should only be prohibited under Article 20 if they constitute incitement to imminent acts of violence or discrimination against a specific individual or group.”⁴⁵ The Special Rapporteur further cautioned:

against confusion between a racist statement and an act of defamation of religion. The elements that constitute a racist statement are not the same as those that constitute a statement defaming a religion. To this extent, the legal measures, and in particular the criminal measures, adopted by national legal systems to fight racism may not necessarily be applicable to defamation of religion.⁴⁶

Against these findings, the OIC’s demand for wide-ranging mandatory criminal liability for defamation-based offenses in the context of incitement to religious hatred neglects the need for a fact specific and contextual inquiry into such prosecutions and, moreover, is woefully out of touch with existing international norms. The blunt conclusion issued jointly nearly a decade ago by the UN and Organization of American States (“OAS”) special rapporteurs on freedom of expression together with the Organization for Security and Co-operation in Europe (“OSCE”) Representative on Freedom of the Media is also worth recalling:

Criminal defamation laws . . . are unnecessary to protect reputations. The threat of criminal sanctions[,] imprisonment and prohibitive fines . . . exerts a significant chilling effect on freedom of expression which cannot be justified. Criminal defamation laws are frequently abused, being used in cases which do not involve the public interest and as a first, rather

⁴⁴ See International Covenant on Civil and Political Rights, G.A. Res. 2200A (XXI), art. 20(2), U.N. Doc. A/RES/2200(XXI) A (Dec. 16, 1966) (“Any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law.”); see also ARTICLE 19, THE CAMDEN PRINCIPLES ON FREEDOM OF EXPRESSION AND EQUALITY 10, n.3 (2009) (stating a definition of incitement that is based on Article 20(2) as “refer[ring] to statements about national, racial or religious groups which create an imminent risk of discrimination, hostility or violence”), and Heiner Bielefeldt, Frank La Rue, & Githu Muigai, *OHCHR Expert Workshops on the Prohibition of Incitement to National, Racial or Religious Hatred*, OFFICE OF THE HIGH COMMISSIONER FOR HUMAN RIGHTS, 11 (Apr. 6–7, 2011) (endorsing Principle 12 of Article 19’s Camden Principles), <http://www.ohchr.org/Documents/Issues/Religion/JointSRsubmissionforNairobiworkshop.pdf>.

⁴⁵ 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,”* Human Rights Council, ¶ 47, U.N. Doc. A/HRC/2/3 (Sept. 20, 2006) (by Asma Jahangir and Doudou Diène).

⁴⁶ *Id.* ¶ 49.

than last resort. Criminal defamation laws should be abolished and replaced with appropriate civil defamation laws.⁴⁷

The UN Human Rights Committee has consistently reaffirmed this viewpoint, calling on states to decriminalize conventional defamation laws and to cap the amount of possible damages awarded in civil lawsuits.⁴⁸

Allowing the OIC and others to conflate defamation of religion with incitement to religious hostility is problematic for two related reasons. First, under the conflated definition, states can use an otherwise legitimate international norm to prosecute insults or criticism directed at religious beliefs simply by applying a relaxed interpretation to terms such as “advocacy,” “incitement” and “hostility.” Second, permitting a dilution of the stringent standards associated with ICCPR Article 20(2) may have the effect of cheapening the coin, which in turn may give rise to other states disregarding their obligation to prohibit genuine advocacy of hostility that actually constitutes incitement to imminent violence and leaves more immediately threatening acts unchecked.

⁴⁷ Santiago Canton, Freimut Duve, & Abid Hussain, *Statement Regarding Key Issues and Challenges in Freedom of Expression* (Mar. 7, 2000), http://www.ifex.org/international/2000/03/07/report_on_key_issues_and_challenges. In the U.S. context, one observer has remarked:

Criminal libel law . . . is a useless and increasingly unconstitutional remedy for the redress of racial or ethnic group defamation. . . . Criminal defamation is not recognized in the Model Penal Code or by a leading criminal law treatise. Even though racial and ethnic defamation affect the public weal and not merely individual interests, the criminal law of libel is no longer effective to redress that group wrong.

Michael J. Polelle, *Racial and Ethnic Group Defamation: A Speech-Friendly Proposal*, 23 B.C. THIRD WORLD L.J. 213, 257–258 (2003).

⁴⁸ See, e.g., Human Rights Comm., *Concluding Observations of the Human Rights Committee: Russian Federation*, ¶ 24(b), UN Doc. CCPR/C/RUS/CO/6 (Nov. 24, 2009) (noting that the “State party should . . . [d]ecriminaliz[e] defamation and subject it only to civil lawsuits, capping any damages awarded”); see also Human Rights Comm., *Concluding Observations of the Human Rights Committee: Mexico*, ¶ 20(d), UN Doc. CCPR/C/MEX/CO/5 (May 17, 2010) (suggesting that the State party should “[t]ake steps to decriminalize defamation in all states.”); Human Rights Comm., *Concluding Observations of the Human Rights Committee: The Former Yugoslav Republic Of Macedonia*, ¶ 6, UN Doc. CCPR/C/MKD/CO/2 (Apr. 17, 2008) (noting that the Committee “welcomes the amendments to the Criminal Code, decriminalizing the offence[] of defamation . . . as steps in the right direction towards ensuring freedom of opinion and expression particularly of journalists and publishers”); Human Rights Comm., *Concluding observations of the Human Rights Committee: Italy*, ¶ 19, UN Doc. CCPR/C/ITA/CO/5 (Apr. 24, 2006) (“The State party should ensure that defamation is no longer punishable by imprisonment.”). The UN Human Rights Committee’s *General Comment No. 34* reiterates this position: “States parties should consider the decriminalization of defamation and, in any case, the application of the criminal law should only be countenanced in the most serious of cases and imprisonment is never an appropriate penalty.” Human Rights Comm., *General Comment No. 34: Article 19: Freedom of Opinion and Expression*, ¶ 47, UN Doc. CCPR/C/GC/34 (Sept. 12, 2011).

The need to more clearly delineate and preserve this bright line distinction is even more pressing due to the nature of the compromise struck in Resolution 16/18 and specifically the failure to authoritatively repudiate the concept of defamation of religion. By agreeing to shift the debate into a decidedly less confrontational space made possible by vague terms open to subjective interpretation, the United States and others may have complicated the task of identifying and effectively confronting limitations on free expression and freedom of religion or belief motivated by the desire to curb perceived criticism or insult of religious beliefs. Indeed, while achieving consensus may be laudable, moving into this mostly untested gray zone seems particularly ill-advised given the OIC's ongoing effort to graft defamation of religion onto the framework of incitement, even at the expense of delegitimizing existing international law.

II. RESOLUTION 16/18: ENDING A DECADE OF "DIVISIVE DEBATE"?

A. Resolution 16/18: Crafting a Consensus

On its surface, UNHRC Resolution 16/18 on "Combating Intolerance, Negative Stereotyping and Stigmatization of, and Discrimination, Incitement to Violence and Violence Against, Persons Based on Religion or Belief"⁴⁹ represents a turning point insofar as it breaks the longstanding UNHRC practice of endorsing an annual resolution explicitly decrying defamation of religions. The resolution also ends a lengthy paper trail of mandated annual reporting dedicated to defamation of religion produced by various UN bodies. In place of this, the UNHRC, acting by consensus, agreed to condemn "any advocacy of religious hatred that constitutes incitement to discrimination, hostility or violence," while recognizing that "interfaith and intercultural dialogue . . . can be among the best protections against religious intolerance and can play a positive role in strengthening democracy and combating religious hatred."⁵⁰

To this end, the resolution sets out a number of concrete suggestions intended "to foster a domestic environment of religious tolerance, peace and respect"⁵¹ and to "promot[e] the ability of members of all religious communities to manifest their religion, and to contribute openly and on an equal footing to society."⁵² For

⁴⁹ Human Rights Council Res. 16/18, *supra* note 7.

⁵⁰ *Id.* ¶¶ 3–4.

⁵¹ *Id.* ¶ 5.

⁵² *Id.* ¶ 6(b).

example, the UNHRC calls on states to “[s]peak[] out against intolerance, including advocacy of religious hatred that constitutes incitement to discrimination, hostility or violence.”⁵³ The resolution also urges states to adopt, in accord with ICCPR Article 20(2), “measures to criminalize incitement to imminent violence based on religion or belief.”⁵⁴ Lastly, the resolution serves—albeit unofficially—as the departure point for what has come to be known as the “Istanbul Process,” which is a series of meetings intended to “spur implementation of the specific actions called for in Resolution 16/18”⁵⁵ by, among other things, “sharing best practices.”⁵⁶

B. Consensus? Yes. End to Defamation? No.

Based on the remarks of those states that continue to tout the legitimacy of prohibiting defamation of religion, it is evident that the putative norm is still very much alive and well, despite the new consensus approach intended to supplant it. For example, addressing the high level segment of the 16th Session of the UNHRC before it passed Resolution 16/18, OIC Secretary General Ekmeleddin Ihsanoglu reiterated his call for “establishing an Observatory at the Office of the High Commissioner to monitor acts of defamation of all religions.”⁵⁷ Ihsanoglu lauded the OIC’s flexibility in negotiations, expressing an expectation for “some reciprocity,” and asserted that the “perception that supporting [defamation of religion] would throttle one’s right to freedom [of] expression is only a myth.”⁵⁸

Several weeks later, the ambassador from Pakistan, Zamir Akram, articulated the OIC’s view more bluntly in his introductory remarks immediately preceding UNHRC adoption of the resolution:

This draft resolution addresses a number of issues over which the OIC has been expressing concern over the years. Having

⁵³ *Id.* ¶ 5(e).

⁵⁴ *Id.* ¶ 5(f). That threshold seems to align with American constitutional law and precludes criminal sanctions for incitement to discrimination, hostility, or non-imminent violence. See *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969) (per curiam) (noting that incitement is protected speech unless the speaker calls for “imminent lawless action and is likely to incite or produce such action”).

⁵⁵ U.S. Dep’t of State, *The “Istanbul Process for Combating Intolerance and Discrimination Based on Religion or Belief” Implementing Human Rights Council (HRC) Resolution 16/18 December Expert Level Meeting*, HUMANRIGHTS.GOV, 2, <http://www.humanrights.gov/wp-content/uploads/2011/12/20111204-Istanbul-Process.pdf> (last visited Mar. 16, 2012). The Istanbul Process is discussed at greater length in Part III.C *infra*.

⁵⁶ *Id.*

⁵⁷ Ekmeleddin Ihsanoglu, Sec’y Gen., OIC, Statement at the High Level Segment of the 16th Session of the Human Rights Council 9 (Mar. 1, 2011), *available at* <http://www.eyeontheun.org/assets/attachments/documents/9429hrc16sessionoic.pdf>.

⁵⁸ *Id.* at 10.

said that, I want to state categorically that *this resolution does not replace the OIC's earlier resolutions on combatting defamation of religions which were adopted by the Human Rights Council and continue to remain valid.*⁵⁹

Reinforcing this position, the Saudi Arabian ambassador in his explanation before the vote observed that:

This text contains many positive points [However,] this text . . . is not replacing the other existing text *which also criminalizes attack on religion. This text still remains valid* . . . [and events like the burning of the Koran in the United States] calls on us all to redouble our efforts against this phenomenon.⁶⁰

Despite these pointed statements, U.S. Ambassador Eileen Chamberlain Donahoe chose not to refute the assertion that an international norm prohibiting defamation of religion remained valid.⁶¹ Instead, she left it to the representative from Hungary to politely demur: “insofar as they are directed at the EU we do not agree with the . . . allegations made by the distinguished Ambassador of Pakistan in . . . his introduction to this resolution.”⁶²

⁵⁹ Zamir Akram, Permanent Representative of Pak. to the U.N. Office at Geneva, Remarks at the 16th Session, 46th Plenary Meeting of the Human Rights Council (Mar. 24, 2011) (emphasis added), available at <http://webcast.un.org/ramgen/ondemand/conferences/unhrc/sixteenth/hrc110324pm2-eng.rm?start=00:39:20&end=00:49:44>. For video of the entire March 24, 2011 proceedings, see U.N., 15:00–18:00 46th Plenary Meeting, <http://www.un.org/webcast/unhrc/archive.asp?go=110324#pm2> (last visited Mar. 26, 2012). Remarkably, this loaded statement received virtually no press coverage, netting only four hits via a Google search. Search Results for “state categorically that this resolution does not replace the OIC’s earlier resolutions on combatting defamation of religions,” GOOGLE, <http://www.google.com/search?hl=en&safe=off&site=webhp&q=%22state+categorically+that+this+resolution+does+not+replace+the+OIC’s+earlier+resolutions+on+combating+defamation+of+religions%22&oq=%22state+categorically+that+this+resolution+does+not+replace+the+OIC’s+earlier+resolutions+on+combating+defamation+of+religions%22> (last visited Mar. 16, 2012).

⁶⁰ Ahmed Suleiman Ibrahim Alaquil, Saudi Arabia Ambassador to the Human Rights Council, Remarks at the 16th Session, 46th Plenary Meeting of the Human Rights Council (Mar. 24, 2011) (emphasis added), available at <http://webcast.un.org/ramgen/ondemand/conferences/unhrc/sixteenth/hrc110324pm2-eng.rm?start=00:50:10&end=00:51:42>.

⁶¹ See Eileen Chamberlain Donahoe, U.S. Ambassador to the Human Rights Council, Remarks at the 16th Session, 46th Plenary Meeting of the Human Rights Council (Mar. 24, 2011), available at <http://webcast.un.org/ramgen/ondemand/conferences/unhrc/sixteenth/hrc110324pm2-eng.rm?start=00:54:04&end=00:58:47> (noting that the resolution only allows for punishment when expression incites imminent violence, but not addressing the OIC members’ claims that the prior resolutions remained valid).

⁶² András Dékány, Permanent Representative of Hung. to the U.N. Office at Geneva, Remarks at the 16th Session, 46th Plenary Meeting of the Human Rights Council (March 24,

Following its adoption by consensus, numerous officials and nongovernmental organizations (“NGOs”) lined up to applaud Resolution 16/18 as a death knell for defamation of religion. The United States Commission on International Religious Freedom (“USCIRF”), long critical of the OIC’s effort to install a norm prohibiting defamation of religion, offered an observation seemingly disconnected from reality: “Tragically, it took the assassinations of two prominent Pakistani officials who opposed that country’s draconian blasphemy laws . . . to convince the OIC that the annual defamation of religions resolutions embolden extremists rather than bolster religious harmony.”⁶³ Likewise, Human Rights Watch ventured that the shift to combating intolerance “implicitly rejects the ‘defamation of religions’ concept.”⁶⁴

Oddly, neither of these statements sought to account for the multiple reassertions of the norm’s validity expressed during the Council session. Perhaps more cautiously, the UN’s Special Rapporteurs on Freedom of Religion or Belief, on Freedom of Opinion and Expression, and on Contemporary Forms of Racism jointly declared the adoption of Resolution 16/18 a “positive development.”⁶⁵ During an Office of the High Commissioner for Human Rights (“OHCHR”)-sponsored expert workshop in Nairobi, Kenya, they expressed their collective appreciation that “the [UNHRC] has—after years of debate—ultimately found a way to unanimously address [the] worrying phenomena [of intolerance, negative stereotyping, discrimination, and incitement] without referring to concepts or notions that would undermine international human rights law.”⁶⁶ At the same time, however, they “emphasize[d] the principle that individuals rather than religions *per se* are the

2011), *available* at
<http://webcast.un.org/ramgen/ondemand/conferences/unhrc/sixteenth/hrc110324pm2-eng.rm?start=00:59:05&end=01:02:22> (speaking on behalf of the EU).

⁶³ 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/newsroom/press-releases/3570-uscirf-welcomes-move-away-from-defamation-of-religions-concept.html>.

⁶⁴ *UN: Rights Body Acts Decisively on Iran, Cote d’Ivoire*, HUMAN RIGHTS WATCH (Mar. 25, 2011), <http://www.hrw.org/news/2011/03/25/un-rights-body-acts-decisively-iran-cote-d-ivoire>. Human Rights Watch attributed particular significance to the fact that “the new resolution was proposed by the Organization of the Islamic Conference and adopted by consensus.” *Id.*

⁶⁵ Heiner Bielefeldt, Frank La Rue, & Githu Muigai, *OHCHR Expert Workshops on the Prohibition of Incitement to National, Racial or Religious Hatred*, OFFICE OF THE HIGH COMMISSIONER FOR HUMAN RIGHTS, 8 (Apr. 6–7, 2011), <http://www.ohchr.org/Documents/Issues/Religion/JointSRsubmissionforNairobiworkshop.pdf>.

⁶⁶ *Id.*

rights-holders.”⁶⁷ These statements were reiterated by the special rapporteurs in their joint submissions to the follow up OHCHR workshops held in Bangkok, Thailand⁶⁸ and Santiago, Chile during 2011.⁶⁹

III. LIVING IN A POST-CONSENSUS WORLD: THE WEST DREAMS WHILE THE OIC SCHEMES

Despite the general fanfare and congratulatory accolades surrounding the consensus vote on Resolution 16/18, neither the content of the resolution nor the remarks of state representatives at the UNHRC offer anything that decisively invalidates or discredits the recognition of an international prohibition on defamation of religion. In fact, as the following sections indicate, despite the omission of the term “defamation of religion” from UN resolutions in 2011, the OIC continues to support this norm actively as a *fait accompli*. This consistent position denigrates the spirit of consensus in which the resolutions combatting intolerance ostensibly were passed. More disturbingly, this behavior may ultimately undermine the very objectives to which Resolution 16/18 aspires by condoning the continued prosecution of blasphemy-based offenses and potentially discrediting otherwise legitimate efforts to combat discrimination and incitement.

A. The UN’s Ad Hoc Committee on the Elaboration of Complementary Standards

Following the UNHRC’s 2006 decision, the Ad Hoc Committee on the Elaboration of Complementary Standards embarked on a series of working sessions “to draw up the requisite legal instruments”⁷⁰ that would address existing gaps in the CERD and formulate new

⁶⁷ *Id.*

⁶⁸ Heiner Bielefeldt, Frank La Rue, & Githu Muigai, *OHCHR Expert Workshops on the Prohibition of Incitement to National, Racial or Religious Hatred*, OFFICE OF THE HIGH COMMISSIONER FOR HUMAN RIGHTS, 12 (July 6–7, 2011) http://www2.ohchr.org/english/issues/opinion/articles1920_iccpr/docs/expert_papers_Bangkok/SRSubmissionBangkokWorkshop.pdf.

⁶⁹ Heiner Bielefeldt, Frank La Rue, & Githu Muigai, *OHCHR Expert Workshops on the Prohibition of Incitement to National, Racial or Religious Hatred*, OFFICE OF THE HIGH COMMISSIONER FOR HUMAN RIGHTS, 10 (Oct. 12–13, 2011) <http://www.ohchr.org/Documents/Issues/Expression/ICCPR/Santiago/JointSRSubmissionSantiago.pdf>.

⁷⁰ Human Rights Council Dec. 3/103, Global Efforts for the Total Elimination of Racism, Racial Discrimination, Xenophobia and Related Intolerance and the Comprehensive Follow-Up to the World Conference Against Racism, Racial Discrimination, Xenophobia and Related Intolerance and the Effective Implementation of the Durban Declaration and Programme of Action, ¶ (a), U.N. Doc. A/HRC/DEC/3/103 (Apr. 23, 2007).

normative standards aimed at combating incitement to racial and religious hatred.⁷¹ As noted above, the OIC attempted to use this venue to blur the line between defamation and incitement and press for a new treaty prohibiting insults and ridicule of religion.⁷² In part because of opposition to this approach, the meetings held from 2008 through 2010 were characterized by an overriding sense of discord and contention so profound that the position of Chairperson-Rapporteur remained vacant for an extended period.⁷³ But what of the Ad Hoc Committee's session following the passage of Resolution 16/18, which occurred in a new atmosphere of consensus that put aside the previous "false divide that pits religious sensitivities against freedom of expression"?⁷⁴ The second part of the Ad Hoc Committee's third session, which convened April 11–21, 2011, is instructive in this regard.

After an abortive start to the third session and a delay of nearly six months, member states reconvened and agreed that Jerry Matthews Matjila, Permanent Representative of South Africa, would serve as chairperson-rapporteur for the committee.⁷⁵ In turn, Matjila proposed four initial topics for discussion intended to reflect "burning issues of the times" and "key topics and concerns of participants":⁷⁶ (1) "xenophobia"; (2) "incitement to racial, ethnic and religious hatred"; (3) "racial and xenophobic acts committed through information and communication technologies"; and (4) "racial, ethnic and religious profiling."⁷⁷ Matjila suggested that the committee address incitement to racial, ethnic and religious hatred specifically because it "had been the focus of attention during recent sessions of the Human Rights Council, [and] . . . the Council's last session had adopted a resolution by consensus and that he wished to build thereon."⁷⁸ The United States expressed the view that any discussion in the Ad Hoc Committee should reflect the new consensus language contained in

⁷¹ *Id.* ¶ (a). For additional background on the Ad Hoc Committee, see *Ad Hoc Committee on the Elaboration of Complementary Standards*, OFFICE OF THE UNITED NATIONS HIGH COMMISSIONER FOR HUMAN RIGHTS, <http://www2.ohchr.org/english/issues/racism/adhoccommittee.htm> (last visited Mar. 18, 2012).

⁷² See *supra* Part I.B.

⁷³ Human Rights Council, *Report of the Ad Hoc Committee on the Elaboration of Complementary Standards on its Third Session*, ¶ 4, UN Doc. A/HRC/18/36 (Sept. 6, 2011) [hereinafter HRC Ad Hoc Comm. Report].

⁷⁴ Stephen Kaufman, *Clinton Says More Effort Needed to Combat Religious Intolerance*, IIP DIGITAL (July 15, 2011), <http://iipdigital.usembassy.gov/st/english/article/2011/07/20110715180740nehpets0.7188227.html#axzz1o12afMnj> (quoting Secretary of State Hilary Clinton).

⁷⁵ HRC Ad Hoc Comm. Report, *supra* note 73, ¶¶ 4, 6, 7.

⁷⁶ *Id.* ¶ 15.

⁷⁷ *Id.* ¶ 14.

⁷⁸ *Id.* ¶ 16.

Resolution 16/18, namely “combating advocacy of national, ethnic, religious and racial hatred that constitutes incitement to discrimination, hostility or violence.”⁷⁹ But other participants disagreed, leaving the formal meetings bogged without consensus over which issues the committee should in fact address.

In an attempt to overcome the impasse, the Ad Hoc Committee adjourned and shifted into “informal consultations” facilitated by Mothusi Bruce Rabasha Palai, the permanent representative of Botswana.⁸⁰ Following these efforts, Palai reported back that “[i]n view of the need to keep the participants working together, topic 2 ‘Advocacy and incitement to racial, ethnic, national and religious hatred’ had been dropped.”⁸¹ According to Palai’s report, the EU “seemed to have major difficulty with the wording of the topic’s title,”⁸² whereas the United States reiterated its concern as being “more one of characterization than of reality or substance,” and “suggested that the Ad Hoc Committee move forward on the basis of [the UNHRC] consensus resolution *rather than revert to previous terminology and focus*.”⁸³

Ultimately, the Ad Hoc Committee could only agree to move forward on discussions relating to the topics of xenophobia and the “[e]stablishment, designation or maintaining of national mechanisms with competences to protect against and prevent all forms and manifestations of racism, racial discrimination, xenophobia and related intolerance.”⁸⁴ These discussions reveal a continuing overarching procedural disagreement over whether perceived gaps in normative standards require new treaties or protocols or can be addressed within existing frameworks through more effective implementation.⁸⁵ Coupled with the obvious ongoing substantive tensions alluded to above, these factors together may help explain additional delays in the Ad Hoc Committee’s scheduled meetings and anticipated work product.⁸⁶ The chairperson’s plea for “other regions

⁷⁹ *Id.* ¶ 18 (internal quotation marks omitted).

⁸⁰ *Id.* ¶ 21.

⁸¹ *Id.* ¶ 23.

⁸² *Id.* ¶ 27.

⁸³ *Id.* ¶ 29 (emphasis added).

⁸⁴ *Id.* ¶ 63.

⁸⁵ For example, the United States “expressed the need for practical discussions that focused on better implementation of existing norms, as the problem was not that there were gaps in the existing international legal framework, but rather that there were gaps in practical implementation of existing standards.” *Id.* ¶ 67. In contrast, the views of the OIC and the Africa Group held that before addressing national mechanisms, “new gaps required the elaboration of new standards” and “[n]ational mechanisms alone could not fill gaps and it was only logical to set norms first.” *Id.* ¶¶ 71–72. This underlying dispute led the EU to observe that “the Ad Hoc Committee appeared to be at a standstill again . . .” *Id.* ¶ 85.

⁸⁶ The Ad Hoc Committee’s fourth session was postponed from late 2011 to April 2012.

to consider if they were now ready to take on the responsibility of serving as Chairperson of the Ad Hoc Committee” may also have a role in the delay.⁸⁷

The UNHRC’s review of Ad Hoc Committee’s progress provides additional insight into the status of the “consensus” reached in Resolution 16/18. During a general debate addressing the Ad Hoc Committee’s third report held in September 2011,⁸⁸ Pakistan, on behalf of the OIC, explained that Resolution 16/18 was

an attempt by the OIC to build consensus on an issue of vital importance . . . by identifying ways and means to deal with the growing problem of religious intolerance and discrimination, and incitement to hatred and violence based on religion. However, as projected by some, it is important to emphasize that resolution 16/18 did not replace the OIC’s earlier resolutions on combating defamation of religions which were adopted by the Human Rights Council and continue to remain valid.⁸⁹

From the OIC’s perspective, then, it would be perfectly legitimate for the Ad Hoc Committee to consider and propose a new treaty or protocol addressing defamation of religion in the context of incitement to religious hatred. In support of this understanding, the representative from Kuwait reasoned that the “constitution of the state of Kuwait is in conformity with the rules and regulations of human rights conventions” and thus, “[l]egally, it is not allowed to express any opinion that includes scorn or that degrades or demeans any faith

Human Rights Council, *Report of the Ad Hoc Committee on the Elaboration of Complementary Standards on its Fourth Session*, UN Doc. A/HRC/19/78 (Dec. 1, 2011).

⁸⁷ HRC Ad Hoc Comm. Report, *supra* note 73, ¶ 108.

⁸⁸ See *Human Rights Council Holds General Debate on Racism, Racial Discrimination, Xenophobia and Related Forms of Intolerance*, OFFICE OF THE HIGH COMMISSIONER FOR HUMAN RIGHTS (Sept. 27, 2011), <http://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=11441&LangID=E> (providing testimony in an unofficial form).

⁸⁹ Saeed Sarwar, *Draft Statement by Pakistan, on Behalf of the OIC Member States, During General Debate Under Agenda Item 9 During the 18th Session of the Human Rights Council* (Geneva, 27 September 2011), 2, <https://extranet.ohchr.org/sites/hrc/HRCSessions/RegularSessions/18thSession/OralStatements/1%20Pakistan%20%28OIC%29%2031.pdf> (password protected). Similar to remarks offered before adoption of Resolution 16/18, the U.S. statement delivered during the general debate does not contradict the OIC assertion concerning defamation of religion. See Emily Narkis, *Remarks Delivered on Racism, Racial Discrimination, Xenophobia and Related Forms of Intolerance, Follow-Up and Implementation of the Durban Declaration and Programme of Action at the Human Rights Council 18th Session* (Sept. 27, 2011), available at <https://extranet.ohchr.org/sites/hrc/HRCSessions/RegularSessions/18thSession/OralStatements/5%20United%20States%2031.pdf> (password protected).

or religion . . . be it in challenging the beliefs or the teachings and traditions. This applies [to] all religions without naming one religion.”⁹⁰ Likewise, the Moroccan delegate stressed the importance of the Ad Hoc Committee’s work and associated its own position with that of the OIC and Africa Group.⁹¹

B. OIC Resolutions and Other Activities

Despite the ostensible existence of a new consensus view on incitement at the UN, delegates to the UNHRC cannot be faulted for insisting on the continued legitimacy of defamation of religion within in the Council and elsewhere. In reality, these government officials are merely restating another consensus—yet contradictory—view maintained by the OIC that continues to “call upon the international community to take effective measures to combat the defamation of religions”⁹² Indeed, the resolutions emerging from the OIC’s most recent Council of Foreign Ministers—which followed months after the unanimous UNHRC endorsement of Resolution 16/18—plainly establish that securing a prohibition against defamation of religion remains one of the organization’s overriding objectives, despite any “historic”⁹³ UN consensus relating to incitement.

For example, Resolution No. 34/38-POL On Combating Islamophobia and Eliminating Hatred and Prejudice Against Islam generally “[r]eaffirm[s] all OIC resolutions, which stress, *inter alia*, the need for effectively combating defamation of Islam and incitement to religious hatred, hostility, violence and discrimination against Islam and Muslims, as well as the growing trend of Islamophobia.”⁹⁴ More specifically, the resolution affirms the OIC’s commitment to securing a prohibition against defamation that applies

⁹⁰ Haya Al-Duraie, Kuwait Ambassador to Human Rights Council, Remarks at 18th Session, 31st Plenary Meeting of the Human Rights Council (Sept. 27, 2011), *available at* <http://www.unmultimedia.org/tv/webcast/2011/09/kuwait-item-9-general-debate-31st-plenary-meeting.html>.

⁹¹ Omar Rabi, Morocco Ambassador to the Human Rights Council, Remarks at the 18th Session, 31st Plenary Meeting of the Human Rights Council (Sept. 27, 2011), *available at* <http://www.unmultimedia.org/tv/webcast/2011/09/morocco-item-9-clustered-id-on-racism-30th-plenary-meeting.html>.

⁹² OIC, *OIC Astana Declaration: Peace, Cooperation and Development*, ¶ 16, O.I.C. Doc. OIC/CFM-38/2011/ASTANA DEC/FINAL (June 30, 2011).

⁹³ Suzan Johnson Cook, U.S. Ambassador-at-Large for Int’l Religious Freedom, Remarks: Promoting Respect and Tolerance for International Religious Freedom (Sept. 13, 2011), *available at* <http://www.state.gov/j/drl/rls/rm/2011/172232.htm>.

⁹⁴ OIC, *On Combating Islamophobia and Eliminating Hatred and Prejudice Against Islam*, OIC Res. No. 34/38-POL, *compiled in Resolutions on Political Affairs*, at 75, O.I.C. Doc. OIC/CFM-38/2011/POL/FINAL (June 28–30, 2011) (emphasis removed) [hereinafter OIC Res. 34/38-POL]. The resolution expresses “the firm determination of Member States to continue their effective cooperation and close consultations” to this end. *Id.* at 76, § 1.

exclusively to so-called “divine religions”⁹⁵ and categorically links defamation with blasphemy by condemning “all blasphemous acts against Islamic principles, symbols and sacred personalities” and “all abhorrent and irresponsible statements about Islam and its sacred personalities.”⁹⁶

The resolution’s provisions notably omit any consideration of the deleterious impact of existing anti-blasphemy measures in OIC member states and elsewhere.⁹⁷ But perhaps most starkly at odds with the fanfare surrounding the UNHRC’s consensus on combating incitement, the OIC resolution calls upon all states “to prevent any . . . defamation of Islam by incorporating legal and administrative measures which render defamation illegal and punishable by law.”⁹⁸ Drawing on the OIC’s position in the UNHRC Ad Hoc Committee, the resolution calls for “a legally binding international instrument to prevent intolerance, discrimination, prejudice and hatred on the grounds of religion, and defamation of religions . . .”⁹⁹

If the OIC’s commitment to advancing a prohibition on defamation of religion still appears ambivalent or otherwise displaced by the consensus vote at the UNHRC, Resolution 34/38-POL cements the OIC’s position by establishing an annual reporting requirement intended to cover “defamatory acts against Islam or its sacred personalities.”¹⁰⁰ And it maintains the defamation issue as an item agenda for the 39th Session of the Council of Foreign Ministers.¹⁰¹

Similarly, Resolution 35/38-POL, expressly addressing “Combating Defamation of Religions” also reaffirms previous UN resolutions on defamation of religion, and

[e]mphasiz[es] that the consistent pattern of safe passage of the resolution, by a majority vote beyond OIC membership, lends recognition and international legitimacy to the urgent need to combat defamation of religions.¹⁰²

To undergird this position, the OIC elsewhere calls for “the non-use of the universality of human rights as a pretext to interfere in the

⁹⁵ *Id.*

⁹⁶ *Id.* § 5.

⁹⁷ See *infra* Part IV.C (discussing numerous instances of anti-blasphemy laws being used by OIC member states to infringe on freedom of expression and freedom of religion or belief).

⁹⁸ OIC Res. 34/38-POL, *supra* note 94, at 77, § 9.

⁹⁹ *Id.* § 12 (quotations omitted). The resolution also established an “open-ended Intergovernmental Group of Legal and Political Experts to develop and examine the legal and political elements of such an instrument.” *Id.* at 78, § 13.

¹⁰⁰ *Id.* § 16.

¹⁰¹ *Id.* § 18.

¹⁰² OIC Res. No. 35/38-POL, *supra* note 11, at 79 (emphasis removed).

states' internal affairs and diminish their national sovereignty."¹⁰³ Together with this, the OIC also asserts that western states have a responsibility to "ensure full respect to Islam and all divine religions" and must reject the use of "freedom of expression or press as a pretext to defame religions."¹⁰⁴ Arguably, these assertions may reflect no more than rhetorical declarations. Resolution 35/38-POL, however, also mandates very practical steps for advancing efforts to secure a prohibition against defamation by, among other things, intensifying efforts to coordinate positions and broaden the support base in favor of defamation resolutions "including through . . . possibilities of reciprocal arrangements with other groups and states."¹⁰⁵ The resolution also recommends specific activities be undertaken by the OIC Secretary General.¹⁰⁶

This political and legal maneuvering in turn begs the question: How does the OIC reconcile its business-as-usual marching orders concerning an international prohibition on defamation of religion with the consensus mandate espoused by Resolution 16/18 and celebrated by government and NGO officials alike? To help answer this question, the OIC's 2011 resolutions provide two critical pieces of information. First, the organization offers no more than a passing acknowledgement of the so-called historic UNHRC resolution. And even then, the reference is couched in classically tepid diplomatic parlance that merely takes note of "the adoption by consensus of the HRC resolution 16/18."¹⁰⁷ But beyond this lukewarm endorsement, the OIC more tellingly "[u]rges all Member States to continue to support the [defamation of religion] resolution on bloc . . . while exploring alternative approaches, including the one contained in the HRC resolution 16/18."¹⁰⁸ From this perspective, the resolution

¹⁰³ OIC, *On Follow Up and Coordination of Work On Human Rights*, OIC Res. No. 1/38-Leg, compiled in *Resolutions on Legal Affairs*, at 4, § 5, O.I.C. Doc. OIC/CFM-38/2011/LEG/RES (June 28–30, 2011) [hereinafter OIC Res. No. 1/38-Leg]; see also OIC, *On Follow Up and Coordination of Work On Human Rights*, OIC Res. No. 1/37-Leg, at 1, § 5, compiled in *Resolutions on Legal Affairs*, O.I.C. Doc. OIC/CFM-37/2010/LEG/RES.FINAL (May 18–20, 2010) [hereinafter OIC Res. No. 1/37-Leg] (emphasis removed) ("Calls for the non-use of the universality of human rights as a pretext to interfere in the states' internal affairs and undermine their national sovereignty.")

¹⁰⁴ OIC Res. No. 1/38-Leg, *supra* note 103, at 4, § 8; see also *id.* at 5, § 10 (similarly reaffirming "the need to pursue, as a matter of priority, a common policy aimed at preventing defamation of Islam perpetrated under the pretext and justification of the freedom of expression in particular through media and Internet").

¹⁰⁵ OIC Res. No. 35/38-POL, *supra* note 11, at 82, § 14.

¹⁰⁶ *Id.* § 16.

¹⁰⁷ *Id.* § 14. The preamble of this resolution "[r]eaffirm[s] the OIC sponsored resolutions on combating defamation of religions adopted by the Human Rights Council and the United Nations General Assembly" and then "[a]lso reaffirm[s] the OIC sponsored resolution 16/18." *Id.* at 79 (emphasis removed).

¹⁰⁸ *Id.* at 82, § 15.

ostensibly responsible for putting an end to “divisive debate” at the UN is no more than a distraction, an alternative approach to securing the OIC’s unaffected top priority—an international prohibition against speech deemed critical or insulting of Islam, or at the very least, international validation for the continued prosecution of blasphemy offenses at home.

That this objective remains a “top priority” is confirmed not only in the text of the OIC resolution on combating defamation of religion,¹⁰⁹ but also in the organization’s steadfast commitment to the subject even in the face of seemingly more urgent matters. For example, a survey of issues addressed at the OIC Annual Coordination Meeting held in September 2011, and illustrated in the below table, indicates that defamation of religion received more consideration than developments in Libya, Afghanistan, Syria, and Iraq combined.¹¹⁰ In fact, the only issue that garnered more attention than defamation was the OIC’s perennial concern with the Arab-Israeli/Israeli-Palestinian conflict—an issue inextricably linked to the organization’s establishment in 1969.¹¹¹

¹⁰⁹ *Id.* § 17.

¹¹⁰ OIC, *Final Communiqué of the Annual Coordination Meeting of Ministers of Foreign Affairs of the OIC Member States*, O.I.C. Doc. OIC/ACM-2011/FC (Sept. 26, 2011) [hereinafter OIC, *Final Communiqué*].

¹¹¹ Ishtiaq Ahmad, *The Organization of the Islamic Conference: From Ceremonial Politics Towards Politicization?*, in *BEYOND REGIONALISM?: REGIONAL COOPERATION, REGIONALISM AND REGIONALIZATION IN THE MIDDLE EAST* 125, 125 (Cilja Harders & Matteo Legrenzi eds., 2008).

Table: Issues Addressed by OIC Annual Coordination Meeting
Final Communiqué 2011

| <i>Rank</i> | <i>Issue</i> | <i>Total # of Paragraphs (Paragraph #s)</i> |
|-------------|---|---|
| 1 | Arab-Israeli/Israeli-Palestinian conflict (express references only) | 12 (¶¶ 5–11, 13–15, 45, & 54) |
| 2 | Defamation of religion, Islamophobia, & incitement to racial and religious hatred | 10 (¶¶ 54–63) |
| 3 | Terrorism | 6 (¶¶ 39–44) |
| 3 | UN reform (including OIC voting at the UN relating expressly to, <i>inter alia</i> , defamation of religion) ¹¹² | 6 (¶¶ 64–69) |
| 4 | Nuclear weapons/energy, disarmament & non-proliferation | 5 (¶¶ 45–49) |
| 5 | Jammu and Kashmir | 4 (¶¶ 20–23) |
| 6 | Libya | 4 (¶¶ 26–29) |
| 7 | Somalia | 2 (¶¶ 25 & 33) |
| 7 | Kosovo | 2 (¶¶ 30–31) |
| 8 | Azerbaijan | 1 (¶ 18) |
| 8 | Cyprus | 1 (¶ 19) |
| 8 | Iraq | 1 (¶ 32) |
| 8 | Muslims in Greece | 1 (¶ 34) |
| 8 | Sudan | 1 (¶ 35) |
| 8 | Yemen | 1 (¶ 36) |
| 8 | Djibouti | 1 (¶ 37) |
| 8 | Afghanistan | 1 (¶ 38) |
| 8 | Syrian crisis (Arab Spring) | 1 (¶ 15) |

This ranking indicates that UNHRC Resolution 16/18 failed to persuade the OIC that defamation of religion needed to be shelved or abandoned. An EU-sponsored review of the UNHRC that *predates* adoption of Resolution 16/18 confirms that the OIC’s agenda priorities remain unchanged, even in a “post-consensus” era.

¹¹² See also OIC, *On Coordination and Voting Patterns of Member States at the United Nations and Other International and Multilateral Fora*, Res. No. 41/37-POL, compiled in *Resolutions on Political Issues*, at 99, § 5, O.I.C. Doc. OIC/CFM-37/2010/POL/RES//FINAL (May 18–20, 2010) [hereinafter OIC Res. No. 41/37-POL] (emphasis added) (“Calls on Member States to further enhance their [UN] cooperation and coordination, and adopt unified positions and voting patterns . . . that advance the objectives and principles of the OIC and interests of the Islamic world, including those that relate to combating Islamophobia, the defamation of religions, and peaceful settlement of conflicts.”). The 2011 final communiqué “urge[s] Member States to implement [this] Resolution . . .” OIC, *Final Communiqué*, *supra* note 110, ¶ 67.

According to the report, “[a]lmost all of the OIC resolutions in regular sessions concern Israeli violations of human rights, or defamation of religions.”¹¹³

In addition to illuminating the OIC’s top priorities, the 2011 Final Communique is also instructive insofar as it confirms the OIC’s framing of UNHRC Resolution 16/18 as merely a stepping-stone on the path to an international prohibition of defamation of religion. The Communique specifically lauds the OIC Groups in New York and Geneva for placing the “crucial” issue of “incitement to racial and religious hatred, *in particular, its contemporary manifestation—i.e. the defamation of religions*, at the top of the permanent agenda of the General Assembly and the HRC.”¹¹⁴ The statement then proceeds to: (1) “emphasize[] the need to develop, at the United Nations, including the Human Rights Council, a legally binding international instrument to promote respect for all religions”;¹¹⁵ (2) “stress[] the need to prevent the abuse of freedom of expression and freedom of press for insulting Islam and other divine religions”;¹¹⁶ and finally (3) urge Member States to implement OIC Resolution 41/37-POL,¹¹⁷ which stated their commitment to vote as a bloc at the UN on OIC objectives, “including those that relate to combating Islamophobia [and] the defamation of religions”¹¹⁸

The significance of both the OIC drive in favor of bloc voting and its impact on UN affairs is worth underscoring in the context of Resolution 16/18 and any future action on the questions of incitement and defamation. The EU’s 2011 report on the UNHRC observes that “the Africa Group often seems to be working in conjunction with the OIC—and frequently OIC members will speak on behalf of the Africa Group. The OIC’s concerns have thus been dominating the HRC’s discussions and outcomes.”¹¹⁹ As an outgrowth of the pervasiveness of ‘bloc politics’ within the HRC, “moderate states in blocs opposing the EU often find it more attractive to go along with the OIC or the Africa Group or the NAM [Non Aligned Movement] than to resist the peer pressure and vote with the EU.”¹²⁰ More distressingly, the

¹¹³ The European Union and the Review of the Human Rights Council, EUR. PARL. DOC. PE 433.870, at 13 (2011).

¹¹⁴ OIC, *Final Communique*, *supra* note 110, ¶ 54 (emphasis added).

¹¹⁵ *Id.* ¶ 59.

¹¹⁶ *Id.* ¶ 61.

¹¹⁷ *Id.* ¶ 67.

¹¹⁸ OIC Res. No. 41/37-POL, *supra* note 112, at 99, § 5.

¹¹⁹ EUR. PARL. DOC. PE 433.870, *supra* note 113, at 13. This phenomenon is confirmed by the Africa Group’s position within the framework of the Ad Hoc Committee on Complementary Standards. *See supra* Part I.B.

¹²⁰ *Id.* at 15.

pattern of response to this bloc voting has been colored by a “prevailing view . . . that the EU should avoid ‘losing’ and therefore should not run . . . resolutions that may not attract a consensus.”¹²¹ As a consequence, the report finds that EU ambitions in the UNHRC have been distinctly lowered. Rather than propose and pursue its own resolutions,¹²² the EU approach is characterized by a shift away “quite considerably from its initial position” in favor of “going for consensus.”¹²³ Although this tactic may generate the appearance of unanimity within the Council, it does little to address the report’s underlying conclusion that consensus-seeking behavior may ultimately harm “the cause of promoting and protecting human rights.”¹²⁴ In this respect, Resolution 16/18 and its outgrowth is a case in point.

*C. The Istanbul Process for Combating Intolerance and
Discrimination Based on Religion or Belief: Anyone for Jenga?*

On the heels of the 38th session of the OIC’s Council of Foreign Ministers, the OIC and United States co-hosted in Istanbul, Turkey, a high-level ministerial meeting intended to facilitate Resolution 16/18’s implementation. The event, which gathered representatives from key states and international organizations, ended with a feeble joint statement “call[ing] upon all relevant stakeholders throughout the world to take seriously the call for action set forth in Resolution 16/18.”¹²⁵ Secretary of State Hillary Clinton separately remarked:

[T]ogether we have begun to overcome the false divide that pits religious sensitivities against freedom of expression, and we are pursuing a new approach based on concrete steps to fight intolerance wherever it occurs. Under [Resolution 16/18], the international community is taking a strong stand

¹²¹ *Id.* at 12–13. The report also noted:

The EU’s isolation is evident in the voting records of the Human Rights Council. While most resolutions in the HRC are approved by consensus, roll-call votes are held on the most contentious issues. In the first fifteen regular sessions, there were a total of 89 roll-call votes. In 64 of them (72%), EU member states were in the minority.

Id. at 14.

¹²² *Id.* at 13.

¹²³ *Id.* at 18.

¹²⁴ *Id.*

¹²⁵ *Joint Statement on Combating Intolerance, Discrimination, and Violence Based on Religion or Belief*, ORGANISATION OF ISLAMIC COOPERATION (Jul. 15, 2011), <http://www.oicun.org/oicus/oicusprojects/20110719041927244.html>.

for freedom of expression and worship, and against discrimination and violence based upon religion or belief.¹²⁶

To further advance this new approach, the United States announced the “Istanbul Process,” a series of expert level meetings intended to “operationalize[e] the text of HRC Resolution 16/18 . . . [and] turn our energies to seeking real and effective measures against bigotry, discrimination, and violence on the basis of religion or belief in the ways spelled out in Resolution 16/18, which are fully consistent with freedom of expression.”¹²⁷

The first of these meetings was held behind closed doors over three days in late December 2011 in Washington DC. The meeting focused on the twin themes of identifying methods to better enforce laws that prohibit discrimination on the basis of religion or belief and exploring government strategies to engage religious minorities, including religious and cultural awareness training for government officials.¹²⁸ Although not in attendance, OIC Secretary General Ihsanoglu sent a message to the meeting participants, reiterating verbatim the remarks he offered several months earlier in Istanbul:

The importance of the consensual adoption of [Resolution 16/18] cannot be overemphasized. . . .

. . . .

Let me say that it reaffirmed OIC’s credibility as well as demonstrated ability to seek, promote and build consensus on even the most sensitive of issues in contemporary international relations. It clearly demonstrated that, as a mature International Organization, OIC was not wedded to either a particular title or the content of a resolution. We just wanted to ensure that the actual matter of vital concern and interest to OIC Member states was addressed.¹²⁹

¹²⁶ Clinton, *supra* note 9.

¹²⁷ U.S. Dep’t of State, Resolution 16/18 December Expert Level Meeting, *supra* note 55, at 2.

¹²⁸ Cook, *supra* note 13; *see also* Agenda, Istanbul Process For Combating Intolerance and Discrimination Based on Religion or Belief, Dec. 12–14, 2011 (on file with the author).

¹²⁹ OIC Secretary General, Message to the Washington Meeting on the Istanbul Process (Dec. 14, 2011), *available at* <http://www.oicun.org/oicus/oicusprojects/20111215123907595.html>. This message is a repeat of the one offered at the outset of the ministerial meeting held in Istanbul on July 15, 2011. *See* OIC, *Statement of HE Prof. Ekmeleddin Ihsanoglu, the OIC Secretary General, at the Ministerial Meeting, held on 15 July 2011 at the IRCICA in Istanbul-Turkey* (July 19, 2011), www.oicun.org/oicus/oicusprojects/20110719042534728.html.

It is difficult to reconcile this statement with those promulgated by OIC representatives and others in the lead up to voting on Resolution 16/18. Yet more egregiously, when contextualized against the flurry of OIC activity both internally and at the UN reasserting the organization's commitment to securing a prohibition against perceived criticism and insult of religious ideas and beliefs, the Secretary General's assertion that the OIC is not wed to content appears dubious at best.

For its part, the U.S. Department of State has announced its intention to compile "a comprehensive report based on discussions [from the December meetings] outlining a set of recommendations and best practices to be submitted to the [OHCHR] for public distribution."¹³⁰ But confronted with the OIC's seemingly contradictory positions, one must wonder what value such recommendations will have in developing a genuinely consensual vision for combating religious intolerance while upholding religious freedom and freedom of expression. Indeed, the quest for concrete implementation standards will likely prove to be a Jenga moment for Resolution 16/18. By failing to decisively invalidate the chimera of defamation of religion, the UN has allowed the OIC to advocate its continued legality, including by openly asserting that implementation of Resolution 16/18 is one possible "alternative approach" to achieving the end goal of shielding religious beliefs from criticism and insult. Against this backdrop, international negotiations aimed at identifying implementation tools and practices will likely be subject to significant pressure, particularly with respect to key terms enshrined in Resolution 16/18.

Although international law does provide some guidance, such as ICCPR Article 20, which suffers from underdeveloped consideration, the ongoing activity of the UNHRC Ad Hoc Committee and the OIC's unaltered position signal the persistence of radically divergent opinions. In this vein, discrepancies and nuances over parsing what constitutes incitement, advocacy, discrimination, hostility, religious hatred, denigration, negative religious stereotyping, and imminent violence may generate three possible outcomes: (1) promulgated international implementation standards that omit precise definitions for key terms but retain consensus support; (2) a complete public breakdown in negotiations or a contentious roll call vote on implementation standards where consensus over specific terms cannot be reached; or (3) the parties may opt in favor of death by committee,

¹³⁰ U.S. Dep't of State, Resolution 16/18 December Expert Level Meeting, *supra* note 55, at 2.

where consensus over specific terms cannot be reached, resulting in no public follow up by the UNHRC on implementation standards.

In the first scenario, national authorities are left to fill in the blanks, allowing for operationalization of Resolution 16/18 that facilitates subjective interpretation and measures that continue to protect select religious beliefs at the expense of freedom of expression and freedom of religion or belief. Here, the OIC will be quick to point to its consistent understanding that while “human rights are universal in nature,” any consideration must “bear[] in mind the significance of national and regional particularities and various historical, cultural and religious backgrounds.”¹³¹ In the second case, where negotiations suffer a public breakdown, the OIC’s hand is similarly strengthened insofar as its member states are left free to invoke both consensus Resolution 16/18 and previous defamation of religion resolutions as valid bases for redoubling efforts intended to prohibit defamation of religion. A roll call vote on implementation standards likewise leaves Resolution 16/18 intact and, given the current makeup of the UNHRC, seems unlikely to endorse any norms that contradict OIC objectives. Under the third scenario, the parties may, in the spirit of consensus, “agree to disagree” and in turn opt to bury international implementation standards rather than spark another “divisive debate.” That outcome would similarly empower national authorities to superimpose a subjective interpretation on Resolution 16/18, including a linkage between it and previous defamation of religion resolutions. This linkage, in turn, would ostensibly validate domestic measures limiting perceived criticism or insult of select religious beliefs as comporting with international law.

IV. MOVING FORWARD

In November 2011, the UN’s Third Committee approved a consensus resolution mostly mirroring UNHRC Resolution 16/18.¹³² Human Rights First (“HRF”) called the Third Committee text “a decisive break from the polarizing focus in the past on defamation of religions.”¹³³ Speaking after its adoption, the representative from the

¹³¹ OIC Res. No. 1/38-Leg, *supra* note 103, at 4, § 1; *see also* OIC Res. No 1/37-Leg, *supra* note 103, at 1 (recognizing the importance of promoting human rights while taking into account various historical and cultural backgrounds).

¹³² Social, Humanitarian & Cultural—Third Committee Res. 66/69(b), U.N. Doc. A/C.3/66/L.47/Rev.1 (Nov. 11, 2011). One notable distinction requires the Secretary-General to prepare “a report on steps taken by States to combat intolerance, negative stereotyping, stigmatization, discrimination, incitement to violence and violence against persons, based on religion or belief.” *Id.* at 5, § 10.

¹³³ Press Release, Human Rights First, U.N. Third Committee Makes Decisive Break from “Defamation of Religion” (Nov. 15, 2011), <http://www.humanrightsfirst.org/2011/11/15/u-n->

United Arab Emirates (“UAE”), on behalf of the OIC, again emphasized that the resolution was inexorably linked to prior resolutions addressing defamation of religion.¹³⁴ Alongside this, the most recent issue of *OIC Journal* affirmed for its readers that incitement to religious hatred and defamation of religion are indistinguishable: “Resolution 16/18 signifies an alternative and consensual approach towards dealing with the issue of ‘defamation of religions’ or incitement to hatred on religious grounds with a view to addressing vital concerns of all parties on this important issue.”¹³⁵

Despite the OIC’s very public and consistent assertion that defamation of religion remains valid and the organization’s express intent to continue advocating its formal adoption, the UNGA moved to adopt the Third Committee’s resolution one month later in December 2011, again without a vote.¹³⁶ In an effort to counter “commonly expressed concerns”¹³⁷ challenging the wisdom of the UNGA vote and the unfolding Istanbul Process,¹³⁸ HRF sought to

third-committee-makes-decisive-break-from-%E2%80%9Cdefamation-of-religion%E2%80%9D/. HRF also heralded Resolution 16/18 as a fresh start which “charted a new course” by focusing on the protection of the rights of individuals rather than the protection of abstract ideas and religions. Press Release, Human Rights First, U.N. General Assembly Urged to Combat Intolerance, Respect Free Expression (Oct. 21, 2011), <http://www.humanrightsfirst.org/2011/10/21/u-n-general-assembly-urged-to-combat-intolerance-respect-free-expression/>.

¹³⁴ See Press Release, General Assembly, Third Committee, Text Recommending Adoption of Protocol to Child Rights Convention Establishing Communications Procedure for Individual Complaints Approved by Third Committee; 13 Other Texts Approved on Such Issues as Combating Religious Intolerance, Disabilities Convention, Human Rights Learning, Human Rights Council Report, U.N. Press Release GA/SHC/4029 (Nov. 15, 2011) (“[The consensus] was a very positive development . . . which also complemented other General Assembly resolutions.”).

¹³⁵ *‘Istanbul Process’ Continues: UN Resolution 16/18 Sets on an Implementation Framework in Washington*, OIC J., Sept.–Dec. 2011, at 48, 48.

¹³⁶ G.A. Res. 66/167, U.N. Doc. A/RES/66/167 (Dec. 19, 2011); see also Press Release, General Assembly, General Assembly Adopts More Than 60 Resolutions Recommended by Third Committee, Including Text Condemning Grave, Systematic Human Rights Violations in Syria, U.N. Press Release GA/11198 (Dec. 19, 2011) (announcing the adoption of the resolution); *Resolutions: 66th Session*, GEN. ASSEMBLY OF THE UNITED NATIONS, <http://www.un.org/en/ga/66/resolutions.shtml> (last visited Mar. 2, 2012) (listing resolutions adopted by the 66th session of the General Assembly).

¹³⁷ See Joëlle Fiss, *U.N. Tackles Religious Intolerance Without Limiting Free Speech*, HUMAN RIGHTS FIRST (Dec. 20, 2011), <http://www.humanrightsfirst.org/2011/12/20/the-u-s-is-not-opening-the-door-to-limiting-freedom-of-speech/> (responding to certain concerns over the U.N. resolution on combating religious intolerance).

¹³⁸ Conservative critics have most vocally raised these concerns. See, e.g., Soeren Kern, *U.S., E.U. Spearhead Islamic Bid to Criminalize Free Speech*, STONEGATE INST. (Jan. 6, 2012, 5:00 AM), <http://www.stonegateinstitute.org/2734/criminalize-free-speech> (criticizing the Obama administration for giving the OIC political legitimacy); Joseph Klein, *The Obama Administration’s Islamist Whitewashing Campaign*, FRONTPAGEMAG.COM (Dec. 21, 2011), <http://frontpagemag.com/2011/12/21/the-obama-administrations-islamist-whitewashing-campaign/> (criticizing the Obama administration for submitting to the OIC’s wishes); Nina

rebut several “myths” related to U.S. engagement with Muslim states. One of these myths, according to HRF, posits that if “[t]he OIC has not abandoned the concept of defamation of religions . . . why bother organizing [the Istanbul Process] if its agenda hasn’t changed?”¹³⁹ Acknowledging that defamation of religion “has not vanished into thin air” and that blasphemy laws “continue to abuse human rights,” HRF downplayed the sustained effort to preserve defamation of religion’s legitimacy by loosely observing that “[a]t the international level . . . certain leaders have not abandoned reference to defamation of religions.”¹⁴⁰ This casual assessment neglects the scope and consistency of the OIC’s multiple statements and resolutions that followed on the heels of Resolution 16/18. Moreover, it recklessly ignores the immediate connection that the OIC continues to draw between previous defamation of religion resolutions and the consensus resolutions of 2011.

Ultimately, HRF’s “myth” and “reality” misses the point. While it may be fair to question the practicality of dialogue, the larger concern should be whether the Istanbul Process can realistically offer a framework for progress given the potential for manipulation outlined above, as well as the failure to decisively reject the defamation of religion chimera. We ignore these shortcomings in the international consensus at the peril of religious dissenters, religious minorities, nonbelievers, artists, academics, journalists, and others who seek to exercise their rights to free expression and freedom of religion in accordance with existing international norms. It therefore behooves governments and other communities concerned with the protection of these rights to stop dutifully validating the consensus approach without taking critical stock of the process to date. To facilitate this undertaking, and in the context of the findings presented herein, the author proposes some general suggestions below.

A. Resolve to Categorically Invalidate Defamation of Religion

Perhaps the single largest obstacle to genuine international progress toward combatting intolerance is the UN’s failure to reject

Shea, *A Perverse ‘Process’: Hillary’s Free-Speech Follies*, N.Y. POST (Dec. 16, 2011, 10:15 PM) (calling on US diplomats to stop the “Istanbul Process”); see also Jonathan Turley, *Criminalizing Intolerance*, Op-Ed, L.A. TIMES, Dec. 12, 2011.

¹³⁹ Fiss, *supra* note 137.

¹⁴⁰ *Id.* Fiss goes on to suggest that “[t]his requires continued vigilance on the part of the US and like-minded governments, as well as human rights and other civil society groups, to ensure that the momentum remains on the side of the new consensus approach.” *Id.*

decisively the concept of defamation of religion. This failure ensures that the idea remains an albatross to any parallel or consensus process. This is particularly true when certain states, most notably OIC members, continue to invoke prior UN resolutions on this topic unchallenged as valid normative standards for protecting select religious beliefs. This overarching problem is exacerbated by the decision to sidestep the stark confrontation over defamation of religion in favor of an approach premised on inadequately defined norms that provide a sufficiently vague platform for achieving consensus. The new consensus approach has effectively shut down the debate over an underlying and unresolved fundamental dispute. And it has effectively moved the debate to an area where states are poised to reformulate the same insidious practices under the guise of the decidedly more admirable objective of combatting intolerance. Pressing the international community to implement norms for combatting intolerance under these circumstances potentially risks accommodating the same goals sought by defamation of religion.

More troubling, the consensus approach complicates the task of identifying problematic practices because it shifts the debate from one characterized by distinct bright lines to a more nuanced and subjective framework that leaves greater maneuvering room for justifying discrimination and limitations of rights. This loss of clarity is problematic not only from a rights perspective, but from an engagement perspective as well. Saying that international law prohibits protecting religious beliefs from insult is a more straightforward proposition than saying international law rejects a national legislature or judiciary's interpretation of what constitutes incitement, or for that matter, imminent violence. Thus, identifying and countering instances of abusive implementation of measures intended to combat intolerance becomes decidedly more complicated. This potential fallout underscores why the Istanbul Process augurs such little promise and in fact may further facilitate human rights abuses.

To counteract this deleterious path, progress on the Istanbul Process must be monitored closely. Discussions regarding the scope of freedom of expression and other fundamental rights necessarily dictate transparency.¹⁴¹ At a minimum, this requires opening future proceedings to outside participation and scrutiny from NGOs, journalists, academics and other concerned parties. Based on

¹⁴¹ Recall that the Washington DC round of the Istanbul Process was "closed-door." Josef Kuhn, *'The Istanbul Process': Hillary Clinton Hosts Summit on Religious Intolerance*, HUFFINGTON POST (Dec. 15, 2011, 9:29 PM), http://www.huffingtonpost.com/2011/12/15/istanbul-process-clinton_n_1152508.html.

whatever progress may be achieved for identifying means of implementing Resolution 16/18 through the Istanbul Process, any future UN resolution enshrining such norms should include operative language clearly invalidating previous defamation of religion resolutions as well as any other attempts to introduce similar norms intended to shield religious beliefs from criticism.¹⁴² Admittedly, the extent to which this is a feasible option is certainly open to debate. Nevertheless, rejection of the defamation of religion concept must be a prerequisite to any further advancement because it affords the only authoritative means by which the specter of defamation of religion can be prevented from contaminating genuine efforts aimed at combatting incitement.¹⁴³ To this end, there are several steps that can be taken that build on earlier successes in lowering the numerical majority voting in favor of defamation of religion resolutions.

B. Assertive Engagement on Constitutional and Legislative Reform

The Arab Spring revolutions can figure prominently in engaging individual OIC member states. While many of these new governments are emerging as decidedly Islamic in orientation, they are also entering a world where human rights commitments are increasingly important. Any extension of diplomatic and political support and recognition, trade benefits, and aid (in the form of financial and other assistance) should require the endorsement and adoption of international human rights standards, not only in new constitutions, but also in legislative reform that the post-revolution era necessitates. Therefore, in addition to monitoring constitutional and legislative change in countries in transition, the international community should create opportunities for concrete engagement, particularly regarding how these new governments intend to address the challenge of combatting intolerance, as well as enshrine and uphold international human rights.

¹⁴² As this Article goes to press, no progress on agreed implementation norms has been made. Instead, the UNHRC's nineteenth session in March 2012 approved by consensus a resolution on combating intolerance that reiterates almost verbatim Resolution 16/18, without any supplemental reference to implementation. Human Rights Council Res. 19/..., Combating Intolerance, Negative Stereotyping and Stigmatization of, and Discrimination, Incitement to Violence and Violence Against, Persons Based on Religion or Belief, 19th Sess., Mar. 23, 2012, U.N. Doc. A/HRC/19/L.7 (Mar. 16, 2012).

¹⁴³ There is at least one precedent at the UN concerning revocation of previous resolutions. Consider the 1991 UNGA decision to cancel its infamous Resolution 3379 from sixteen years earlier, which purported to brand Zionism a form of racism and racial discrimination. The one-line resolution simply provided that the UNGA "[d]ecides to revoke the determination contained in its resolution 3379 (XXX) of 10 November 1975." G.A. Res. 46/86, U.N. Doc. A/RES/46/86 (Dec. 16, 1991). Arguably, a more explicit rejection of the defamation of religion norm that provides additional context and justification could be negotiated.

International recognition of these new governments and endorsements of legitimacy should not be extended as a matter of course. A useful starting point is the EU's decision to condition diplomatic recognition of post-Soviet states *inter alia* on the provision of legal "guarantees for the rights of ethnic and national groups and minorities"¹⁴⁴ Yet, already the international community appears poised to place inadequate emphasis on the importance of concretizing rights in emerging constitutional texts.¹⁴⁵ For example, Libya's Draft Constitutional Charter for the Transitional Stage, provides that "Islam is the Religion of the State and the principal source of legislation is Islamic Jurisprudence (Sharia)."¹⁴⁶ While the maintenance of an established state religion is not per se incompatible with international human rights law, such official recognition must not result in any impairment of recognized rights, "nor in any discrimination against adherents to other religions or non-believers."¹⁴⁷ With this in mind, the text fails to elaborate on key questions including whose interpretation of sharia shall govern during the transitional period, to whom shall sharia be applied, or what will occur in the event of conflicts between sharia and international law. To this end, Article 7, which provides that "[h]uman rights and his basic freedoms shall be respected . . . [and that] [t]he state shall endeavor to join the international and regional declarations and charters which protect such rights and freedoms,"¹⁴⁸ leaves significant room for improvement.

Similarly, statements of western officials do not go far enough in establishing a minimum expectation for enshrining international

¹⁴⁴ *European Community: Declaration on Yugoslavia and on the Guidelines on the Recognition of New States*, 31 INT'L LEGAL MATERIALS 1485, 1487 (1992).

¹⁴⁵ One comparative constitutional scholar recently writing about the unfolding drafting process omitted any mention of an international role in the process or the importance of incorporating strong protection for fundamental human rights. Tom Ginsburg, *Libya's New Constitution: Lessons from Iraq's Missteps*, CHI. TRIB., Oct. 21, 2011. Earlier observations by Ginsburg gloss over the issue of rights and focus instead on governance structure. See Tom Ginsburg, *Thoughts on the Draft Transitional Constitution for Libya*, CONSTITUTIONMAKING.ORG (Aug. 21, 2011, 9:23 AM), <http://www.comparativeconstitutions.org/2011/08/thoughts-on-draft-transitional.html> (discussing the importance of governance structure); see also Catherine Ashton, EU High Representative for Foreign Affairs and Sec'y Policy and Vice President of the European Comm'n, Speech at the Libya Women's Rights Forum (Nov. 12, 2011), available at http://www.europa-eu-un.org/articles/fr/article_11579_fr.htm (emphasizing the importance of political rights for women).

¹⁴⁶ The Transitional Nat'l Council of Libya, *Draft Constitutional Charter for the Transitional Stage*, AL-BAB.COM, art. 1, <http://www.al-bab.com/arab/docs/libya/Libya-Draft-Constitutional-Charter-for-the-Transitional-Stage.pdf> (last visited Mar. 19, 2012).

¹⁴⁷ Human Rights Comm., *General Comment No. 22: Article 18: The Right to Freedom of Thought, Conscience and Religion*, ¶9, UN Doc. CCPR/C/21/Rev.1/Add.4 (Jul. 30, 1993).

¹⁴⁸ *Draft Constitutional Charter*, *supra* note 146, at art. 7.

human rights norms in emerging constitutions and state practice. For example, in July 2011 Secretary of State Clinton said, “In Egypt and Tunisia, we hope to see minorities brought into the process of drafting a new constitution and given a seat at the table as new democracies take shape.”¹⁴⁹ This timid stance is meager support for those favoring reforms in line with international human rights norms, and does precious little to motivate other relevant actors to forgo advocacy of illegitimate limits on freedom of expression, including support for a prohibition on “defamation of religions”.¹⁵⁰ Indeed, several months later, Egypt’s constitution drafting committee is in disarray, faced with charges that some Islamists have sought to hamper the voices of more moderate Egyptian Muslims, Coptic Christians, and secularists, among others. Following a walkout by over 20 committee delegates representative of these minority groups, an administrative court moved to suspend the 100-member committee pending a review of the process surrounding its formation.¹⁵¹

Building on the EU’s post-Cold War approach, therefore, the international community should be prepared to “up the ante”. It must develop a diplomatic strategy that moves beyond previously accepted constraints on engagement in a transparent and straightforward manner. As recent case studies, Afghanistan and Iraq offer scant evidence to support perpetuating the “hands off” approach that prevailed in those constitutional drafting experiences.¹⁵² Nevertheless,

¹⁴⁹ Clinton, *supra* note 9.

¹⁵⁰ See Tunisia: *Affirm Human Rights in New Constitution*, HUMAN RIGHTS WATCH (Oct. 20, 2011), <http://www.hrw.org/news/2011/10/19/tunisia-affirm-human-rights-new-constitution> (noting that a questionnaire that surveyed Tunisian political parties found that those parties “disagree on limits to freedom of expression when it concerns the right to privacy, the protection of minorities against hate speech, and the “defamation of religions””).

¹⁵¹ Bradley Hope, *Egyptian constitution committee suspended*, THE NATIONAL (Abu Dhabi), Apr. 11, 2012, <http://www.thenational.ae/news/world/middle-east/egyptian-constitution-committee-suspended>. See also Zvi Bar’el, *Muslim Brotherhood suffers blow as Egypt court annuls constitutional panel* HA’ARETZ, Apr. 11, 2012, <http://www.haaretz.com/news/middle-east/muslim-brotherhood-suffers-blow-as-egypt-court-annuls-constitutional-panel-1.423595>.

¹⁵² On Afghanistan, see for example United States Commission on International Religious Freedom, *Afghanistan: Draft Constitution Could Codify Repression*, Apr. 17, 2003, http://www.uscirf.gov/index.php?option=com_content&task=view&id=1477 (observing “There is no clear evidence that the United States has been sufficiently involved in [Afghanistan’s] constitution-drafting process to ensure that universal human rights are guaranteed. Through a contractor, U.S. assistance has concentrated on providing technical and logistical support for the drafting committee and assistance in the public consultation process.”), Mir Hermatullah Sadat, *The Implementation of Constitutional Human Rights in Afghanistan*, HUMAN RIGHTS BRIEF 11, no. 2 (2004): 48–50, back page, available at <http://www.wcl.american.edu/hrbrief/11/3sadat.pdf?rd=1> (noting that “the international community and the UN have been generally ineffective in promoting human rights in Afghanistan. The UN has been non-committal because its main agency, United Nations Assistance Mission in Afghanistan (UNAMA), wants to maintain a ‘light footprint’ presence in Afghanistan”), and Cornelia Schneider, *The International Community and Afghanistan’s Constitution*, 7 PEACE, CONFLICT AND DEVELOPMENT: AN INTERDISCIPLINARY JOURNAL (July

some experts continue to endorse precisely this approach, calling for limiting engagement on constitution drafting to generic efforts such as “communicat[ing] that rule of law works” and “offer[ing] fair technical help.”¹⁵³ A new international strategy should draw a principled and valid distinction between the dubious imposition of a constitution on a sovereign state and the legitimate active and assertive promotion of the inclusion of strong, internationally recognized human rights safeguards in any new constitutional text. The international community can use a range of diplomatic, development, trade, and even military assistance incentives to this end, including direct support for those political associations that favor adopting international human rights norms as part of their political platforms. Admittedly, a positive outcome for this more aggressive engagement effort is by no means assured. This reality is underscored by the decision of Egyptian authorities to prosecute a number of prominent quasi-NGOs¹⁵⁴ working in the rule of law and democracy-building sectors for funding and supporting anti-government protests.¹⁵⁵ Nevertheless, supporting such efforts and reinforcing them with parallel, meaningful backup by concerned governments will at least facilitate the exposure of fault lines where they may exist, thus

2005), 174, 187, available at <http://www.peacestudiesjournal.org.uk> (noting that Barnett R. Rubin, a prominent consultant to Afghanistan’s Constitutional Drafting Commission, “in his presentations to the Commission... appeared to be treading very carefully so as not to be perceived as interfering with the process. He made a few general suggestions...”). On Iraq, see for example J Alexander Their, *Writing Iraq’s constitution a chance to change history*, SAN FRANCISCO CHRONICLE, Feb. 25, 2005, B-9, <http://www.sfgate.com/cgi-bin/article.cgi?f=/c/a/2005/02/25/EDGJJBG1IT1.DTL&ao=all> (making no mention of a role for international norms or human rights in Iraq’s new constitution), and *Constitution Fight in Iraq*, PBS Newshour, Aug. 29, 2005, http://www.pbs.org/newshour/bb/middle_east/july-dec05/iraq_8-29.html (according to Spence Spencer, Washington director of the Public International Law and Policy Group, “I can speak from my own experience [in Iraq] that we were very strongly cautioned to make sure that the technical assistance that we provided was good and technical only and to leave the drafting and the decision-making to the Iraqis themselves.”)

¹⁵³ Nathan J. Brown, *Americans, Put Away Your Quills*, CARNEGIE ENDOWMENT FOR INT’L PEACE (Nov. 8, 2011), <http://carnegieeurope.eu/publications/?fa=45951>. See also Ginsburg, *supra* note 145.

¹⁵⁴ These groups include the U.S. based International Republican Institute (“IRI”) and National Democratic Institute (“NDI”), and the Konrad Adenauer Foundation based in Germany. According to the IRI, criminal prosecution of its staff represents “a politically motivated effort to squash Egypt’s growing civil society groups, orchestrated through the courts, in part by Mubarak-era hold overs.” *IRI Statement on Rumored Prosecution of Americans in Egypt*, INT’L REPUBLICAN INST. (Feb. 5, 2012), <http://www.iri.org/news-events-press-center/news/iri-statement-rumored-prosecution-americans-egypt>.

¹⁵⁵ See Scott Shane & Ron Nixon, *Charges Against U.S.-Aided Groups Come with History of Distrust in Egypt*, N.Y. TIMES, Feb. 7, 2012, at A6 (discussing Egypt’s prosecution of nonprofit organizations).

clarifying to what extent emerging governments are genuinely prepared to adopt and abide by international norms.

C. Redouble Diplomacy: Identifying State Practices Inconsistent with Consensus Resolution 16/18 and the Ongoing Problem with Blasphemy Prosecutions

Concerned parties should redouble their public and private diplomatic initiatives targeting states that have previously abstained from or voted in favor of defamation of religion resolutions. Informational outreach campaigns should identify state practices inconsistent with Resolution 16/18 norms as well as the ongoing deleterious impact associated with prosecution of blasphemy or defamation of religion offenses. These outreach efforts can also incorporate examples of best practices that highlight protection of religious freedom while simultaneously upholding freedom of expression.¹⁵⁶ Developing these examples can help concretize the risks associated with condoning a loose interpretation of standards and norms associated with combating intolerance or authorizing an international norm upholding defamation of religion.

Despite the 2011 consensus, a meaningful reduction in subjective and discriminatory prosecutions of expression premised on protecting religious beliefs is difficult to discern. For example, consider the Tunisian government's decision to prosecute Nabil Karoui, the director of satellite broadcaster Nessma TV, for airing *Persepolis*, an animated film that includes a brief representation of god as imagined from a child's point of view.¹⁵⁷ Under the press and criminal codes of *l'ancien regime*, Karoui has been charged with insulting a recognized religion¹⁵⁸ and harming public order and good morals¹⁵⁹—offenses that carry a maximum jail term of between two to five years. Several days after the film's screening, which apparently attracted only 1 percent of the TV-viewing audience¹⁶⁰ but was nevertheless described by some as a provocation,¹⁶¹ suspected "Salafist activists" allegedly

¹⁵⁶ Some of examples of steps that can be taken to this end are discussed in Part IV.D *infra*.

¹⁵⁷ The Franco-Iranian production directed by graphic novelist Marjane Satrapi contemplates the 1979 Islamic revolution and rule of Ayatollah Khomeini through the eyes of a young girl.

¹⁵⁸ Art. 48, République Tunisienne, CODE DE LA PRESSE, Imprimerie Officielle de la République Tunisienne, 2010.

¹⁵⁹ Art. 121(3), République Tunisienne, LE CODE PENAL, Imprimerie Officielle de la République Tunisienne, 2011.

¹⁶⁰ Thierry Brésillon, *Tunisie: Nessma TV, Symbole Ambigu pour un Procès Test*, RUE 89 (Jan. 23, 2012, 7:25 AM), <http://blogs.rue89.com/tunisie-libre/2012/01/23/tunisie-nessma-tv-symbole-ambigu-pour-un-proces-test-226346>.

¹⁶¹ See Anthony Shadid, *Tunisia Faces a Balancing Act of Democracy and Religion*, N.Y. TIMES, Jan. 31, 2012, at A1 (describing Salafist activists viewing the film as a provocation).

firebombed Karoui's home.¹⁶² The trial itself has been postponed from November 2011 to January 2012, and most recently was rescheduled to April 2012. On the street outside a Tunis courthouse during the January hearing, a "group of bearded young radicals shouted[,] 'The people want Nessma closed down' and 'You, media cowards, know that religion mustn't be defamed.'"¹⁶³ Although not known for antagonizing deposed President Ben Ali, Karoui has argued the case is "a test for freedom of expression and democracy in Tunisia."¹⁶⁴

L'affaire Persepolis, as it has come to be known, illustrates the risks associated with enforcing offenses based on insult to religion or vague terms open to subjective enforcement. In a country that Human Rights Watch labeled "best placed to move forward"¹⁶⁵ among the states undergoing Arab Spring revolutions, the prosecution may also signal a potential rollback of (admittedly select) rights from the previous regime. Ironically, the previous regime authorized screening of the film in Tunisian theaters, and even contributed towards funding a Tunisian dialect translation for local audiences.¹⁶⁶ While Human Rights Watch describes Tunisia's new Press Code—drafted after the revolution but not yet in force—as "significantly more liberal," the legislation maintains defaming state-recognized religions as a criminal offense,¹⁶⁷ an approach that, on its face, stands at odds with the 2011 consensus.

Egypt also augurs poorly as a bellwether for compliance with the UNHRC's 2011 consensus resolution. In one incident, billionaire Egyptian Coptic Naguib Sawiris tweeted a caricature of Mickey Mouse with a beard and Minnie Mouse in what was interpreted to be conservative Islamic garb. Instead of the Walt Disney Company suing

¹⁶² *Tunisia Must Drop Charges Against TV Boss over 'Persepolis' Screening*, AMNESTY INT'L (Jan. 20, 2012), <http://www.amnesty.org/fr/node/29264>.

¹⁶³ *Trial of Tunisian TV Chief Who Aired 'Persepolis' Postponed*, FR. 24, <http://www.france24.com/en/20120123-trial-tunisian-television-chief-postponed-nessma-tv-nabil-karoui-persepolis-april-19-adjourned> (last updated Jan. 23, 2012).

¹⁶⁴ *Le Procès de L'affaire Persepolis Reprend à Tunis*, LA NOUVELLE TRIB. (Jan. 23, 2012), <http://www.lnt.ma/actualites/le-proces-de-laffaire-persepolis-reprend-a-tunis-23815.html> ("[C]e sera un test pour la liberté d'expression et la démocratie en Tunisie.").

¹⁶⁵ HUMAN RIGHTS WATCH, *WORLD REPORT 2012: EVENTS OF 2011*, at 10 (2012).

¹⁶⁶ Ulysse Gosset, *Nébil Karoui: "En Tunisie, Je Suis Dans la Peau de Salman Rushdie"*, L'EXPRESS (Jan. 23, 2012, 3:13 PM), http://www.lexpress.fr/actualite/monde/afrique/nebil-karoui-en-tunisie-je-suis-dans-la-peau-de-salman-rushdie_1074321.html.

¹⁶⁷ HUMAN RIGHTS WATCH, *supra* note 165, at 636. In another recent case, a Tunisian court sentenced two individuals (one in absentia) to seven years in prison "for violation of morality, and disturbing public order" after they posted depictions of a naked prophet Mohammed to Facebook. Tarek Amara, *Tunisians jailed for Facebook cartoons of Prophet*, REUTERS, Apr. 5, 2012, <http://www.reuters.com/article/2012/04/05/us-tunisia-facebook-idUSBRE8341FO20120405>.

for copyright infringement, he was hauled before Egypt's chief prosecutor and two separate charges of defamation of Islam were filed against him.¹⁶⁸ Although the courts did not address the legitimacy of a criminal offense grounded in protecting select religious beliefs from perceived insult, both charges were dismissed for lack of standing.¹⁶⁹ Other defendants have been less fortunate. In February 2012, an Egyptian criminal court convicted septuagenarian comic actor Adel Imam for "defaming Islam" based on his role in a 2007 film.¹⁷⁰ In another defamation case, an Egyptian juvenile court sentenced a 17-year-old Christian student, Gamal Abdou Massoud, to a three-year jail term "after he insulted Islam and published and distributed pictures that insulted Islam and its Prophet."¹⁷¹

In Indonesia, another state that voted in favor of the consensus resolution of 2011, the Constitutional Court "upheld the country's [1965] anti-blasphemy law . . . which imposes criminal penalties of up to five years' imprisonment on individuals who deviate from the basic teachings of the official religions."¹⁷² As the Special Rapporteur on Religious Freedom observed, this ruling evidenced "resistance to abandoning the criminalization of blasphemy or to repealing discriminatory provisions that purport to combat 'defamation of religions.'"¹⁷³

The provision continues to be enforced, even in a post-consensus era. Most recently, police arrested an Indonesian civil servant for creating a Facebook page in support of atheism.¹⁷⁴ After being held in detention for over two months, Alexander Aan was indicted in April

¹⁶⁸ *Egypt Businessman Naguib Sawiris Faces Blasphemy Trial*, BBC NEWS (Jan. 9, 2012), <http://www.bbc.co.uk/news/world-africa-16473759>.

¹⁶⁹ *Egypt court dismisses Sawiris insulting Islam case*, BBC NEWS, Feb. 28, 2012, <http://www.bbc.co.uk/news/world-middle-east-17192283>; *Court dismisses Islam insult case against tycoon Sawiris*, EGYPT INDEPENDENT, Mar. 3, 2012, <http://www.egyptindependent.com/news/court-dismisses-islam-insult-case-against-tycoon-sawiris>.

¹⁷⁰ *Adel Imam is Sentenced to Jail over Islam Insult*, BBC NEWS (Feb. 2, 2012), <http://www.bbc.co.uk/news/entertainment-arts-16858553>. The actor was sentenced to three months and his appeal is still before the court. *Adel Imam's appeal against contempt of religion jail sentence adjourned*, EGYPT INDEPENDENT (Apr. 4, 2012), <http://www.egyptindependent.com/news/adel-imams-appeal-against-contempt-religion-jail-sentence-adjourned>.

¹⁷¹ *Egypt sends Christian student to jail for insulting Islam*, REUTERS, Apr. 4, 2012, <http://af.reuters.com/article/topNews/idAFJ0E83309420120404>.

¹⁷² Special Rapporteur on Freedom of Religion or Belief, *Interim Report on Elimination of all Forms of Religious Intolerance*, transmitted by Note of the Secretary-General, ¶ 44, n.42, UN Doc. A/65/207 (Jul. 29, 2010) (by Asma Jahangir).

¹⁷³ *Id.* ¶ 44.

¹⁷⁴ Syofiardi Bachyul Jb, *Atheist Civil Servant Arrested for Blasphemy*, JAKARTA POST (Jan. 20, 2012, 6:02 PM), <http://www.thejakartapost.com/news/2012/01/20/atheist-civil-servant-arrested-blasphemy.html>.

2012 under Criminal Code articles 156a(a) and 156a(b)¹⁷⁵ for allegedly deliberately expressing feelings “which principally have the character of being at enmity [sic] with, abusing or staining a religion, adhered to in Indonesia” and intentionally “prevent[ing] a person to adhere to any religion based on the belief of the allmighty [sic] God.”¹⁷⁶ The offense carries a maximum imprisonment term of five years.

The climate for religious intolerance in Indonesia is particularly problematic for atheists, among others,¹⁷⁷ given that the republic’s constitution provides that the “State shall be based upon the belief in the One and Only God.”¹⁷⁸ As the United States Department of State bluntly observed, the Indonesian “government does not allow for not believing in God.”¹⁷⁹ Plainly, this constitutional mandate appears at odds with the 2011 UN consensus calling on states to “foster religious freedom and pluralism by promoting the ability of members of all religious communities to manifest their religion, and to contribute openly and on an equal footing to society.”¹⁸⁰ The provision instead indicates an approach based on the desire to punish expression that is perceived as critical, insulting or even disbelieving of religion.

Individuals critical of Islam fare no better in the Palestinian Authority (“PA”) governed West Bank, where international donors play a central role in the development of Palestinian state institutions. PA forces arrested Waleed Al-Husseini after a sting operation identified him as responsible for Facebook and blog postings allegedly defaming Islam.¹⁸¹ Security sources maintained it was impossible to release Al-Husseini, a Muslim who had renounced his faith in favor of atheism, “because [they were] afraid he w[ould] be killed by his family.”¹⁸² Ultimately, Al-Husseini was given a three-

¹⁷⁵ *Atheist faces three counts in court*, THE JAKARTA POST, Apr. 2, 2012, <http://www.thejakartapost.com/news/2012/04/02/atheist-faces-three-counts-court.html>.

¹⁷⁶ PENAL CODE OF INDON. arts. 156–56(a), <http://www.unhcr.org/refworld/docid/3ffbcee24.html>.

¹⁷⁷ Indonesia’s “Ministry of Religious Affairs extends official status to six religious groups: Islam, Catholicism, Protestantism, Buddhism, Hinduism, and Confucianism.” U.S. DEP’T OF STATE, INTERNATIONAL RELIGIOUS FREEDOM REPORT: INDON. 4 (July–December 2010), available at <http://www.state.gov/documents/organization/171653.pdf>. The criminal code includes provisions that forbid “staining a religion” and preventing “a person to adhere to any religion based on the belief of the almighty God.” INDON. PENAL CODE art. 156(a)(a–b).

¹⁷⁹ INDON. CONST. art. 29(1).

¹⁷⁹ U.S. DEP’T OF STATE, *supra* note 177, at 4.

¹⁸⁰ Human Rights Council Res. 16/18, *supra* note 7, at 3, § 6(b).

¹⁸¹ *Palestinian Jailed for Logging on to Facebook as ‘God’ to Criticize Islam*, HAARETZ.COM (Nov. 12, 2010, 10:00 AM), <http://www.haaretz.com/news/international/palestinian-jailed-for-logging-on-to-facebook-as-god-to-criticize-islam-1.324302>.

¹⁸² *Atheist’ Palestinian Jailed ‘for His Own Safety’*, SYDNEY MORNING HERALD (Dec. 7, 2010), <http://news.smh.com.au/breaking-news-technology/atheist-palestinian-jailed-for-his>

year suspended sentence after being detained for a total of nine months, much of which was spent in jail without charge.¹⁸³ Since his release, security agents have on several occasions arrested and allegedly beaten Al-Husseini with cables, destroyed his two computers, and “demanded that he stop expressing his views.”¹⁸⁴ Another man from the same West Bank city of Qalqilya faces a similar charge after being arrested by police following an altercation with his father. According to the police report, “the father called police to break up the fight after his son ‘cursed God.’”¹⁸⁵ When asked about the case, Qalqilya’s deputy police chief asserted that police would target anyone who “curses God or any prophets or religions.”¹⁸⁶

The Palestinian Authority is still not a voting member of the UN and admittedly did not have a say in the 2011 consensus vote. But police officials volunteering this type of “mission statement” is particularly troubling considering the ongoing role played by international actors including the United States in funding and training Palestinian police forces in subjects that include the rule of law and human rights.¹⁸⁷ Indeed, this approach to law enforcement seems more at home in Saudi Arabia, where Hamza Kashgari recently fled for his life after tweeting that he would not bow to Mohammed but rather shake hands “as equals do.”¹⁸⁸ The views expressed by the twenty-three-year-old prompted Saudi Sheikh Nasser Al Omar to break down in tears while pleading, between sobs, for the Saudi king

own-safety-20101207-18n2p.html.

¹⁸³ Diaa Hadid, *Activists: Climate of Intolerance in West Bank*, WASHINGTON TIMES (Jan. 29, 2012), <http://p.washingtontimes.com/news/2012/jan/29/activists-climate-intolerance-west-bank/>.

¹⁸⁴ *Id.*

¹⁸⁵ *Man Arrested for ‘Cursing God’*, MA’AN NEWS AGENCY (Nov. 18, 2011, 9:41 AM), <http://www.maannews.net/eng/ViewDetails.aspx?ID=437590>.

¹⁸⁶ *Id.* (quotations omitted).

¹⁸⁷ U.S. GOV’T ACCOUNTABILITY OFFICE, GAO-10-505, PALESTINIAN AUTHORITY: U.S. ASSISTANCE IS TRAINING AND EQUIPPING SECURITY FORCES, BUT THE PROGRAM NEEDS TO MEASURE PROGRESS AND FACES LOGISTICAL CONSTRAINTS 17, 45 (2010). *See also Rule of Law Section*, EU CO-ORDINATING OFFICE FOR PALESTINIAN POLICE SUPPORT, <http://www.eupolcopps.eu/content/rule-law-section> (last visited Mar. 19, 2012) (describing an EU Police Mission in the Palestinian Territories); *PCP and EUPOL COPPS Deliver Pilot Human Rights Training*, EU CO-ORDINATING OFFICE FOR PALESTINIAN POLICE SUPPORT (July 9, 2011), <http://www.eupolcopps.eu/content/pcp-and-eupol-copps-deliver-pilot-human-rights-training> (describing a training mission undertaken by the EU Police Mission).

¹⁸⁸ Priyanka Boghani, *Hamza Kashgari, Saudi Writer, Arrested in Malaysia for Offensive Tweet*, GLOBAL POST (Feb. 10, 2012, 11:23 AM), <http://www.globalpost.com/dispatch/news/regions/middle-east/saudi-arabia/120210/hamza-kashgari-saudi-writer-arrested-malaysia>.

to arrest Kashgari and charge him with apostasy.¹⁸⁹ Kashgari's short-lived effort to flee the Saudi kingdom ended when he was detained and promptly deported from Malaysia "for allegedly insulting Islam and the Prophet Muhammad."¹⁹⁰ As this Article goes to press, Kashgari remains in a prison in the capital, Riyadh, "with no official word on if and when he will stand trial."¹⁹¹

Coupled with ongoing subjective and discriminatory prosecutions of expression premised on protecting religious beliefs, certain states continue to proffer distortive assessments of the extent to which their legal regimes comport with international human rights standards. These inconsistencies should receive more active and critical attention, particularly where states purport to faithfully abide by international norms. Examples of selective rendering of human rights compliance abound, particularly in the area of protecting freedom of religion and belief. For example, in a report submitted to the UN Secretary General, Pakistan reiterated its view that "the ways and means of addressing the issues of defamation and discrimination based on religion and belief" should be strengthened and diversified.¹⁹² To this end, Pakistan highlighted steps taken to promote interfaith harmony and to combat vilification of religions, including the use of "Sections 295, 295-A, 296, 297 and 298 of the Pakistan Penal Code."¹⁹³

¹⁸⁹ J. David Goodman, *In Morocco and Saudi Arabia, Limits Seen to Speech on Social Media*, N.Y. TIMES (Feb. 9, 2012, 2:08 PM), <http://thelede.blogs.nytimes.com/2012/02/09/in-morocco-and-saudi-arabia-limits-seen-to-speech-on-social-media/?scp=1&sq=Hamza%20Kashgari&st=cse>.

¹⁹⁰ Boghani, *supra* note 188 (quotations omitted). See also *Saudi Detained in Malaysia for Insulting Prophet Tweet*, BBC NEWS (Feb. 10, 2012, 3:22 AM), <http://www.bbc.co.uk/news/world-asia-16977903>.

¹⁹¹ Ellen Knickmeyer, *Saudi Youth Fear Crackdown After Friend's Arrest*, WALL ST. JOURNAL, Apr. 7, 2012, A7. Other Twitter users are finding their tweets subject to similar scrutiny. Kuwaiti authorities arrested Hamad al-Naqi in March 2012 for allegedly "defaming the Islamic faith and the Prophet, his companions and his wife." Ahmed Hagagy and Sylvia Westall, *Kuwaiti denies insulting Prophet on Twitter - lawyer*, REUTERS, Apr. 3, 2012, <http://www.reuters.com/article/2012/04/03/kuwait-twitter-idUSL6E8F30J420120403>. In the wake of this arrest, Kuwaiti lawmakers have voted in favor of increasing the legal penalty from a jail term to death for insulting God and the prophet Mohammed. "Members of parliament must vote on the proposal again in a second session and it would need the approval of the country's ruler before becoming law." *Parliament votes for death penalty in blasphemy cases*, IRISH TIMES, Apr. 13, 2012, <http://www.irishtimes.com/newspaper/world/2012/0413/1224314681842.html>. For another potential emerging case, see also *Another Twitter user accused of apostasy*, EMIRATES 24/7, Mar. 25, 2012, <http://www.emirates247.com/news/region/another-twitter-user-accused-of-apostasy-2012-03-25-1.450274> (noting outcry among Saudi Twitter users calling for arrest of Mohammed Salama for posting allegedly blasphemous statements concerning Islam).

¹⁹² U.N. Secretary-General, *Combating Defamation of Religions: Rep. of the Secretary-General*, ¶ 56, U.N. Doc. A/66/372 (Sept. 23, 2011) [hereinafter U.N. Secretary-General, *Combating Defamation*].

¹⁹³ *Id.*

What Pakistani authorities omit from this rose-colored portrayal of religious freedom is the fact that the penal code continues to serve as the wellspring for justifying intolerance and persecution of religious minorities. In addition to its selective enforcement, the penal code provides for, among other things, wildly disproportionate penalties when the religion criticized is Islam,¹⁹⁴ the absence of any *mens rea* requirement for “directly or indirectly, defil[ing] the sacred name of the Holy Prophet Muhammad” or other Muslim “holy personages,”¹⁹⁵ and the criminalization of elements of the Ahmadi faith.¹⁹⁶

Not to be outdone, Qatar reported to the UN Secretary General:

. . . that its society is governed by moral, social, religious and cultural values that promote equality and prohibit discrimination These values are inspired by the Islamic faith and reflected in the Constitution and relevant legislation The State is striving to become a model of peaceful coexistence between different faiths . . . and ensuring respect for religious freedoms.¹⁹⁷

Remarkably in the same report, Qatar cited provisions from its Criminal Code as an example of its comportment with international standards.¹⁹⁸ But from an international human rights perspective, these provisions on their face embody precisely the kinds of norms that operate to violate the principles of equality, discrimination, and freedom of religion or belief. Under Qatari law, an individual is subject to:

up to seven years’ imprisonment for denigrating or insulting the deity by any means; making insulting, disparaging or blasphemous remarks about the Koran; making insulting remarks about Islam or an Islamic ritual; defaming any of the revealed religions; insulting the prophet of a religion; or desecrating a place of worship of a revealed religion or any object found in that place.¹⁹⁹

¹⁹⁴ Compare PAK. PENAL CODE art. 295–B (providing a punishment of imprisonment for life for “wilfully defil[ing], damag[ing] or desecrat[ing] a copy of the Holy Qur’an”) and PAK. PENAL CODE, art. 295–C (providing for the punishment of death or life imprisonment for the use of derogatory remarks concerning the Holy Prophet Muhammad), with PAK. PENAL CODE art. 295, 295(a) (providing for less severe penalties for offenses against other religions).

¹⁹⁵ PAK. PENAL CODE art. 295–C, 298–A.

¹⁹⁶ PAK. PENAL CODE art. 298–B–C.

¹⁹⁷ U.N. Secretary-General, *Combating Defamation*, *supra* note 192, ¶ 58.

¹⁹⁸ *Id.* ¶ 60.

¹⁹⁹ *Id.* ¶ 60. The term “revealed religions” typically includes only Islam, Judaism and Christianity. For a longer discussion of how this term has been employed by the OIC and others, see Blitt, *supra* note 4, at 156–159.

The selective and distortive interpretation of human rights law illustrated in these examples sheds light on the unlikely durability of the 2011 consensus insofar as these state practices betray a disconnect between Resolution 16/18 and the willingness to abandon criminal prosecution of individuals who are perceived to insult or criticize certain protected religious views. Accordingly, such laws should be utilized as a tangible departure point for renewed diplomatic engagement to encourage states to take another look at the risks associated with condoning a loose interpretation of standards and norms associated with combating intolerance or upholding defamation of religion. This dialogue should prompt some hard questions. For example, Should we rethink celebrating an international “consensus” on combating intolerance where certain state practices operate in direct opposition to it? Moreover, given the linkage between incitement and defamation espoused by certain states, should implementation measures around Resolution 16/18 reasonably proceed without first clearly precluding the lawfulness of defamation of religion? Based on the outcome of these dialogues, a sharper sense of Resolution 16/18’s viability should emerge, including whether a return to the more fundamental and still unresolved debate over the legitimacy of defamation of religion may be necessary.

D. Fight Intolerance at Home

The United States and others should take concrete measures to address the more egregious instances of state-sanctioned or tolerated discrimination, particularly as it may relate to profiling, dress codes and other measures that may impinge on religious freedom. Further, the government and other community leaders should take a more proactive approach to unequivocally denounce “grassroots” and state-based initiatives that feed and breed xenophobia.²⁰⁰

In a number of recent incidents “internal” public diplomacy could have done more to educate and avert potentially discriminatory state action. For example, in Tennessee, state legislators attempted to brand

²⁰⁰ Other examples beyond the United States come to mind, such as the Swiss ban on minarets, also approved by public referendum. To date, the European Court of Human Rights has declared two petitions on this issue inadmissible because the plaintiffs lacked standing as victims. Petitioners in both cases had neither sought nor been denied authorization by the Swiss authorities to construct a minaret. See Press Release, Registrar of the European Court of Human Rights, Prohibition on Building Minarets in Switzerland: Applications Inadmissible (Jul. 8, 2011),

<http://cmiskp.echr.coe.int/tkp197/view.asp?action=open&documentId=887994&portal=hbk&source=externalbydocnumber&table=F69A27FD8FB86142BF01C1166DEA398649>.

any organization that endorses sharia as a terrorist group. The wildly xenophobic draft bill asserted, among other things, that:

[K]nowing adherence to sharia and to foreign sharia authorities is prima facie evidence of an act in support of the overthrow of the United States government and the government of this state through the abrogation, destruction, or violation of the United States and Tennessee Constitutions by the likely use of imminent criminal violence and terrorism with the aim of imposing sharia on the people of this state.²⁰¹

Ultimately, in the face of public outcry and media attention, the final bill as passed erased any mention of sharia.²⁰²

In another widely publicized instance from 2010, Oklahoma voters were presented with a referendum question that ostensibly sought to “Save Our State”²⁰³ by ostracizing a single religion for discriminatory treatment at the hands of the government.²⁰⁴ Seventy percent of voters endorsed the constitutional amendment which proposed expressly “forbid[ding] courts from considering or using international law . . . [or] Sharia Law.”²⁰⁵ A court petition challenging the amendment’s constitutionality resulted in a temporary restraining order followed by a preliminary injunction enjoining the state “from certifying the election results for State Question 755.”²⁰⁶ The United States Court of Appeals for the Tenth Circuit affirmed the injunction based on the plaintiff’s Establishment Clause claim that the amendment condemned Islam and exposed Muslims to disfavored treatment.²⁰⁷

²⁰¹ S.B. 1028, 2011 Leg., Reg. Sess. (Tenn. 2011) (as introduced by Sen. Ketron). For the bill’s complete legislative history, see *Bill Information for SB1028*, TENN. GEN. ASSEMBLY, <http://wapp.capitol.tn.gov/apps/BillInfo/Default.aspx?BillNumber=SB1028&ga=107> (last visited Mar. 26, 2012).

²⁰² Pub. Charter No. 497, 2011 Leg., Reg. Sess. (Tenn. 2011). For press accounts covering public opposition and subsequent amendments to the bill, see Andrea Zelinski, *Critics Say Anti-Terrorism Bill Went from Bad to Worse to Much, Much Better*, TN REPORT (June 3, 2011), <http://www.tnreport.com/2011/06/critics-say-anti-terrorism-bill-went-from-bad-to-worse-to-better/> and Bob Smietana, *Tenn. Bill Criticized for Targeting Muslims Splits Tea Party*, USA TODAY (May 22, 2011 6:16 AM), http://www.usatoday.com/news/nation/2011-05-22-tennessee-bill-tea-party_n.htm.

²⁰³ *Bill Information for HJR 1056 (2009–2010)*, OKLA. ST. LEGIS., <http://newsb.lsb.state.ok.us/BillInfo.aspx?Bill=HJR1056&Session=1000> (last visited Mar. 26, 2012).

²⁰⁴ The question only landed on the ballot after securing 41–2 and 82–10 majorities in the state Senate and House respectively. *Id.*

²⁰⁵ *State Questions for General Election, Nov. 2, 2010*, OKLA. ST. ELECTION BOARD, at 7 (Nov. 2, 2011), http://www.ok.gov/elections/documents/sq_gen10.pdf; *Summary Results: General Election—Nov. 2, 2010*, OKLA. ST. ELECTION BOARD, <http://www.ok.gov/elections/support/10gen.html> (last visited Mar. 14, 2012).

²⁰⁶ *Awad v. Zirriax*, 754 F. Supp. 2d 1298, 1302 (W.D. Okla. 2010), *aff’d* No. 10–6273, 2012 U.S. App. LEXIS 475 (10th Cir. Jan. 10, 2012).

²⁰⁷ *Awad v. Zirriax*, No. 10–6273, 2012 U.S. App. LEXIS 475, at *37–40 (10th Cir. Jan.

While the courts rightly identified this anti-constitutional and anti-American initiative for what it was, the reality remains that measures like it tap into a bigoted stream of the political discourse in the United States and elsewhere.²⁰⁸ These and other proposed measures that violate domestic constitutional law and international law principles present a concrete opportunity for civil society and government to get in front of manifestations of intolerance. This can be done through non-legislative measures designed to ostracize those that would discriminate, impose unequal treatment, or otherwise unduly restrict freedom of religion or belief. Public outcry, media attention, and reliance on the judiciary can all be effective tools. But each can be bolstered through ongoing educational efforts to help authoritatively dispel oversimplification and misconceptions concerning minority groups, religious practices, and even the function and status of domestic law. Moreover, these measures are in no way contingent on UN resolutions, and can serve as a tangible and good faith demonstration of the sincere commitment to combat intolerance and discrimination based on religious belief. Importantly, they also do not require relying on tactics that themselves foster an environment of discrimination and inequality, which in turn prohibit fair exercise of freedom of expression and freedom of religion or belief.

CONCLUSION

This Article has called attention to the flaws underpinning current efforts to move away from the decade old debate over defamation of religion. By advancing a consensus approach to combatting intolerance without addressing and accounting for the false linkages that continue to be made between incitement and defamation, states concerned with protecting human rights have created an opening that risks perpetuating defamation-type offenses under the ostensible sanction of international law.

10, 2012).

²⁰⁸ The failed Oklahoma initiative aligns with Republican presidential candidate hopeful Newt Gingrich's endorsement of "hav[ing] a federal law that says under no circumstances in any jurisdiction in the United States will Sharia [law] be used in any court to apply to any judgment made about American law." Marc Ambinder, *Oklahoma's Preemptive Strike Against Sharia Law*, THE ATLANTIC (Oct. 25, 2010, 10:10 AM), <http://www.theatlantic.com/politics/archive/2010/10/oklahomas-preemptive-strike-against-sharia-law/65081/>; see also Scott Shane, *In Islamic Law, Gingrich Sees a Mortal Threat to U.S.*, N.Y. TIMES, Dec. 22, 2011, at A2 (discussing Newt Gingrich's position on Sharia law); Andrea Elliot, *Behind an Anti-Sharia Push*, N.Y. TIMES, July 31, 2011, at A1 (discussing the national movement against Sharia law, including the Oklahoma constitutional amendment).

The evidence discussed above should shatter any illusion regarding a genuine consensus around an approach to combatting intolerance premised on “open public debate of ideas” and “foster[ing] religious freedom and pluralism.”²⁰⁹ Malaysia’s deplorable yet perfunctory decision to abide by Saudi Arabia’s request for the deportation of alleged blasphemer Hamza Kashgari is deadly evidence that defamation of religion remains alive and well, and has even garnered sufficient international legitimacy to warrant summary extradition for the purpose of its speedy enforcement. From this perspective, the consensus approach also has failed in a profoundly practical regard by doing nothing to curb prosecutions of individuals on the basis of utterances or actions deemed blasphemous of a predominant faith. A potential death sentence for three little tweets throws this reality into unsettling relief.

This grim reality should be deeply disturbing to those concerned with maintaining the integrity of the international human rights framework. More immediately, however, it should serve as a trigger for reassessing the wisdom of a consensus strategy premised upon sidestepping or ignoring the specter of defamation of religion. Rather than maintain the delusion that combating intolerance will prove a viable end to a divisive debate, we must acknowledge that any genuine consensus on this issue is destined to fail unless defamation of religion is formally repudiated. Until such a time, progress within the Istanbul Process should be suspended. Concerned diplomats and human rights activists alike should return to familiar if divisive fault lines and redouble efforts to condemn and abolish the criminal offense of blasphemy. In Kashgari’s case, such efforts could—and should—have included massive international pressure on Malaysia to refuse the Saudi request to deport.²¹⁰

²⁰⁹ Human Rights Council Res. 16/18, *supra* note 7, ¶4 and ¶6(b).

²¹⁰ The White House and State Department have remained conspicuously silent, at least publicly, concerning Malaysia’s decision to deport and Kashgari’s uncertain status in Saudi Arabia. Patrick Goodenough, *Obama Administration Silent on Saudi Journalist Accused of Online Blasphemy*, CNS NEWS, Feb. 15, 2012, <http://cnsnews.com/news/article/obama-administration-silent-saudi-journalist-accused-online-blasphemy>. Remarks and a Q&A session during Secretary Clinton’s trip to Riyadh at the end of March 2012 likewise made no mention of Kashgari’s case or his continued detention. *Remarks With Saudi Arabian Foreign Minister Saud Al-Faisal*, Mar. 31, 2012, <http://www.state.gov/secretary/rm/2012/03/187245.htm>. The European Union managed to produce several weakly worded statements expressing “deep[] disappoint[ment]” with Malaysia’s decision to deport. According to Catherine Ashton’s spokeswoman, “The EU will continue taking all appropriate steps to achieve a positive outcome of Mr Kashgari’s case.” AFP, *Saudi blogger Hamza Kashgari, facing possible execution for tweets, to be interrogated*, NATIONAL POST, Feb. 14, 2012, <http://news.nationalpost.com/2012/02/14/saudi-blogger-hamza-kashgari-facing-possible-execution-for-tweets-to-be-interrogated/>. Speaking at the opening of a plenary session of the EU Parliament, President, Martin Schulz “stressed the need to protect freedom of expression and

More generally moving forward, governments that previously voted against UN defamation of religion resolutions should inquire of their counterparts that abstained whether they view the fate of Kashgari and others similarly situated as comporting with international human rights law protections. Likewise, individual OIC members with ties to western states should be surveyed and new post-Arab Spring governments coming online should be encouraged to clearly set out their intentions with respect to international human rights obligations. These efforts may bear fruit in identifying a previously unavailable critical mass of states willing to overturn the UN's defamation of religion precedent. At the same time, a good faith effort to address genuine claims of discrimination, intolerance and incitement should proceed apace, despite a freeze on identifying implementing norms relating to Resolution 16/18 and its offspring. These measures can go a long way in building good will and demonstrating a sincere commitment to tackling the challenge of intolerance without recourse to criminal punishment. Even if a UN-sanctioned rejection of defamation of religion proves unachievable and we are left debating its illegitimacy, nothing can justify supporting a framework intended to combat intolerance that allows acts of unbridled intolerance to continue to flourish.

undertook to do all he could to prevent a death sentence being pronounced.” It remains unclear however, what, if any, subsequent measures the EU may have taken in this regard. European Parliament, Minutes Monday, 13 February 2012 – Strasbourg, Item 13: Statements by the President, Feb. 13, 2012, <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+PV+20120213+ITEMS+DOC+XML+V0//EN&language=EN>. See also European Parliament, *Opening: Saudi journalist faces death penalty, discriminatory Dutch web site*, Feb. 13, 2012, <http://www.europarl.europa.eu/news/en/headlines/content/20120203FCS37185/2/html/Opening-Saudi-journalist-faces-death-penalty-discriminatory-Dutch-web-site>.