ARTICLES

TO BAN OR NOT TO BAN BLASPHEMOUS VIDEOS

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ABSTRACT

When the United States did not ban the Innocence of Muslims video in September 2012, world leaders and scholars began debating whether the United States was exempting itself from international law. The Article seeks to unpack this international law question by examining what the International Covenant on Civil and Political Rights (ICCPR), the key international human rights treaty on freedom of expression, provides on whether blasphemous or otherwise offensive speech must be banned by States Parties to the Treaty. The Article then examines the negotiating history of the key ICCPR provision as well as relevant state practice. The views of independent experts in the UN’s human rights machinery are considered as well. The Article concludes that not banning the anti-Islam video was in line with the existing international human rights law regime.

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* Professor of Law and Herman G. Kaiser Chair in International Law at the University of Oklahoma College of Law. This Article emerged from a presentation on this topic that the author gave to the Advisory Committee of the U.S. State Department’s Office of the Legal Adviser on December 8, 2012, when she was the Assistant Legal Adviser for Human Rights and Refugees at the Department’s Office of the Legal Adviser. The views expressed in this Article do not necessarily reflect the views of the U.S. Government. This Article is dedicated to the memory of Amy Ostermeier, a State Department colleague and friend who fought valiantly for broad protections for freedom of expression at the UN before passing away at too early an age. The author expresses thanks for review of the Article by Michael Kozak, Paula Schriefer, Sabeena Rajpal, Arsalan Suleman, and Eric Richardson. © 2013, Evelyn M. Aswad.
I. INTRODUCTION

One of the most debated questions at the UN General Assembly in September 2012 was whether the United States was exempting itself from international law when it did not ban the *Innocence of Muslims* video, which portrayed the most venerable person in Islam in a highly insulting manner. At the UN General Assembly in September 2012, President Barack Obama condemned the anti-Islam video in no uncertain terms, rejected its contents, and justified not banning the film based on First Amendment protections for free speech while noting the futility of trying to control information on the Internet.

But leaders of other nations spoke forcefully at the UN in favor of a very different vision of freedom of expression. Some took the position that freedom of expression does not cover speech that disrespects religious beliefs or insults religious sensibilities. Others argued that

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1. Remarks by the President to the UN General Assembly, THE WHITE HOUSE (Sept. 25, 2012, 10:22 AM), http://www.whitehouse.gov/the-press-office/2012/09/25/remarks-president-un-general-assembly. President Obama called the video “crude and disgusting” and emphasized that “the United States government had nothing to do with this video, and I believe its message must be rejected by all who respect our common humanity.”

2. Specifically, President Obama stated:

   I know there are some who ask why we don’t just ban such a video. And the answer is enshrined in our laws: Our Constitution protects the right to practice free speech . . . . Americans have fought and died around the globe to protect the right of all people to express their views, even views that we profoundly disagree with. We do not do so because we support hateful speech, but because our founders understood that without such protections, the capacity of each individual to express their own views and practice their own faith may be threatened. We do so because in a diverse society, efforts to restrict speech can quickly become a tool to silence critics and oppress minorities. We do so because given the power of faith in our lives, and the passion that religious differences can inflame, the strongest weapon against hateful speech is not repression; it is more speech—the voices of tolerance that rally against bigotry and blasphemy, and lift up the values of understanding and mutual respect . . . . In 2012, at a time when anyone with a cell phone can spread offensive views around the world with the click of a button, the notion that we can control the flow of information is obsolete.

   Id.

3. For example, Afghan President Hamid Karzai stated: “We strongly condemn these offensive acts, whether it [sic] involves the production of a film, the publication of cartoons, or indeed any other acts of insult and provocation. Such acts can never be justified as freedom of speech or expression.” President Hamid Karzai Speaks at the United General Assembly, AFGHAN MISSION (Sept. 25, 2012), http://www.afghanistan-un.org/2012/09/president-hamid-karzai-speaks-at-the-united-nations-general-assembly/. Even UN Secretary General Ban Ki-moon stated at a press conference with regard to the anti-Islam video that “[f]reedom of expression should be and must
such forms of expression were forms of “incitement” and therefore needed to be banned.\(^4\) Some leaders at the UN suggested that international law may have been violated because the offensive speech had not been banned.\(^5\)

Even a few law professors called on the United States to acknowledge that not banning the anti-Islam video was inconsistent with international law and practice. One professor argued that the United States needed to re-think its First Amendment, given his belief that the rest of the world, including Western secular countries, would not protect the offensive video.\(^6\) Though not arguing for a change to U.S. law, another called for the United States to at least grapple more transparently with provisions of international human rights instruments, such as Article 20 of the International Covenant on Civil and Political Rights be guaranteed and protected, when they [sic] are used for common justice, common purpose. When some people use this freedom of expression to provoke or humiliate some others’ values and beliefs, then this cannot be protected in such a way.” \(^4\)Press Conference by Secretary-General Ban Ki-moon at United Nations Headquarters, UNITED NATIONS (Sept. 19, 2012), http://www.un.org/News/Press/docs/2012/sgsm14518.doc.htm.

4. Egypt’s then-President Mohamed Morsi stated, “[w]e must act together in the face of extremism, discrimination, and incitement to hatred on the basis of religion or race . . . . Egypt respects freedom of expression. One that is not used to incite hatred against anyone. One that is not directed towards one specific religion or culture.” Larisa Epatko, U.N. General Assembly 2012: Speeches, Meetings and More, PBS (Sept. 27, 2012, 9:00 AM), http://www.pbs.org/newshour/rundown/2012/09/un-general-assembly-live-blog.html. Similarly, Pakistan’s President Asif Ali Zardari stated, “I want to express the strongest condemnation for the acts of incitement of hate against the faith of billions of Muslims of the world and our beloved prophet Mohammed (Peace Be Upon Him) . . . . [T]he international community . . . should criminalize such acts that destroy the peace of the world and endanger world security by misusing freedom of expression.” Zia H. Shah, President Zardari’s Speech before UN General Assembly, THE MUSLIM TIMES, http://www.themuslimtimes.org/2012/10/countries/pakistan/president-zardaris-speech-before-un-general-assembly (last visited June 18, 2013).

5. Then-President of the General Assembly, Ambassador Nasser Abdulaziz Al-Nasser of Qatar, stated in a press release that he “wishes to express his serious concern that such acts amount to incitement to hatred and xenophobia, and could lead to international instability. These acts violate the purposes and principles of the UN Charter and relevant international instruments . . . . While reaffirming the right to freedom of expression, he calls for the observance of obligations in accordance with international law.” Statement Attributable to the Spokesman of the President of the UN General Assembly, UNITED NATIONS (Sept. 12, 2012), https://www.un.org/en/ga/president/66/news/PRStatements/CultureofTolerance120912.shtml.

(ICCPR), which he viewed as mandating bans on speech such as the anti-Islam video.  

This Article seeks to unpack this international law question by examining what the ICCPR, the key international human rights treaty on freedom of expression, provides on whether blasphemous or otherwise offensive speech must be banned by States Parties. The Article begins by analyzing the relevant provisions of the ICCPR, which are Articles 19 and 20. Article 19 provides the international protection for freedom of expression. Article 20, which is frequently invoked in UN debates about banning blasphemy, prohibits hateful advocacy that rises to the level of incitement to violence or other harm. The Article then examines the negotiating history of Article 20 for any lessons that can be drawn with regard to speech that offends religious sensibilities. The Article then reviews relevant state practice under Article 20. The views of key independent experts in the UN’s human rights machinery are considered as well. In light of this examination, the Article concludes that not banning the anti-Islam video was in line with the existing international human rights law regime.

II. TEXTUAL ANALYSIS OF ICCPR ARTICLES 19 AND 20

Of the human rights treaties addressing bans on speech, the ICCPR is the most relevant to the topic of speech that offends religious beliefs. The ICCPR entered into force in 1976 and has 167 States Parties today,


8. The other human rights treaties with mandatory bans on speech include Article 3 of the Convention on the Prevention and Punishment of the Crime of Genocide and Article 4 of the Convention on the Elimination of Racial Discrimination. Convention on the Prevention and Punishment of the Crime of Genocide art. 3, Dec. 9, 1948, 78 U.N.T.S. 277 (“The following acts shall be punishable,” including “direct and public incitement to genocide.”); International Convention on the Elimination of All Forms of Racial Discrimination art. 4, Dec. 21, 1965, 660 U.N.T.S. 195 (“States Parties . . . (a) Shall declare an offence punishable by law all dissemination of ideas based on racial superiority or hatred, incitement to racial discrimination, as well as all acts of violence or incitement to such acts against any race or group of persons of another colour or ethnic origin, and also the provision of any assistance to racist activities, including the financing thereof; (b) Shall declare illegal and prohibit organizations, and also organized and all other propaganda activities, which promote and incite racial discrimination, and shall recognize participation in such organizations or activities as an offence punishable by law . . . ”).
including the United States, which became a State Party in 1992. Article 20(2) is the most frequently cited provision for justifying bans on speech that offends religious beliefs. It appears immediately after the provision protecting freedom of expression in Article 19, which provides a framework for interpretation and contains provisions that apply to Article 20.

Article 19 states:

1. Everyone shall have the right to hold opinions without interference.
2. Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.
3. The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:
   (a) For respect of the rights or reputations of others;
   (b) For the protection of national security or of public order (ordre public), or of public health or morals.

Article 19 sets forth broad protections for the right to freedom of expression. It permits—but does not require—restrictions on expression in certain limited situations. In particular, a State Party desiring to limit expression under Article 19 must meet several criteria. First, the restrictions must be “provided by law.” This phrase is widely understood to mean, at a minimum, that the law must be specific and clear to give sufficient notice to the public of what is prohibited, and the law must be available to the public. Second, the restriction must be

10. See infra discussion at Section IV, notes 34-36.
12. It should be noted that the Human Rights Committee, which is the body of independent experts charged under the ICCPR with monitoring of implementation by States Parties, has recommended as the appropriate interpretation that “provided by law” means the law “must be
“necessary,” which is generally understood, *inter alia*, as the least re-
strictive means to achieve the legitimate government purpose.\(^{13}\) Third,
the restriction must be for one of the enumerated legitimate governmen-
tal purposes: respect for the rights or reputations of others, protection
of national security or public order, or protection of public health or
mores.\(^{14}\)

Article 20 reads as follows:

1. Any propaganda for war shall be prohibited by law.
2. Any advocacy of national, racial or religious hatred that consti-
tutes incitement to discrimination, hostility or violence shall be
prohibited by law.\(^{15}\)

In reviewing Article 20(2), a number of questions as well as ambi-
guities in the text readily come to mind. To begin with, the Article is
phrased as a mandatory prohibition, but do the Article 19 safeguards
(e.g., “by law” and “necessary”) apply to restrictions imposed under
Article 20? While some could argue that Article 20 is a separate article
and thus not subject to such safeguards, most would agree it would not
make sense for these fundamental safeguards to apply to all restrictions
on speech except those imposed under Article 20. Indeed, the Human
Rights Committee has recently recommended to states that they inter-
pret the safeguards in Article 19 as applying to restrictions imposed
under Article 20.\(^{16}\)

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\(^{13}\) The Human Rights Committee recommends that states understand the necessity prong
as encompassing “strict tests” of necessity and proportionality. In particular, the Committee
believes restrictive measures “must be the least intrusive instrument amongst those which might
achieve their protective function; they must be proportionate to the interest to be protected.” See
General Comment No. 34, *supra* note 12, ¶¶ 22, 34.

171.

\(^{15}\) *Id.* art. 20.

\(^{16}\) General Comment No. 34, *supra* note 12, ¶ 50 (“A limitation that is justified on the
basis of Article 20 must also comply with article 19, paragraph 3.”). The United States also
understands that any restrictions under Article 20 must meet the criteria set forth in Article 19.3.
*U.S. Observations, supra* note 12, ¶ 11.
The “Advocacy” Component of Article 20

On its face, Article 20 does not mandate or authorize the banning of speech solely because it triggers or provokes undesirable outcomes like violence. Rather, it encompasses a much narrower class of speech, specifically only speech that constitutes “advocacy” of racial, religious, or national hatred. The plain meaning of “advocacy” is the “act of pleading for, supporting, or recommending.”\(^{17}\) In other words, the speaker must have the *intention* of promoting hatred on one of the proscribed grounds with his or her speech. Article 20 thus would not cover situations in which, for example, speech *accidentally* promotes hatred or presumably a situation in which a reporter is merely covering advocacy of hatred as part of his or her news reporting function. In UN discussions, the “advocacy” prong of Article 20(2) is frequently ignored, with the focus being solely on speech that allegedly “incites,” a legally flawed characterization of Article 20(2), given its requirement that advocacy be shown.\(^{18}\) An example of advocacy of hatred would be a speaker adhering to religion X who calls on an angry mob of co-religionists to physically attack persons of religion Y. It would not constitute “advocacy” for a speaker adhering to religion X to simply criticize, question, mischaracterize or ridicule religion Y without the intent to promote hatred against members of religion Y.

The “Incitement” Test for Article 20

Article 20(2) is also clear on its face that, even where the intent to promote hatred can be demonstrated, such advocacy of hatred by itself is not sufficient to trigger the obligation to prohibit expression. Rather, such advocacy of hatred must also rise to the level of “incitement” to discrimination, hostility, or violence. This phrasing contains important but vague terms, which raise critical questions of interpretation. For example, what is the test for “incitement”? How proximate must the causal link be between the advocacy and the undesirable results of...
“discrimination, hostility, and violence”? Is the incitement test one in which the advocacy must hold a risk, a significant risk, or a bad tendency of triggering the three undesirable results? Or advocacy that is more likely than not to trigger the undesirable results? Or advocacy that is likely to trigger the undesirable results in the very near future, i.e., imminently? A plain reading of the text does not provide answers to these questions.

C. The “Hostility” Prong of Article 20

In considering the ambiguity of Article 20(2), one also wonders about the inclusion of “hostility” in the list of undesirable results from the hateful advocacy. The ordinary meaning of hostility is “a hostile state, condition, or attitude,”19 and “hostile” means “opposed in feeling, action, or character, antagonistic” and “not warm, friendly, or generous; not hospitable.”20 Can it truly be that a human rights treaty would contain a mandatory ban on speech that triggers feelings that are not warm, friendly, or generous? Or is it better understood as requiring advocacy of hostile behavior, such as threats of bodily harm against particular persons (e.g., threatening to harm an individual’s family if they do not leave the neighborhood)? The number of questions that readily emerge from a plain reading of Article 20(2) warrants consideration of the ICCPR negotiating history to better understand why the drafters included this provision and how such background relates to speech that insults religious beliefs and sensibilities.

III. Negotiating History for ICCPR Article 20(2)

The negotiation process for the ICCPR started in 1947 and continued for almost two decades until its adoption and opening for signature by the UN General Assembly in 1966.21 The debates about Article 20(2) were among the most contentious during the negotiations. The charge in favor of including text that ultimately became Article 20(2) was led by, among others, the Soviet Union, which argued

that the road to the Nazi atrocities was paved with hateful propaganda and the ICCPR needed a provision to deal with such speech. The U.S. delegation, initially led by Eleanor Roosevelt, zealously countered such views with several arguments, including: (1) it was wholly out of place in a human rights treaty to empower and require states to ban speech; (2) such a provision would be abused by repressive regimes to justify problematic crackdowns on speech; (3) the wording of the provision was ambiguous, which was very dangerous and would compound governmental abuse; and (4) the principle of democracy was better served by allowing individuals to create disputes than by suppressing speech.

As negotiations continued, during certain meetings, the pro-Article 20(2) camp mustered enough votes to include variations of such a prohibition on speech in the draft ICCPR, and in other meetings, the anti-Article 20(2) camp rallied enough votes to remove such text from the draft. In 1961, sixteen countries proposed a compromise text that was ultimately adopted into the final version of Article 20 by a vote of fifty-two in favor, with nineteen against (including the United States) and twelve abstaining.

An examination of the negotiating history does not do much to enhance our understanding of individual terms in the Article, as the

22. U.N. ESCOR, 5th Sess., 123rd mtg. at 4, U.N. Doc. E/CN.4/SR.123 (June 14, 1949) (“ Millions had perished because of the propaganda of racial and national superiority, hatred, and contempt had not been stopped in time. Yet five years had hardly elapsed since the end of the war and there were already signs of similar tendencies in various countries of the world.”). Other delegations agreed with these concerns, including the French who lamented “ that vicious phenomenon of the modern world, propaganda, which was a] mind-conditioning and spiritual rape of the masses.” U.N. ESCOR, 9th Sess., 329th mtg. at 12, U.N. Doc. E/CN.4/SR.378 (Oct. 19, 1953).


24. See Farrior, supra note 21 (noting that initially, this prohibition on harmful speech appeared elsewhere in the draft ICCPR text, but was moved later in the negotiations to Article 20).

25. U.N. GAOR, 16th Sess., U.N. Doc. A/C.3/SR.1083 ¶ 59 (Oct. 25, 1961). Some countries, such as France, that had initially supported a prohibition on hateful advocacy withdrew support given problems with the final phrasing, including insertion of the word “ hostility.” For the countries that proposed the compromised text, see BOSSUYT, supra note 21, at 409 (Brazil, Cambodia, Congo, Ghana, Guinea, Indonesia, Iraq, Lebanon, Mali, Morocco, Philippines, Poland, Saudi Arabia, Thailand, United Arab Republic, and Yugoslavia).
debate was quite politicized. It is clear, however, that the stated general animating purpose behind Article 20(2) was that, in the aftermath of the Nazi atrocities, it was viewed as necessary to proscribe speech that was intended to and would lead to such atrocities. Article 20(2) was included to prohibit advocacy inciting harm against a targeted national, racial, or religious group. In other words, the point of Article 20(2) was to prohibit expression where the speaker intended for his or her speech to cause hate in listeners who would agree with the hateful message and therefore engage in harmful acts towards the targeted group. There is no indication in the negotiating history that Article 20 was intended to prohibit speech about a targeted group that would offend the feelings of members of that group. There is certainly no suggestion in the negotiating history that speech should be banned if the targeted group would take offense to or oppose the message and members of the group display rejection of the message through violence or other harmful acts against the speaker or those associated with the speaker. In short, Article 20(2) was not meant to embody in human rights law a “heckler’s veto,” which would mandate the stifling of speakers when those who are offended choose to show their displeasure through harmful acts.

IV. CERTAIN STATE PRACTICE REGARDING ARTICLE 20(2) & THE “DEFAMATION OF RELIGIONS” DEBATE AT THE UN

Despite the divided vote on Article 20, only seven (out of 160) States Parties to the ICCPR have a reservation, understanding, or declaration (RUD) with respect to Article 20(2). Most of these RUDs clarify that the states will interpret Articles 19 and 20 consistently and that they will not enact further laws. The U.S. RUD states: “[A]rticle 20 does not authorize or require legislation or other action by the United States that would restrict the right of free speech and association protected by the Constitution and laws of the United States.” There were no objections lodged with the treaty

26. See, e.g., MANFRED NOWAK, UN Covenants on Civil and Political Rights 362 (1993) (“Because the debates were primarily of a political nature, the travaux preparatoires are of only limited assistance in interpreting this provision.”).
27. UN Treaty Collection, supra note 9. The States Parties with a RUD on Article 20 are Australia, Belgium, Luxemburg, Malta, New Zealand, the United Kingdom, and the United States. Id.
28. Id.
29. Id.
depositary with respect to any of these RUDs.\textsuperscript{30}

The debate at the UN about whether international law mandates or permits banning blasphemous speech has been a matter of heated discussion for about a decade with respect to the Organization of Islamic Cooperation’s (OIC) “defamation of religions” resolutions at the UN.\textsuperscript{31} In both the UN Human Rights Council and at the UN General Assembly, the OIC had succeeded since 1999 in having resolutions adopted on religious intolerance, which evolved into attempts to legitimize bans on speech disrespectful of religions (including both prohibitions on and criminalization of such speech).\textsuperscript{32} The debates surrounding those resolutions were very contentious, with Western countries voting against the resolutions in their early years and many other countries withdrawing their support in 2008, 2009, and 2010.\textsuperscript{33}

These debates included discussion about whether ICCPR Article 20(2) covered speech that was blasphemous or disrespectful of religions. In 2006, the Human Rights Council requested the UN Office of the High Commissioner for Human Rights (OHCHR) to report on “the increasing trend of defamation of religions, incitement to racial and religious hatred, \ldots its recent manifestations,” and “its implications for” ICCPR Article 20(2).\textsuperscript{34} In response, the High Commissioner submitted preliminary findings about relevant international law and regional and national jurisprudence, and found there was no consen-

\begin{footnotesize}
30. Id.
33. The last time the defamation of religions resolution was adopted at the Human Rights Council, the vote was 25 in favor, 17 against, and 8 abstaining. 13th Session of the Human Rights Council: Resolutions, decisions, and President’s Statements, UNITED NATIONS HUMAN RIGHTS COUNCIL, http://www.ohchr.org/EN/HRBodies/HRC/RegularSessions/Session13/Pages/ResDecStat. aspx (last visited June 19, 2013). The last time the resolution was adopted by the UNGA, the vote count was 79 in favor, 67 against, and 40 abstaining. Resolutions adopted by the General Assembly at its 65th session, UNITED NATIONS DOCUMENTATION: RESEARCH GUIDE, http://www.un.org/depts/dhl/resguide/r65.shtml (last visited June 18, 2013). Thus, there were more countries opposed or abstaining than in favor of the text during the last year it was run at the UN.
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The report noted a lack of international consensus on the meaning of key words in Article 20(2), including “incitement,” “hatred,” and “hostility.”

It should be noted that, despite the lack of consensus noted in the 2006 OHCHR report on the scope of Article 20(2), the vast majority of those States Parties with Article 20(2) obligations did not seek to ban the anti-Islam film within their countries. Of particular significance is the fact that European countries (whose embassies and other interests were also threatened by protests) did not ban the video.

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36. See id. ¶ 81. “While international human rights law, as well as regional and national jurisprudence and practice, permits states to curb speech and other forms of manifestations that have the potential to foster racial hatred and violence, there is no consensus on critical elements of the law and practice varies considerably.” Id. ¶ 3.
The decision by most states not to ban the anti-Islam video was in line with the most recent international consensus at the UN about how to treat religious intolerance, including speech that offends religious sensibilities. In March 2011, the OIC decided to stop running its contentious “defamation of religions” resolution. Instead, the OIC sponsored a different resolution, which was adopted by consensus both at the UN Human Rights Council and the UN General Assembly, and embodied a new way forward on combating religious intolerance. This resolution (best known as “HRC Resolution 16/18” or just “16/18”) focuses on time-proven and practical measures that governments and other actors should undertake to promote religious tolerance. For example, the resolution encourages states to speak out against intolerance, train government officials in effective outreach strategies, enforce anti-discrimination laws, engage in education and awareness building, promote inter-faith dialogue, and counter illicit religious profiling. The only provision in the OIC’s resolution that involves banning speech reflects the U.S. constitutional standard of incitement to imminent violence. The 16/18 approach to combating religious intolerance, including offensive speech, reflects the appropri-
ate, effective, and wide-ranging toolbox available to governments in reacting to such speech without resorting to broad bans on speech.

V. Views of the UN’s Independent Human Rights Experts

The highly contentious UN debates on the “defamation of religions” resolutions caused the UN’s independent human rights watchdogs to address the topic. In particular, the Special Rapporteur on Freedom of Expression and the Special Rapporteur on Freedom of Religion spoke out against banning speech solely because the speech is insulting or offensive to religious beliefs and sensibilities.

In a joint 2008 statement issued with other independent experts on freedom of expression, the UN Special Rapporteur on Freedom of Expression stated:

- The concept of ‘defamation of religions’ does not accord with international standards regarding defamation, which refer to the protection of reputation of individuals, while religions, like all beliefs, cannot be said to have a reputation of their own.
- Restrictions on freedom of expression should be limited in scope to the protection of overriding individual rights and social interests, and should never be used to protect particular institutions, or abstract notions, concepts or beliefs, including religious ones.
- Restrictions on freedom of expression to prevent intolerance should be limited in scope to advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence.
- International organizations, including the United Nations General Assembly and Human Rights Council, should desist from the further adoption of statements supporting the idea of "defamation of religions."  

Similarly, in 2006, the UN Special Rapporteur for Freedom of Religion, stated:

[International human rights law protects primarily individuals in the exercise of their freedom of religion and not religions.

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per se . . . the right to freedom of religion or belief as enshrined in relevant international legal standards, does not include the right not to have a religion or belief that is free from criticism or ridicule . . . defamation of religions may offend people and hurt their religious feelings but it does not necessarily or at least directly result in a violation of their rights, including the right to freedom of religion.44

In addition, the Human Rights Committee’s recommendation to ICCPR States Parties on this topic is:

Prohibitions of displays of lack of respect for a religion or other belief system, including blasphemy laws, are incompatible with the Covenant, except in the specific circumstances envisaged in article 20, paragraph 2, of the Covenant . . . . it would be impermissible for any such laws to discriminate in favour of or against one or certain religions or belief systems, or their adherents over another, or religious believers over non-believers. Nor would it be permissible for such prohibitions to be used to prevent or punish criticism of religious leaders or commentary on religious doctrine and tenets of faith.45

Thus, among UN experts who form the institution’s independent human rights machinery, those experts who are primarily charged with freedom of expression and freedom of religion issues have all concluded that banning speech because it is blasphemous or otherwise insulting to religious beliefs and sensibilities is generally inconsistent with the UN’s international human rights law regime. Blasphemous speech is not automatically synonymous with speech that is prohibited under Article 20(2). Advocacy of hatred that rises to the level required in Article 20(2) may at times contain some blasphemous components and such speech could be banned under Article 20(2), if the rigorous safeguards set forth in Article 19(3) (as well as other relevant provisions of the ICCPR) are met, but such situations are the exception rather than the rule, according to these UN independent experts.

45. General Comment No. 34, supra note 12, ¶ 48.
VI. Conclusion

In sum, the action of the United States in not banning the anti-Islam video would have been in accord with the international human rights law regime even if the United States did not have a reservation to Article 20. By its plain meaning, Article 20(2) does not require banning insulting speech that provokes violence unless there is advocacy of hatred, that is, an intent on the part of the speaker to promote hatred that would incite certain harm. From the negotiating history, it is clear that Article 20(2) was included in the aftermath of the Nazi atrocities and intended to prohibit hateful advocacy inciting harm against a targeted national, racial, or religious group. There is no indication that Article 20(2) was intended to prohibit speech about a group that would prompt a violent reaction from members of that same group to show opposition to the speaker’s message, which would have effectively created a dangerous heckler’s veto over speech of all kinds. Though the UN High Commissioner for Human Rights identified in 2006 a lack of consensus among states about key terms in Article 20(2), state practice by ICCPR parties with Article 20 obligations was overwhelmingly to not ban the anti-Islam video in September 2012 or similar caricatures of other faiths in recent years. In addition, the UN’s independent experts who are primarily charged with issues of freedom of expression and freedom of religion have concluded that banning speech solely because it is blasphemous or offends religious sensibilities is generally inconsistent with the international human rights regime.

This debate and calls to ban offensive speech are sure to continue. Rather than ban such materials, governments and other actors should actively deploy the 16/18 consensus toolkit of proactive and effective measures, including publicly condemning such speech, to deal with speech that is insulting with regard to religious beliefs. Not only have these measures proven their worth in diminishing inter-faith tensions, they also provide concrete benchmarks for determining whether governments are serious in their policy efforts to promote tolerance.