
WHY THE UNITED STATES CANNOT AGREE TO DISAGREE ON BLASPHEMY LAWS

Evelyn M. Aswad,* Rashad Hussain** & M. Arsalan Suleman***

ABSTRACT:.....	123
I. INTRODUCTION.....	124
II. BACKGROUND ON BLASPHEMY LAWS.....	128
III. THE INTERNATIONAL LEGAL REGIME AND BLASPHEMY BANS.....	136
A. <i>The Public Order Argument</i>	138
B. <i>The Religious Sensibilities Argument</i>	142
C. <i>The Incitement Argument</i>	143
IV. THE WAY FORWARD.....	144
A. <i>Human Rights Council Resolution 16/18</i>	145
B. <i>The Istanbul Process</i>	146
V. CONCLUSION.....	149

ABSTRACT:

At the Boston University International Law Journal’s symposium “Realigning Western Policy and International Law after the Arab Spring,” held on March 25, 2013, Professor Aswad gave the keynote address, where she described the extensive U.S. diplomatic efforts to promote the broadest possible protections for freedoms of expression and religion, even when it comes to speech that is considered blasphemous. A symposium participant asked why the United States cannot just agree to disagree with Muslim-majority countries on the treatment of blasphemy given the religious sensibilities in those countries and the number of other pressing equities the United States has pending with those countries. This Article seeks to answer that question. For the reasons expressed in this Article, the authors argue that blasphemy bans and other similar laws violate universal human rights, unfairly target religious minorities, and undermine the very objectives they seek to achieve. They also argue that an additional international mechanism for addressing blasphemy issues can be found in an implementation process for a recent Human Rights Council resolution that seeks to combat religious intolerance without infringing on fundamental freedoms.

I. INTRODUCTION

In recent years, controversial speech deemed blasphemous by some audiences has been the subject of significant debate, religious tension, and, at times, even violent protests.¹ These debates have become more pronounced following the revolutions in a number of states in the Middle East and North Africa. The issue continues to pose international diplomatic challenges both in the context of how the United States responds to such speech in its domestic system as well as how other states have dealt with the issue in their countries.

Perhaps the most high profile incident illustrating this challenge occurred in the Fall of 2012, following the release of the *Innocence of Muslims* video.² Violent protests took place in some countries, including at some U.S. embassies and consulates in Muslim-majority countries.³ Protesters in

* Evelyn M. Aswad is a Professor of Law and the Herman G. Kaiser Chair in International Law at the University of Oklahoma College of Law. Professor Aswad was the keynote speaker for the *Boston University International Law Journal's* symposium entitled "*Realigning Western Policy and International Law after the Arab Spring*," which occurred while she was the Assistant Legal Adviser for Human Rights and Refugees at the U.S. Department of State. The views expressed in this Article do not necessarily reflect the views of the U.S. Government. This Article is dedicated to all those who have lost their lives in advocating for an end to blasphemy laws. The authors would like to make clear that we condemn speech that is disrespectful and insulting of religious beliefs, although we do not believe legal prohibitions on such speech are appropriate.

** Rashad Hussain is the U.S. Special Envoy to the Organization of Islamic Cooperation, which is the second largest international body after the United Nations. Previously he served as Deputy Associate Counsel to the President. The views expressed in this Article do not necessarily reflect the views of the U.S. Government.

*** M. Arsalan Suleman is the Deputy Special Envoy to the Organization of Islamic Cooperation and also the Counselor for Multilateral Affairs in the Bureau of Democracy, Human Rights, and Labor at the U.S. Department of State. The views expressed in this Article do not necessarily reflect the views of the U.S. Government.

¹ This Article uses the term "blasphemous speech" or "blasphemy" to encompass speech that is deemed disrespectful of God or the divine, disrespectful or critical of religious beliefs, or otherwise offends religious sensibilities. This Article clarifies when the term is used in a different sense by cited studies. Violent crimes against persons or property motivated by religious animus (e.g., assaults on persons or the desecration of religious sites) are hate crimes and not treated in this Article as "blasphemy," which we view as relating solely to incidents involving speech without physical harm to persons or property.

² See Stan Wilson, *Producer of Anti-Islam Film Arrested, Ordered Held Without Bail*, CNN (Sept. 28, 2012), <http://edition.cnn.com/2012/09/27/world/california-anti-islam-filmmaker/?c=&page=1> (discussing the film and international controversy it generated).

³ See John Hudson, *A Map of Muslim Protests Around the World*, ATLANTIC WIRE (Sept. 14, 2012), <http://www.theatlanticwire.com/global/2012/09/map-muslim-protests-around-world/56865/>, for a full list of global protests against the *Innocence of Muslims* video.

some countries demanded that the United States ban the amateur video, which included offensive depictions of the Prophet Muhammad. High-level U.S. officials condemned the video as “disgusting and reprehensible,” but upheld the right to even the most offensive speech.⁴ The video and protests led to a significant debate about the U.S. treatment of offensive speech at the UN General Assembly’s annual gathering of world leaders.⁵ Another high profile series of incidents began in late 2010 when a Florida pastor threatened to burn a copy of the Qur’an, eliciting strong condemnation from the highest levels of the U.S. government.⁶ That pastor later burned a copy of the Qur’an in 2011, and subsequent protests resulted in several deaths in Afghanistan.⁷ In a separate incident, there were reports of U.S. soldiers burning the Qur’an in February 2012 near Kabul, Afghanistan and several soldiers were killed as well as more than thirty Afghans in violent riots.⁸ Some scholars have argued that certain elites have encouraged and even incited violence about allegedly blasphemous speech in order to serve particular political ends.⁹

In Arab Spring countries, where revolutions were undertaken in the hope of, *inter alia*, greater respect for freedoms of expression and religion, these aspirations have not yet been achieved. On the contrary, many of the new

⁴ See Press Release, Office of the Press Sec’y, Remarks by the President to the UN General Assembly (Sept. 25, 2012), <http://www.whitehouse.gov/the-press-office/2012/09/25/remarks-president-un-general-assembly>. For Secretary Clinton’s remarks, see Jennifer Epstein, *Clinton: Video is Disgusting and Reprehensible*, POLITICO (Sept. 13, 2012, 10:34 AM), <http://www.politico.com/politico44/2012/09/clinton-video-is-disgusting-and-reprehensible-135446.html>.

⁵ For a summary of that UN debate, including President Obama’s condemnation of the *Innocence of Muslims* video and defense of free speech, see Evelyn M. Aswad, *To Ban or Not to Ban Blasphemous Videos*, 44 GEO. J. INT’L L. 1313, 1314 (2013).

⁶ For the U.S. government’s condemnations, see, e.g., Matthew Lee, *Clinton, Gates Denounce Planned Quran Burning*, BOSTON.COM (Sept. 8, 2010), http://www.boston.com/news/nation/articles/2010/09/08/clinton_gates_denounce_planned_quran_burning/; see also Stephanie Condon, *Obama on Quran Burning: You ‘Don’t Play Games’ With Troop Safety*, CBS NEWS (Sept. 10, 2010, 12:16 PM), http://www.cbsnews.com/8301-503544_162-20016074-503544.html.

⁷ Kevin Sieff, *Florida Pastor Terry Jones’s Koran Burning has Far Reaching Effect*, WASH. POST (April 2, 2011), http://articles.washingtonpost.com/2011-04-02/local/35229731_1_dove-world-outreach-center-florida-pastor-koran.

⁸ See *2 US Troops Killed in Afghanistan Following Koran Burning*, FOX NEWS (Mar. 1, 2012), <http://www.foxnews.com/world/2012/03/01/2-troops-killed-by-afghan-soldier-civilian/>, for a description of such deaths in Afghanistan.

⁹ See Mark Lagon & Ryan Kaminski, *Clash of Elites: What Lies Behind the Defamation Debates*, GEORGETOWN JOURNAL OF INTERNATIONAL AFFAIRS, Winter/Spring (2013).

regimes have enshrined blasphemy bans in their domestic systems¹⁰ and increased the enforcement of such laws, which have often targeted Christian communities, other religious minorities, and political dissent.¹¹ For example, the constitution adopted in Egypt under then-President Mohamed Morsi contained a new provision prohibiting “[i]nsult or abuse of all religious messengers and prophets.”¹² The U.S. government, in its annual human rights report, and others, criticized Egypt for elevating its ban on blasphemy from statute to its constitution, as well as for its numerous blasphemy prosecutions.¹³

¹⁰ A recent study has found that, while the Middle East and North African region had the highest restrictions on religious freedom in the world pre-Arab Spring, most of the restrictions have remained in place, with some restrictions worsening and religious hostilities increasing in the region. *Cf. Sidebar: Religious Restrictions and Hostilities in the Middle East and North Africa During the Arab Spring*, in PEW RESEARCH CENTER, ARAB SPRING ADDS TO GLOBAL RESTRICTIONS ON RELIGION 15 (Sandra Stencel, ed., June 2013), available at <http://www.pewforum.org/files/2013/06/RestrictionsIV-web.pdf> (examining religious restrictions generally, including blasphemy bans).

¹¹ See, e.g., U.S. DEP’T OF STATE, COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES FOR 2012: EGYPT (2013), available at <http://www.state.gov/documents/organization/204569.pdf>; U.S. DEP’T OF STATE, INTERNATIONAL RELIGIOUS FREEDOM REPORT FOR 2012: EGYPT (2013), available at <http://www.state.gov/documents/organization/208598.pdf>.

¹² *Controversial Articles in the Egyptian Constitution*, CARNEGIE ENDOWMENT FOR INT’L PEACE (last visited July 28, 2013), <http://egyptelections.carnegieendowment.org/2013/01/04/controversial-articles-in-the-2012-egyptian-constitution>.

¹³ U.S. DEP’T. OF STATE, COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES FOR 2012: EGYPT, *supra* note 11, at 11-14 (noting that “[a] Cairo court sentenced a 17-year-old Christian boy to three years in jail for publishing cartoons on his Facebook page that mocked Islam and the Prophet Muhammad. . . . [P]olice arrested blogger Alber Saber for allegedly posting on his Facebook page a link to a film ridiculing Islam and the Prophet Muhammad. . . . [A] Cairo court tried in absentia and convicted seven expatriate Coptic Christians of insulting Islam for their role in the making of a video that denigrated the Prophet Muhammad and sentenced them to death. The court also tried in absentia and convicted preacher Terry Jones of the same offense and sentenced him to death.”). A Muslim cleric who destroyed the Bible at the *Innocence of Muslims* video protests in Egypt was given an eleven-year sentence for blasphemy though his sentence was suspended in favor of a \$14,000 fine pending appeal. See *Hardline Egyptian Cleric Sentenced for Burning Bible*, AL ARABIYA (June 16, 2013), <http://english.alarabiya.net/en/News/middle-east/2013/06/16/Hard-line-Egyptian-cleric-sentenced-for-burning-Bible.html> (reporting that “there has been a surge in such [blasphemy] cases in recent months.”); see also *Human Rights Council Must Do More to Protect Human Rights in Palestine, Syria, Egypt*, CAIRO INST. FOR HUMAN RIGHTS STUDIES (June 17, 2013), <http://www.cihrs.org/?p=6839&lang=en> (Noting that, significantly, Germany, Norway, and the United States delivered a joint statement before the Human Rights Council in which they expressed that they are “deeply dismayed by the sharp rise over the past two years in legal action against individuals for

In May 2012, a Tunisian court fined a television station owner for screening *Persepolis*, a film that briefly depicts God.¹⁴ The court found that the film's depiction undermined public morals and the public order, though it later dropped certain charges and reduced the punishment to a fine without imprisonment.¹⁵ This verdict was issued at about the same time Tunisia was hosting World Press Freedom Day, prompting concerns by U.S. officials about the strength of the freedoms of expression and religion in Tunisia.¹⁶ Other Arab Spring countries, such as Libya, are also implementing blasphemy bans.¹⁷ It should be noted that such laws, policies, and lawsuits remain controversial matters in Arab Spring countries. For example, the head of Tunisia's Ennahda party recently

expressing their opinions and beliefs," pointing out that such acts are "inconsistent with Egypt's obligations to protect freedom of opinion and expression under the International Covenant on Civil and Political Rights.").

¹⁴ U.S. DEP'T OF STATE, COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES FOR 2012: TUNISIA (2013), available at <http://www.state.gov/documents/organization/204597.pdf> (providing the following additional details on this case: "[O]n May 12, [2012] a court convicted Nabil Karoui, head of the Nessma television station, of disrupting public order and violating moral values when Nessma broadcast the French-Iranian film *Persepolis* in October 2011. Conservative Islamists and extremist Salafists criticized the film's depiction of God as sacrilegious, engaged in widespread protests, and attacked Karoui's residence. The government deployed hundreds of troops to separate rival protesters. Ultimately, courts fined Karoui but dismissed the charge of 'libeling religion and disrupting public order and morals,' which would have required a prison sentence."). This report also highlighted other incidents. *Id.* at 10 (noting that "a municipal court in Mahdia convicted two bloggers of 'insulting others via public communication networks' and disseminating material which could 'disturb public order' after the defendants posted an article critical of the Prophet Muhammad on Facebook. The court issued a prison sentence of seven and one-half years and a fine of 1,200 dinars (\$775) for the offense. One of the bloggers fled abroad to avoid prosecution and was granted asylum in Romania. The court's decisions were confirmed on appeal.").

¹⁵ *Id.*

¹⁶ Charlene Porter, *World Marks Press Freedom Day Under Shadow of Journalist Deaths*, IIP DIGITAL (May 3, 2012), <http://iipdigital.usembassy.gov/st/english/article/2012/05/201205035025.html#axzz2aMKAq600> (citing condemnation of the initial verdict by the U.S. Assistant Secretary of State for International Organizations and the U.S. Ambassador to Tunisia).

¹⁷ *Libya: Blasphemy Charges Over Election Posters*, HUMAN RIGHTS WATCH (June 20, 2013), <http://www.hrw.org/news/2013/06/20/libya-blasphemy-charges-over-election-posters-0> *Libya* (reporting that criminal blasphemy charges were brought against political leaders for posters that were viewed as insulting to Islam). In Syria, armed groups have been committing assaults and murders in the name of enforcing blasphemy bans. See, e.g., *The Boy Killed for an Off-hand Remark About Muhammad – Sharia Spreads in Syria*, BBC NEWS (July 2, 2013, 12:22 AM), <http://www.bbc.co.uk/news/world-middle-east-23139784> (reporting that a Muslim teenager was killed by armed men for a joke he made about the Prophet Muhammad when asked for a free cup of coffee).

stated, “[b]laspemy is not a crime. Freedom of choice is very clear in the Qur’an; it says ‘let there be no compulsion in religion.’”¹⁸

In answering the question of why the United States expends significant diplomatic capital to promote the broadest protections for freedoms of expression and religion rather than “agreeing to disagree” about blasphemy, this Article begins by analyzing some basic questions about blasphemy laws and mapping out which countries still have them. Next, this Article discusses what range of expression is typically banned and punished by these laws, their origin, and the problems that have arisen in countries that implement them.

Following this discussion, this Article examines the international legal regime relevant to blasphemy bans. This Article then discusses recent diplomatic efforts, including UN Human Rights Council Resolution 16/18 (“Resolution 16/18”) and the related Istanbul Process, to combat religious intolerance while protecting freedoms of expression and religion. Resolution 16/18 eliminates the “defamation of religion” concept from prior UN resolutions and removes calls for any restriction on speech inconsistent with freedom of expression. This Article argues that Resolution 16/18 and the Istanbul Process provide a strong foundation for the international community to deal with such issues and makes some recommendations to guide these efforts. This Article’s conclusion summarizes the authors’ reflections on why the United States cannot “agree to disagree” on blasphemy laws, and why neither U.S. policy nor international law should be realigned on this contentious and high profile issue.

II. BACKGROUND ON BLASPHEMY LAWS

A recent analysis by the Pew Research Center’s Forum on Religion and Public Life¹⁹ found that as of 2011, almost half (47%) of the countries in

¹⁸ Joelle Fiss, *Leader of Tunisia’s Ruling Party: Blasphemy is Not a Crime*, HUMAN RIGHTS FIRST (June 7, 2013), available at <http://www.humanrightsfirst.org/2013/06/07/leader-of-tunisia%E2%80%99s-ruling-party-blasphemy-is-not-a-crime/> (noting that the ruling party had initially sought a provision in the Tunisian constitution banning blasphemy). In Egypt, a coalition of non-governmental organizations found that accusations of blasphemy and insulting the president were the most common freedom of expression violations in Egypt and called for repeal of such laws. Rana Muhammad Tasha, Human Rights, Post Revolution: One Year in Power, DAILY NEWS EGYPT, June 29, 2013, available at <http://www.dailynewsegypt.com/2013/06/29/human-rights-achievements-one-year-in-power/> (noting that blasphemy laws are generally used against Egypt’s Christian minority). The new interim government in Egypt has initiated a process for amending Egypt’s newly adopted constitution. *Egypt’s interim president forms committee to amend constitution*, CBS NEWS, July 20, 2013, http://www.cbsnews.com/8301-202_162-57594702/egypts-interim-president-forms-committee-to-amend-constitution/.

¹⁹ Brian Grim, *Laws Penalizing Blasphemy, Apostasy and Defamation of Religion are*

the world have laws and policies that punish blasphemy,²⁰ apostasy,²¹ or defamation.²² Specifically, the Pew study found that 32 countries out of 198 (16%) have blasphemy laws,²³ 20 (10%) have apostasy laws, and 87 (44%) have disparagement laws.²⁴

Widespread, PEW RESEARCH CENTER, RELIGION & PUBLIC LIFE PROJECT (Nov. 21, 2012), <http://www.pewforum.org/2012/11/21/laws-penalizing-blasphemy-apostasy-and-defamation-of-religion-are-widespread/>. Though this particular study defined “blasphemy” narrowly to exclude speech that disparages or criticizes religions, the term is frequently used to include speech that disparages religions or religious beliefs. Unfortunately, the study did not disaggregate which countries penalize disparagement of religion from those that penalize hate speech against persons because of their religion. *Id.*

²⁰ The study defined blasphemy as “remarks or actions contemptuous of God or the divine.” *Id.*

²¹ The study defined apostasy as abandonment of one’s religion. *Id.*

²² The study defined defamation as both criticism of religion as well as hate speech against members of religious groups. *Id.*

²³ The study found that the Middle East and North Africa as a region have the highest proportion of countries criminalizing blasphemy (65%). *Id.* States or territories in that region that criminalize blasphemy include Algeria, Bahrain, Egypt, Jordan, Kuwait, Lebanon, Morocco, Oman, Qatar, Saudi Arabia, Sudan, United Arab Emirates, and Western Sahara. *Id.* The study also found that 18% of countries in the Asia-Pacific region have blasphemy laws. *Id.* Those states include Afghanistan, India, Indonesia, Iran, Malaysia, Maldives, Pakistan, Singapore, and Turkey. *Id.* The study found that 18% of European countries have such laws. *Id.* Those states include Denmark, Germany, Greece, Ireland, Italy, Malta, Netherlands, and Poland. *Id.* The study found that two out of forty-eight sub-Saharan African countries have blasphemy laws: Nigeria and Somalia. *Id.*

²⁴ The study found that laws in this category are most prevalent in Europe, where 80% of countries have laws or policies in place. *Id.* The following are the European states that the study found to have such laws: Austria, Belarus, Belgium, Bosnia-Herzegovina, Croatia, Czech Republic, Denmark, Finland, France, Germany, Greece, Hungary, Iceland, Ireland, Latvia, Liechtenstein, Lithuania, Luxemburg, Macedonia, Malta, Moldova, Montenegro, Netherlands, Norway, Poland, Portugal, Romania, Russia, Serbia, Slovakia, Slovenia, Spain, Sweden, Switzerland, Ukraine, and the United Kingdom. *Id.* The study found that most laws in this region penalized hate speech rather than speech that “defamed” religions. *Id.* In the Middle East and North Africa region, 75% of countries had laws in this category and most penalized “defamation of religions,” not hate speech directed at persons. *Id.* Those states include Algeria, Bahrain, Egypt, Jordan, Kuwait, Lebanon, Morocco, Oman, Saudi Arabia, Sudan, Syria, Tunisia, the United Arab Emirates, Western Sahara, and Yemen. *Id.* In the Asia-Pacific region 34% of countries had laws and policies that fell into this category. *Id.* Those states include Armenia, Bangladesh, Bhutan, Brunei, Cambodia, India, Indonesia, Iran, Kyrgyzstan, Malaysia, Maldives, Burma, Pakistan, Singapore, Thailand, Turkey, and Uzbekistan. *Id.* In Sub-Saharan Africa, the study found that 27% of countries had such laws and policies. *Id.* Those states include Burundi, Central African Republic, Congo, Ethiopia, Gambia, Guinea, Mali, Mauritania, Republic of Congo, Rwanda, Seychelles, South Africa, and Tanzania. *Id.* In the Americas, 17% of countries have such laws and policies. *Id.* Those states include Brazil, Canada, Chile, El Salvador, Trinidad & Tobago, and Venezuela. *Id.*

In the United States, blasphemy bans are unconstitutional,²⁵ though anti-blasphemy laws remain on the books in some states.²⁶ These statutes are

A 2008 survey conducted by the Council of Europe (“COE”)’s European Commission for Democracy through Law found that a small minority of COE member states had blasphemy laws (though the survey did not adopt a formal definition of blasphemy, generally viewing it as a lack of reverence for God or the divine) and that prosecutions were rare. Eur. Consult. Ass., *Report on the Relationship Between Freedom of Expression and Freedom of Religion: The Issue of Regulation and Prosecution of Blasphemy, Religious Insult and Incitement to Religious Hatred*, 76th Sess., STUDY. NO. 406/2006 (2008), available at [http://www.venice.coe.int/webforms/documents/?pdf=CDL-AD\(2008\)026-e](http://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2008)026-e). The report found about half of COE member states had religious insult laws (defined as insult to those belonging to a particular religious group and insult to religious feelings) and almost all had incitement to hatred laws. *Id.* at 9-10.

²⁵ In 1952, the U.S. Supreme Court held that expression cannot be banned on the basis that it is sacrilegious. *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495 (1952). The issue arose in the context of a New York statute, which permitted the banning of motion picture films on the basis that they were “sacrilegious.” *Id.* at 497. Specifically, the Court found “the state has no legitimate interest in protecting any or all religions from views distasteful to them. . . . It is not the business of government in our nation to suppress real or imagined attacks upon a particular religious doctrine. . . .” *Id.* at 506.

²⁶ Massachusetts, Michigan, Oklahoma, Pennsylvania, South Carolina, and Wyoming still have blasphemy laws on the books. Massachusetts’s statute provides: “Whoever willfully blasphemes the holy name of God by denying, cursing or contumeliously reproaching God, his creation, government or final judging of the world, or by cursing or contumeliously reproaching Jesus Christ or the Holy Ghost, or by cursing or contumeliously reproaching or exposing to contempt or ridicule, the holy word of God contained in the holy scriptures shall be punished by imprisonment in jail for not more than one year or by a fine of not more than three hundred dollars and be also be bound to good behavior.” MASS. GEN. LAWS ch. 272, § 36 (2010). Michigan’s law provides: “Any person who shall willfully blaspheme the holy name of God, by cursing or contumeliously reproaching God, shall be guilty of a misdemeanor.” MICH. COMP. LAWS ANN. § 750.102 (West 2004). Oklahoma’s statute provides: “Blasphemy consists in wantonly uttering or publishing words, casting contumelious reproach or profane ridicule upon God, Jesus Christ, and the Holy Ghost, the Holy Scriptures or the Christian or any other religion.” OKLA. STAT. ANN. tit. 21, §§ 901-903 (West 2002). Pennsylvania’s statute provides: “The corporate name shall not contain . . . [w]ords that constitute blasphemy, profane cursing or swearing or that profane the Lord’s name.” 15 PA. CONS. STAT. ANN. § 1303 (West 2013). South Carolina’s statute provides: “[a]ny person who shall . . . use blasphemous, profane or obscene language at or near the place of meeting shall be guilty of a misdemeanor and shall, on conviction, be sentenced to pay a fine of not less than twenty nor more than one hundred dollars, or be imprisoned for a term not exceeding one year or less than thirty days, either or both, at the discretion of the court. S.C. CODE ANN. § 16-17-520 (2003). Wyoming’s statute provides: “nothing . . . shall authorize the publication of blasphemous or indecent matter.” WYO. STAT. ANN. § 1-29-106 (2013). In Oklahoma, a lawmaker said that he was motivated to seek repeal of Oklahoma’s blasphemy law after the violence that erupted in September 2012 surrounding the *Innocence of Muslims* video. *Oklahoma Lawmaker Seeks to Eliminate Blasphemy Law*, TULSA WORLD, Sept. 26, 2006,

invoked rarely, if at all; the only case the authors could find in the last thirty to forty years arose in 2010 under Pennsylvania's blasphemy statute, when a case was brought against a business owner for seeking to give his enterprise a name that government officials found to be blasphemous: "I Choose Hell Productions, LLC."²⁷ Although the court found the statute unconstitutional,²⁸ it still remains on the books.

The type of expression banned by blasphemy laws around the globe ranges from the destruction of holy books²⁹ to statements that call into question religious beliefs³⁰ to depictions deemed disrespectful of God or holy figures.³¹ Cases have been brought against those whose expression is

http://www.tulsaworld.com/article.aspx/Oklahoma_lawmaker_seeks_to_eliminate_blasphemy_law/20120926_12_0_olhm819353. The law, however, has not yet been repealed. OKLA. STAT. ANN. tit. 21, §§ 901-903 (West 2002).

²⁷ *Kalman v. Cortes*, 723 F. Supp. 2d 766 (E.D. Pa. 2010). In this case, the plaintiff challenged a Pennsylvania statute that banned corporate names containing "words that constitute blasphemy, profane cursing or swearing or that profane the Lord's name." *Id.* at 776. The plaintiff argued the statute was unconstitutional, alleging it had a non-secular purpose of advancing religion and fostering excessive government entanglement with religion as well as violating free speech protections because it embodied a viewpoint restriction and was vague. *Id.* at 771. While the legislative history was sparse, there were news stories that highlighted the statute was passed because a gun store was incorporated with a name that offended church members. *Id.* at 777. The statute provided no definitions for "blasphemy, profane cursing or swearing" or profaning the Lord's name. *Id.* at 778. Pennsylvania employees who were supposed to implement the statute testified they had received no training or guidance. *Id.* The plaintiff testified that he had chosen his company's name based on his philosophy that it is better to struggle through difficult times than to commit suicide. *Id.* at 778-779.

²⁸ *Id.*

²⁹ HUMAN RIGHTS FIRST, *BLASPHEMY LAWS EXPOSED: THE CONSEQUENCES OF CRIMINALIZING "DEFAMATION OF RELIGIONS"* 10 (2012) [hereinafter *BLASPHEMY LAWS EXPOSED*], available at http://www.humanrightsfirst.org/wp-content/uploads/Blasphemy_Cases.pdf (citing to the cases of a mentally ill person who spent fourteen years in the mental ward of a Pakistani prison for throwing torn "pages" of a Qur'an down the drain, though nothing linked her to the evidence, and a high school student in Indonesia sentenced to one year in jail for creating a blog that showed him stomping on the Qur'an and putting it in the toilet).

³⁰ *Id.* (noting that, in 2010, a member of a musical group in Poland was arrested and fined \$1,450 for suggesting that the Bible was written by drunkards and drug abusers, and that an author of books about conversion from Buddhism to Islam was arrested in Sri Lanka and spent time in jail for offending a spiritual leader of Buddhism).

³¹ *Id.* at 7-10 (describing Egypt's 2009 revocation of a license for a magazine because it published a poem that depicted God as people, objects, and animals; Sudan's 2007 arrest of a primary school teacher after her class named their teddy bear Muhammad; Iran's 2007 arrest of student activists who questioned the Prophet Muhammad; and Austria's 2011 imposition of a fine on a lecturer in Vienna for denigrating the Prophet Muhammad).

generally disrespectful of religious beliefs³² and those who insult religious feelings.³³ When the United States previously allowed blasphemy bans, speech was curtailed and punished for similar reasons.³⁴

Some countries have modified their blasphemy laws in recent years in an effort to strengthen or clarify such laws. For example, Ireland adopted a blasphemy law in 2009 to clarify the Irish Constitution's prohibition on blasphemy.³⁵ In 2012, Kuwait's Parliament sought to increase the criminal penalty for blasphemy to include the death penalty, though the measure was

³² *Id.* at 6 (noting that India's Ministry of Communications and Information Technology issued regulations in 2011 requiring social media networks to screen and remove any offensive, including blasphemous, content). *See also* Jo-Anne Prud'homme, FREEDOM HOUSE, POLICING BELIEF: THE IMPACT OF BLASPHEMY LAWS ON HUMAN RIGHTS (2010), *available at* http://www.freedomhouse.org/sites/default/files/Policing_Belief_Full.pdf (citing cases of artistic expression in Greece); *see also* U.S. COMM'N ON INT'L RELIGIOUS FREEDOM, ANNUAL REPORT (2013) (highlighting the 2012 decision by Greek authorities to arrest a Facebook user on charges of blasphemy for criticizing a deceased Greek Orthodox monk and to bring blasphemy charges against the director and cast of a play that portrayed Jesus and his apostles as homosexuals).

³³ *Id.* at 298 (noting that the Polish Supreme Court found that a rock musician could be guilty of offending religious feelings when he ripped up a Bible and criticized Catholics during a concert, and that a Philippine trial court convicted a man of offending religious feelings in protesting the role of bishops in politics). In 2012, a punk band in Russia that crashed an Orthodox mass and sang an anti-Putin prayer was convicted of "hooliganism motivated by religious hatred." Katya Soldak, *Pussy Riot Revisited*, FORBES (June 21, 2013, 4:10 PM), <http://www.forbes.com/sites/katyasoldak/2013/06/21/pussy-riot-revisited/>. The lower house of the Russian Parliament afterwards passed a measure prohibiting insulting religions. *Id.*

³⁴ *People v. Ruggles*, 8 Johns. 290 (N.Y. Sup. Ct. 1811) (upholding a conviction for saying disrespectful things about Jesus and the Virgin Mary in a pub); *State v. Mockus*, 113 A. 39 (Me. 1921) (upholding a conviction for questioning and ridiculing the basic tenets of the Christian faith in a lecture).

³⁵ The Irish constitution prohibits the publication or utterance of "blasphemous, seditious, or indecent" material. IR. CONST., 1937, art. 40; U.S. DEP'T OF STATE, 2009 HUMAN RIGHTS REPORT: IRELAND 11-14 (2010), *available at* <http://www.state.gov/j/drl/rls/hrrpt/2009/eur/136037.htm>. Ireland passed a law to better define the constitution's blasphemy prohibition which provided that a person can be found guilty of blasphemy if he or she "publishes or utters matter that is grossly abusive or insulting in relation to matters held sacred by any religion, thereby causing outrage among a substantial number of the adherents of that religion." Defamation Act 2009 (Act No. 31/2009) (Ir.), *available at* http://www.bailii.org/ie/legis/num_act/2009/031.html. The law also added an intent requirement and a showing that a reasonable person would not find genuine literary, artistic or other value in the material. *See* Joelle Fiss, *Lessons of the Debate Over Ireland's Blasphemy Law*, HUMAN RIGHTS FIRST (Nov. 14, 2013), <http://www.humanrightsfirst.org/2013/11/14/lessons-of-the-debate-over-ireland%E2%80%99s-blasphemy-law/>.

vetoed by the Emir.³⁶ In early 2013, Russia adopted a new blasphemy law that criminalizes public acts that disrespect or insult people's religious beliefs, with a penalty of up to three years imprisonment for such actions in places of worship and up to one year imprisonment if committed elsewhere.³⁷ Within the United States, the aforementioned Pennsylvania blasphemy case involved a statute that was adopted as recently as 1988.³⁸

In many countries, blasphemy bans originated in laws imported from colonizing powers. For example, in the United States, the British prohibition on blasphemy was transmitted to the original thirteen colonies.³⁹ After U.S. independence, bans on blasphemy were brought into individual state legal systems through the incorporation of the British common law into the U.S. legal system.⁴⁰ It took the U.S. Supreme Court over 150 years to overcome this colonial legacy when it finally ruled that blasphemy bans were unconstitutional in 1952.⁴¹ In the Indian subcontinent, the British imposed blasphemy bans during their colonial rule in an effort to maintain harmony amongst various religious groups.⁴² These

³⁶ U.S. COMM'N ON INT'L RELIGIOUS FREEDOM, *supra* note 32, at 298.

³⁷ *Russia: New Laws an Affront to Basic Human Rights*, AMNESTY INT'L (July 1, 2013), <http://www.amnesty.org/en/news/russia-new-laws-affront-basic-human-rights-2013-07-01>.

³⁸ See Kalman, 723 F. Supp. 2d 766.

³⁹ *Id.* at 773. In the Massachusetts colony, four Quakers were hanged for blasphemy in 1659-1660 and numerous individuals were prosecuted for blasphemy in the Salem witch trials of the 1690s. *Id.*

⁴⁰ For example, in 1811, the New York State Supreme Court affirmed a blasphemy conviction of a man who said insulting things about Jesus and the Virgin Mary while intoxicated at a pub. Ruggles, 8 Johns 290. The court rejected the defendant's arguments that religious freedom provisions in the state constitution protected his views, finding that Christianity in general defined the boundaries of religious freedom, just as it had in British common law. *Id.* The court reasoning also stated that because his statement had been made with a wicked and malicious disposition, and not in any serious discussion of religion, it constituted an "abuse" of freedom of expression. *Id.* Other courts also found that Christianity was part of the common law and, therefore, upheld blasphemy bans. See, e.g., *Updegraph v. Commonwealth*, 11 Serg. & Rawle 394 (Pa. 1824).

⁴¹ *Burstyn*, 343 U.S. 495.

⁴² Osama Siddique & Zahra Hayat, *Unholy Speech and Holy Laws: Blasphemy Laws in Pakistan – Controversial Origins, Design Defects, and Free Speech Implications*, 17 MINN. J. INT'L L. 303, 336-37 (2008) (noting that part of the motivation may have also been to protect the Muslim minority from the Hindu majority). At an academic seminar, a professor of anthropology at Harvard University observed that "[b]l blasphemy was a big issue in the England of the 1830s and the colonial architects of these laws were simply transferring English concerns onto an Indian audience It gave legitimacy to colonial rule to depict locals as excitable and irrational people who were highly sensitive to insults." *Tracing Roots: Academics Delve into Blasphemy Law's Origin*, EXPRESS TRIB., Jan. 14, 2011, <http://tribune.com.pk/story/103621/tracing-roots-academics-delve-into-blasphemy-laws-origin/>. He also noted that the concept of blasphemy had been a minor theme in Islamic law

colonial laws were retained upon independence by some countries, including Pakistan.⁴³

Blasphemy bans pose a variety of problems. First, they directly restrict freedom of expression by placing undue limitations on content.⁴⁴ Further, vague wording and expansive interpretations of blasphemy laws often widen the scope of the violations of such laws.⁴⁵ Second, blasphemy laws infringe upon freedom of religion because the state in effect becomes an arbiter of religious truth claims, often playing a role in defining or defending orthodoxy.⁴⁶ Accordingly, blasphemy bans constrain the ability to fully manifest and express one's views on religion, as they are subjected to state-sanctioned interpretations of religion.

Third, as demonstrated in numerous reports by human rights groups,⁴⁷ blasphemy laws are frequently enforced in a discriminatory manner that results in the suppression of political dissidents and religious minorities.⁴⁸ These laws create a powerful tool for governments and other actors to target vulnerable and marginalized populations, often to cater to particular constituencies. For example, during the span of one month in Egypt, a Christian teacher was fined for insulting the Prophet Muhammad in class, a writer was sentenced to multiple years in prison for promoting atheism, and a Christian lawyer was sentenced to one year in prison for insulting Islam in a private conversation.⁴⁹

In Pakistan, there have been dozens of prosecutions for blasphemy in 2013 alone, many of which targeted Pakistan's minority Christian and Ahmedi populations. For example, a Christian couple was charged with

and that enabling insult to religious feelings to be actionable criminalized religious discourse and led to religious nationalism. *Id.* At the same seminar, another speaker noted there was no mention of blasphemy in the Qur'an. *Id.*

⁴³ *Id.* (discussing how British blasphemy laws were imported into Pakistan's legal system). In 1977, Pakistan modified its blasphemy law to include life imprisonment for defiling the Qur'an and, in 1986, Pakistan introduced the death penalty for anyone "defaming" Islam. *The History of the Blasphemy Law*, EXPRESS TRIB., Jan. 5, 2011, <http://tribune.com.pk/story/99414/the-history-of-the-blasphemy-law/>.

⁴⁴ See Prud'homme, *supra* note 32, at 2.

⁴⁵ *Id.* at 3.

⁴⁶ *Id.* at 7.

⁴⁷ *Id.* at 6; see also Asma Uddin, *Blasphemy Laws in Muslim Majority Countries*, REV. FAITH & INT'L AFF., Summer 2011.

⁴⁸ Prud'homme, *supra* note 32, at 6.

⁴⁹ Ben Hubbard & Mayy El Sheikh, *Islamists Press Blasphemy Cases in New Egypt*, N.Y. TIMES, June 18, 2013, http://www.nytimes.com/2013/06/19/world/middleeast/islamists-press-blasphemy-cases-in-a-new-egypt.html?pagewanted=all&_r=0 (reporting a flood of blasphemy cases against members of the Christian minority).

sending a blasphemous text message,⁵⁰ a Christian man was sentenced to life in prison for sending a blasphemous text message,⁵¹ a printer was arrested for blasphemy because he was printing Ahmedi literature,⁵² and a Muslim man in Punjab was sentenced to ten years for misquoting a hadith, or saying, of the Prophet Muhammad.⁵³ Even Pakistan's former Ambassador to the United States, Sherry Rehman, is under investigation for blasphemy after making critical statements regarding Pakistan's blasphemy law.⁵⁴

Fourth, enforcement of blasphemy laws often leads to other human rights violations and abuses, including extrajudicial killings and arbitrary arrests.⁵⁵ Blasphemy accusations are often reflective of communal tensions and can spark violence. In early 2013, a blasphemy accusation in Lahore, Pakistan sparked mob violence that destroyed churches, businesses, and nearly 200 homes.⁵⁶ Since 1990, there have been over fifty murders in Pakistan related to blasphemy accusations.⁵⁷ Mob violence related to blasphemy cases has also occurred in Indonesia.⁵⁸

⁵⁰ Asher John, *Christian Couple Charged with Blasphemy in Gojra*, PAKISTAN TODAY, July 23, 2013, <http://www.pakistantoday.com.pk/2013/07/23/news/national/christian-couple-charged-with-blasphemy-in-gojra/>. See also *Christian Jailed for Text Messages in Gojra, Pakistan*, OPEN DOORS (July 26, 2013), <http://www.opendoorsusa.org/news/2013/07-July/Christian-jailed-for-text-messages-in-Gojra-Pakistan>.

⁵¹ Anugrah Kumar, *Pakistani Christian Gets Life in Prison for Blasphemous Text Messages*, CHRISTIAN POST (July 15, 2013) <http://www.christianpost.com/news/pakistani-christian-gets-life-in-prison-for-blasphemous-text-messages-100051/>. See also *Christian Jailed for Text Messages in Gojra, Pakistan*, *supra* note 50.

⁵² *Ahmadi Literature: Blasphemy Suspect Denied Bail*, EXPRESS TRIB., July 9, 2013, <http://tribune.com.pk/story/560862/ahmadi-literature-blasphemy-suspect-denied-bail>.

Ahmadis self-identify as a religious sect of Islam, but are often deemed a religious minority in Pakistan. Because the literature supported Ahmadis, the printer violated laws against groups that the government has determined to be non-Muslim claiming to be Muslim. *Id.*

⁵³ Nabeel Anwar Dhakku, *Man Jailed for 10 Years in Blasphemy Case*, DAWN.COM (Jan. 10, 2013), <http://beta.dawn.com/news/777648/man-jailed-for-10-years-in-blasphemy-case>.

⁵⁴ Asim Tanveer, *Pakistani Man Accuses Ambassador to U.S. of Blasphemy* (REUTERS), Feb. 21, 2013, <http://www.reuters.com/article/2013/02/21/us-pakistan-usa-idUSBRE91K0KE20130221>.

⁵⁵ See Prud'homme, *supra* note 32.

⁵⁶ Declan Walsh & Waqar Gillani, *Attack on Christians Follows Claims of Blasphemy in Pakistan*, N.Y. TIMES, Mar. 9, 2013, http://www.nytimes.com/2013/03/10/world/asia/explosion-rips-through-mosque-in-peshawar-pakistan.html?_r=0.

⁵⁷ *Pakistan: A Historical Overview of Blasphemy Laws*, ASIAN HUM. RTS. COMMISSION (May 11, 2013), <http://www.humanrights.asia/news/ahrc-news/AHRC-STM-090-2013>.

⁵⁸ Bruno Philip, *Indonesian Blasphemy Law Sparks Muslim Violence in Java*, THE GUARDIAN, Feb. 15, 2010, <http://www.theguardian.com/world/2011/feb/15/indonesia>.

Finally, blasphemy laws fail in their often-stated objective of promoting religious harmony. A study by the Pew Forum on Religion and Public Life found that countries with the most restrictions on religious freedom, such as blasphemy laws, also have the highest level of religious hostilities.⁵⁹ Although this study does not necessarily imply a causal link, at the very least it disproves the argument that defamation and blasphemy laws help to promote religious harmony.

Blasphemy laws and related enforcement actions may actually be counterproductive from the perspective of deterring alleged acts of blasphemy, since they raise the profile of the offensive speech even more than would have been the case without such laws, governmental enforcement actions, or societal calls for punishment. In this regard, calls to ban materials such as the *Innocence of Muslims* video,⁶⁰ the infamous Danish cartoons,⁶¹ or the tweets of the Saudi teen-age blogger who fled to Malaysia⁶² created those materials' high profiles and exponentially increased their viewership. Thus, blasphemy laws – or at least calls to implement them – have dramatically increased the viewership of offensive materials, which undermines the intended purpose of those laws.

III. THE INTERNATIONAL LEGAL REGIME AND BLASPHEMY BANS

Countries with blasphemy bans generally rely on three arguments to justify such laws under international human rights law: (1) that international law permits curtailing blasphemy because states may limit speech that threatens the public order by provoking violence towards the speaker;⁶³ (2) that prohibiting speech that offends religious sensibilities is needed to protect the right to religious freedom for those who are offended;⁶⁴ and (3) that international law mandates banning advocacy of religious hatred that incites discrimination, hostility, or violence.⁶⁵

The treaty most relevant to the treatment of blasphemy is the

blasphemy-sectarian-violence-philip.

⁵⁹ PEW RESEARCH CTR., RISING TIDE OF RESTRICTIONS ON RELIGION, 12 (Sept. 2012), available at <http://www.pewforum.org/files/2012/09/RisingTideofRestrictions-fullreport.pdf>.

⁶⁰ *Innocence of Muslims*, *supra* note 2.

⁶¹ John Ward Anderson, *Cartoons of Prophet Met with Outrage*, WASH. POST (Jan. 31, 2006), <http://www.washingtonpost.com/wp-dyn/content/article/2006/01/30/AR2006013001316.html>.

⁶² Affan Chowdhry, *Saudi Blogger Flees After Death Threats Over Prophet Mohammed Tweets: 'I'm afraid'*, THE GLOBE AND MAIL (Can.) (Feb. 10, 2012), <http://www.theglobeandmail.com/news/world/worldview/saudi-blogger-flees-after-death-threats-over-prophet-mohammed-tweets-im-afraid/article545338/>.

⁶³ See *infra* Part III.A.

⁶⁴ See *infra* Part III.B.

⁶⁵ See *infra* Part III.C. See also Aswad, *supra* note 5.

International Covenant on Civil and Political Rights (“ICCPR”), which sets forth the international legal protections for the freedoms of religion (Article 18) and expression (Article 19).⁶⁶ The ICCPR entered into force in 1976 and has 167 States Parties today.⁶⁷ This section will focus primarily on the first two arguments set forth above.⁶⁸

⁶⁶ International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 U.N.T.S. 171, *available at* http://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-4&chapter=4&lang=en (last visited Dec. 9, 2013) [hereinafter *ICCPR*].

⁶⁷ United Nations Treaty Collection, International Covenant on Civil and Political Rights, http://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-4&chapter=4&lang=en (last visited Dec. 14, 2013). Only three States Parties have reservations, understandings or declarations (“RUD’s”) specifically on Article 18, none of which are Arab Spring states (of which Egypt, Tunisia, Libya, Syria, and Yemen are parties to the ICCPR). *Id.* The government of the Lao People’s Democratic Republic “declares that Article 18 of the ICCPR shall not be construed as authorizing or encouraging any activities, including economic means, by anyone which directly or indirectly, coerce or compel an individual to believe or not to believe in a religion or to convert his or her religion or belief. The Government of the Lao People’s Democratic Republic considers that all acts creating division and discrimination among ethnic groups and among religions are incompatible with Article 18 of the Covenant.” *Id.* The Swedish government objected to this RUD. *Id.* The Maldives has a RUD, stating that “[t]he application of the principles set out in Article 18 of the Covenant shall be without prejudice to the Constitution of the Republic of Maldives.” *Id.* Numerous European countries, Canada, and Australia objected to this RUD. *Id.* The Mauritanian government, while accepting the provisions set out in Article 18 concerning freedom of thought, conscience, and religion, declared “that their application shall be without prejudice to the Islamic Shariah.” *Id.* Numerous European countries objected to this RUD. *Id.* Mexico also issued a RUD to Article 18, stating that “[u]nder the Political Constitution of the United Mexican States, every person is free to profess his preferred religious belief and to practice its ceremonies, rites and religious acts, with the limitation, with regard to public religious acts, that they must be performed in places of worship and, with regard to education, that studies carried out in establishments designed for the professional education of ministers of religion are not officially recognized. The Government of Mexico believes that these limitations are included among those established in paragraph 3 of this article.” *Id.* No countries objected to this RUD. *Id.* Bahrain sought to insert a RUD on Article 18 (saying that it did not affect “the prescriptions of the Islamic Shariah”), but the UN Secretariat rejected this RUD because it was submitted after Bahrain had already become a party to the ICCPR, and other States Parties objected to the RUD. *Id.* Only a few States Parties have a RUD specifically on Article 19. *Id.* Italy, Luxemburg, Monaco, and the Netherlands have RUDs to ensure the compatibility of the ICCPR with their broadcast licensing schemes, and Malta has a RUD with respect to its limits on speech for public officials. *Id.* The United States addressed the permissible limitations in Article 19(3) by stating in its RUD’s its view that “States Party to the [ICCPR] should wherever possible refrain from imposing any restrictions or limitations on the exercise of the rights recognized and protected by the [ICCPR], even when such restrictions and limitations are permissible under the terms of the [ICCPR].” *Id.*

⁶⁸ The third argument for justifying blasphemy bans concerns Article 20 of the ICCPR,

A. The Public Order Argument

ICCPR Article 18 provides the following protections for religious freedom:

1. Everyone shall have the right to freedom of thought, conscience and religion. This right shall include freedom to have or to adopt a religion or belief of his choice, and freedom, either individually or in community with others and in public or private, to manifest his religion or belief in worship, observance, practice and teaching.
2. No one shall be subject to coercion which would impair his freedom to have or to adopt a religion or belief of his choice.
3. Freedom to manifest one's religion or beliefs may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others.
4. The States Parties to the present Covenant undertake to have respect for the liberty of parents and, when applicable, legal guardians to ensure the religious and moral education of their children in conformity with their own convictions.⁶⁹

ICCPR Article 19 provides the following protections for freedom of expression:

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:

which provides that “[a]ny advocacy of national, racial, or religious hatred that incites discrimination, hostility, or violence shall be prohibited by law.” *Id.* art. 20(2). The argument that blasphemous speech is required to be banned by Article 20 is addressed at length, and rejected, in Aswad, *supra* note 5. In summary, the concept of incitement in Article 20 refers to speech where an audience agrees with the speaker's hateful message and follow the speaker into violence against the targeted group. *Id.* In most blasphemy cases, governments seek to ban speech on the basis of preventing violence by members of the targeted group who *oppose* the message rather than on the basis of preventing violence or discrimination against the targeted group. *Id.*

⁶⁹ ICCPR, *supra* note 66, art. 18.

- (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.⁷⁰

The first two subsections of both articles provide broad protections for the fundamental freedoms of religion and expression. It is also clear that the third subsection of each article permits – but does not require – restrictions on these rights in limited situations.

Under international law, a State Party desiring to limit these freedoms must meet several criteria. First, the restriction must be “provided by law.”⁷¹ The Human Rights Committee, the body of independent experts that monitor implementation of the ICCPR, has recommended that this phrase in Article 19 means that the law “must be formulated with sufficient precision to enable an individual to regulate his or her conduct accordingly and it must be made accessible to the public. A law may not confer unfettered discretion . . . on those charged with its execution.”⁷² Any law aimed at banning or criminalizing blasphemy must be sufficiently precise such that it notifies government officials and society of the law’s parameters. If the law is phrased in a broad or vague manner, it will not meet this criterion and will not withstand challenge under international human rights law.

It would be extremely difficult for a law phrased as “prohibiting insults to religious feelings” or “disrespecting the sacred” to give sufficient notice to government officials or citizens charged with implementation. For example, in the aforementioned 2010 case from Pennsylvania, the blasphemy statute at issue gave wide discretion with respect to the phrases and words that would trigger its application to government employees charged with its implementation.⁷³ The court recounted this troubling aspect of the case in several points in the opinion. The statute provided no definitions of the terms “blasphemy”, “profane cursing”, or profaning the Lord’s name.⁷⁴ The employees implementing the statute testified that they

⁷⁰ *Id.* art. 19.

⁷¹ *Id.* arts. 18-19.

⁷² General Comment No. 34, Human Rights Committee, U.N. CCPR, 102nd Sess., at ¶ 6, U.N. Doc. CCPR/C/GC/34 (2011) [hereinafter *HRC General Comment No. 34*]. The United States views the by-law requirement as encompassing “laws that are accessible, clear, and subject to judicial scrutiny.” OFFICE OF THE LEGAL ADVISER, U.S. DEP’T OF STATE, DIGEST OF UNITED STATES PRACTICE IN INTERNATIONAL LAW 226, 226 (CarrieLyn D. Guymon ed., 2011), [hereinafter *U.S. Observations*]. Although General Comment 34 focused on ICCPR Article 19, there is no reason to think that the phrase has a different meaning when used in Article 18.

⁷³ See Kalman, 723 F. Supp. 2d at 766.

⁷⁴ *Id.* at 778.

had not received training or guidance on how to implement the statute.⁷⁵ When one of the employees sought to develop guidance on “suspect words”, she “did not consult with anyone else or undertake any research regarding non-Christian religions, [and] had not received any training or education regarding religion or religious denominations”⁷⁶

That said, statutes that are written with great precision often violate other provisions of the ICCPR, as they tend to favor one or a few specific religions. For example, if a law specifically banned particular words that are only relevant to certain religions or beliefs, that law would violate the provisions of the ICCPR that prohibit religious discrimination and guarantee equal protection of the law.⁷⁷ Similarly, if a blasphemy law is drafted in a neutral fashion but is only applied to protect certain religions, such implementation would violate the non-discrimination provisions of the ICCPR. Issuing penalties of different degrees, depending on the religion or belief of the accused, would also violate equal protection of the law. Many existing blasphemy laws would not withstand scrutiny under these non-discrimination protections.

The second criterion for a State Party desiring to limit the freedoms contained in Articles 18 and 19 is that the restriction must be “necessary” to achieve a legitimate purpose.⁷⁸ The Human Rights Committee has recommended that this means, *inter alia*, that the limitation must be “the least intrusive instrument amongst those which might achieve the protective function and the limitations and consequences must be proportionate to the interest being protected.”⁷⁹ In order to satisfy this criterion, a state seeking to develop a blasphemy law must demonstrate not only that there is no less intrusive instrument, but also that the law must strive to achieve a legitimate governmental interest. Articles 18 and 19 specify the governmental interests that may be used to justify the restrictions, namely “protect[ing] public safety, order, health, or morals or the fundamental rights and freedoms of others.”⁸⁰ All of the enumerated legitimate government

⁷⁵ *Id.*

⁷⁶ *Id.*

⁷⁷ The Human Rights Committee has noted that any prohibitions on blasphemy must also comply with Articles 2 and 26. HRC General Comment No. 34, *supra* note 72, ¶ 48 (“Thus, for instance, 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.”). ICCPR Article 2 provides that all the rights contained in the Treaty shall be protected without discrimination as to, *inter alia*, religion and Article 26 provides for equal protection of the law regardless of religion or belief. ICCPR, *supra* note 66, arts. 2, 26.

⁷⁸ HRC General Comment No. 34, *supra* note 73, ¶ 34.

⁷⁹ *Id.* at ¶ 29.

⁸⁰ *Id.* arts. 18 (3). ICCPR Article 19(c) similarly states the governmental interests that

purposes must, of course, be invoked in good faith and not as pretexts for illicit bans on speech. For example, a state could not pass laws banning blasphemy on the pretext of maintaining public order when the true intention is to protect the stability of a party in office or to protect a particular religion.⁸¹

Countries often argue that they must ban blasphemy to preserve public order within society.⁸² Essentially, states argue that certain speech may be punished because it might provoke an audience to use violence against the speaker or those who are associated with the speaker. The legal question posed, therefore, is whether governments can ban insulting speech in order to maintain public order, which is one of the enumerated legitimate governmental interests under ICCPR Article 19(3).

The least restrictive means of governmental action in these cases is to limit the violent reactions of the offended audiences, which have no right to commit such violence, in order to protect the human rights of the unpopular speakers. In the wake of the violence over the *Innocence of Muslims* video, the international community passed several resolutions at the United Nations to emphasize that “violence can never be an acceptable response to acts of intolerance on the basis of religion or belief.”⁸³ This is a clear message from the international community that violent reactions to offensive speech are always unacceptable modes of expressing opposition or insult. Governments should only stop speakers if crowd control is impossible and the threat to public order is imminent. In such a scenario, the government would not be acting to prohibit the speech, but rather to protect the speaker until crowd control is achieved. Any lower standard for banning offensive speech would risk creating incentives for those who are insulted to express their displeasure by engaging in violence to silence those

may be used to justify restrictions are “respect of the rights or reputations of others . . . the protection of national security or public order (ordre public), or of public health or morals.” *Id.* Art 19(3).

⁸¹ Interestingly, Justice Frankfurter’s concurring opinion in *Burstyn* noted that the lesson from the British experience with blasphemy was that “[b]lasphe[m]y was the chameleon phrase which meant the criticism of whatever the ruling authority of the moment established as orthodox religious doctrine.” *Burstyn*, 343 U.S. at 529.

⁸² See Prud’homme, *supra* note 32, at 9.

⁸³ Human Rights Council Res. 16/18, Resolution Adopted by the Human Rights Council: Combatting Intolerance, Negative Stereotyping and Stigmatization of, and Discrimination, Incitement to Violence and Violence Against, Persons Based on Religion or Belief, 16th Sess., Feb. 28-Mar. 25, 2011, U.N. Doc. A/HRS/RES/16/18 (April 12, 2011) [hereinafter HRC Resolution 16/18]; see also UN General Assembly Resolution A/RES/67/178 (Dec. 20, 2012); Press Release, Security Council, Security Council Press Release on Attacks Against United States Diplomatic Personnel, U.N. Press Release SC/10761 (Sept. 12, 2012) (“[S]uch acts are unjustifiable regardless of their motivations, whenever and by whomsoever committed.”).

speakers that they disagree with. Such a lower standard risks turning the public order exception into a violent rioter's veto under human rights law, which would empower those who react with violence and punish those who express their unpopular views.⁸⁴ Further, a lower standard would lead to odd and inconsistent results. For example, it would be permissible to insult a group that believes in non-violence (or that typically does not react with violence) because it would be clear that members of that group would not respond through violence. These are not the types of incentives that good governance mandates, and it would be particularly unacceptable given the international community's reaffirmation that reacting to insulting and intolerant speech with violence is always unacceptable.⁸⁵

B. The Religious Sensibilities Argument

The second justification used by some for banning blasphemy is that religious sensibilities of believers must be protected or else their religious freedom will be impaired. However, there is no indication in the text of Article 18 that it includes a right to never be insulted or a right to universal agreement with one's religious views. To the contrary, inherent in the

⁸⁴ The Human Rights Committee has warned that "when a State party imposes restrictions on the exercise of freedom of expression, these may not put in jeopardy the right itself. The Committee recalls that the relation between the right and restriction and between norm and exception must not be reversed." HRC General Comment No. 34, *supra* note 72, ¶ 21.

⁸⁵ In addition, any public order justification would be questioned by a human rights body given the empirical data in the Pew Study, *supra* note 59, finding that countries with restrictions on religion, like blasphemy laws, actually have higher levels of religious hostility, thus calling into question a public order rationale. While countries seek to ban blasphemy under the "public morals" provision of Article 19(3), however, the Human Rights Committee recently stated in General Comment 34, "the concept of morals derives from many social, philosophical and religious traditions; consequently limitations . . . for the purpose of protecting morals must be based on principles not deriving exclusively from a single tradition. Any such limitation must be understood in the light of universality of human rights and the principle of non-discrimination." HRC General Comment No. 34, *supra* note 72, ¶ 32. Accordingly, it would be extremely difficult to justify blasphemy bans on this basis, as there are a wide variety of views within and among religious, social and philosophical traditions when it comes to blasphemous speech. In the context of blasphemy, "public morals" is frequently invoked as a basis to protect a particular religion or group rather than the morals of society as a whole. *See Prud'homme, supra* note 32, at 30 (discussing Egypt's justification for its blasphemy ban). It is relevant to note that in General Comment 34, the Human Rights Committee completely closed off Article 19(3) (including both public order and morals) as a potential justification for blasphemy laws when it said "[p]rohibitions 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." HRC General Comment No. 34, *supra* note 72, ¶ 48.

concept of manifesting religion, discussing religion, or educating about a particular religion is the idea that one can contradict and criticize other religions, even to the point of offending the sensibilities of others. As stated by the UN Special Rapporteur on Freedom of Religion, religious freedom “does not include the right 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”⁸⁶

Furthermore, as discussed in the previous section, blasphemy laws and attempts to ban speech may actually increase the salience of potentially offensive speech, thereby exacerbating the harm to religious sensibilities. Countries with blasphemy laws often have higher levels of religious tension,⁸⁷ and such laws have not been proven to reduce conflict or increase tolerance. Thus, there is no basis in human rights law or sound public policy for adopting blasphemy laws in order to protect religious sensibilities.

C. *The Incitement Argument*⁸⁸

The third argument used by governments justifying blasphemy bans invokes Article 20(2) of the ICCPR, which provides that “[a]ny advocacy of national, racial, or religious hatred that constitutes incitement to discrimination, hostility, or violence shall be prohibited by law.”⁸⁹ The concept of “incitement” in Article 20 refers to when an audience agrees with a speaker’s hateful message and then follows the speaker to commit violence against a targeted group.⁹⁰ In most blasphemy cases, governments

⁸⁶ UN Special Rapporteur on Freedom of Religion or Belief and UN Special Rapporteur on Contemporary Forms of Racism, Racial Discrimination, Xenophobia, and Related Intolerance, *Report for Human Rights Council Decision 1/107 on Incitement to Racial and Religious Hatred and the Promotion of Intolerance*, ¶¶ 27, 36, 37, U.N. Doc. A/HRC/2/3 (Sept. 20, 2006); *see also* Elimination of all forms of religious intolerance, UN General Assembly Report A/68/290, 7 Aug 2013, at ¶ 43 (“Freedom of religion or belief does not shield religious traditions, or religions as such, against criticism, nor does it protect members of religious communities from critical questions.”).

⁸⁷ *See Rising Tide of Restrictions on Religion*, *supra* note 59.

⁸⁸ The argument that blasphemous speech is required to be banned by Article 20 is addressed at length (and rejected) in *Aswad*, *supra* note 5.

⁸⁹ ICCPR, *supra* note 66, art. 20.

⁹⁰ For an in depth legal analysis of Article 20 in the context of blasphemy, *see Aswad*, *supra* note 5. If the Article 20 concept of “incitement” included cases in which the audience opposed the message and became violent, the ICCPR would not make sense as Article 19(3) would permit – but not require – a state to ban the speech in such circumstances, but Article 20 would require a state to ban the speech in those circumstances. The most sensible reading of both articles is that Article 19(3) covers speech that “provokes” the offended group by

seek to ban speech to prevent violence by members of the audience who oppose the message, rather than to prevent violence or discrimination against the targeted group. Thus, Article 20 is generally inapplicable in the case of blasphemy laws.⁹¹ It is important to note that all of the international law restrictions (e.g., necessity, non-discrimination) discussed in this section are also applicable to any restrictions invoked under Article 20, which would further undermine any arguments justifying blasphemy laws under that article.⁹²

IV. THE WAY FORWARD

Given that blasphemy bans continue to be enforced throughout the world and high profile and emotionally charged blasphemy law-related disputes among states and communities within states persist, it is appropriate to ask how the international community can take additional steps to productively address these laws. Prior debates on this issue at the UN involved much discord and disagreement, as a number of countries supported an effort calling for restrictions on the “defamation of religions.”⁹³ After over a decade of bitter fighting over this “defamation of religions” effort, there is

encouraging it to become violent against the speaker, and Article 20 covers speech that “incites” the audience to follow the speaker into violence against the targeted group.

⁹¹ A recent international expert workshop under the UN High Commissioner for Human Rights that examined Article 20 similarly found that “[s]tates that have blasphemy laws should repeal these as such laws have a stifling impact on the enjoyment of freedom of religion or belief and healthy dialogue and debate about religion”). The Rabat Workshop, Rabat, Morocco, Oct. 5, 2012, *Rabat Plan of Action on the Prohibition of Advocacy of National, Racial, or Religious Hatred that Constitutes Incitement to Discrimination, Hostility, or Violence*, at 5, available at http://www.ohchr.org/Documents/Issues/Opinion/SeminarRabat/Rabat_draft_outcome.pdf.

⁹² HRC General Comment No. 34, *supra* note 72, ¶ 50. The comment also states: “Prohibitions of displays of lack of respect for a religion or other belief system, including blasphemy laws, are incompatible with the [ICCPR], except in the specific circumstances envisaged in article 20, paragraph 2, of the [ICCPR]. Such prohibitions must also comply with the strict requirements of article 19, paragraph 3, as well as such articles as 2, 5, 17, 18 and 26. Thus, for instance, 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.” *Id.* at ¶ 48. *See also* Aswad, *supra* note 5.

⁹³ U.S. COMM’N ON INT’L RELIGIOUS FREEDOM, *supra* note 32, at 229 (describing the debates that took place for almost a decade at the United Nations on the Organization of Islamic Cooperation’s “defamation of religions” resolutions, which sought to legitimize bans on blasphemy). *See also* Prud’homme, *supra* note 32, at 10; Asma Uddin & Harris Tarin, Rethinking “the Redline”: The Intersection of Free Speech, Religious Freedom and Social Change, available at <http://www.brookings.edu/research/papers/2013/11/free-speech-religious-freedom-social-change-tarin-uddin>.

now international consensus as to an action plan meant to combat religious intolerance, but that also protects the freedoms of expression and religion. This action plan is contained in UN Human Rights Council Resolution 16/18 on Combating Intolerance, Discrimination, and Violence on the Basis of Religion or Belief.⁹⁴ The effort to promote its international implementation is called the Istanbul Process.

A. Human Rights Council Resolution 16/18

At the Human Rights Council session in March 2011, occurring on the heels of the assassination of one of Pakistan's most high level advocates against blasphemy bans,⁹⁵ the Organization of Islamic Cooperation ("OIC") sponsored a resolution on religious intolerance that garnered consensus by the forty-seven member states of the Human Rights Council, and later by the full UN membership at the General Assembly.⁹⁶ The resulting resolution, Resolution 16/18, called on states to undertake practical measures to address religious intolerance.⁹⁷

Resolution 16/18 represents an important breakthrough for human rights and the promotion of religious tolerance. It supplanted the toxic "defamation of religions" concept, which sought to restrict freedoms of speech and religion and grant rights to religions instead of individuals. In its stead, Resolution 16/18 presents an action-oriented approach to combat religious intolerance through practical steps that states should take, such as enforcing anti-discrimination laws and speaking out against intolerance, while also protecting freedoms of speech and religion.⁹⁸ It eliminates the prior "defamation" concept and removes calls for any restriction on speech inconsistent with freedom of expression.

Despite prior resolutions seeking the criminalization of blasphemy, the only provision in Resolution 16/18 involving a limitation on speech is a call to adopt measures to criminalize "incitement to imminent violence" based on religion or belief.⁹⁹ Some commentators misunderstood this resolution to justify broad bans on speech or the criminalization of intolerance

⁹⁴ HRC Resolution 16/18, *supra* note 83.

⁹⁵ See *Shabaz Bhatti, Pakistan's Sole Christian Minister, Is Assassinated in Islamabad*, WASH. POST (Mar. 2, 2011), <http://www.washingtonpost.com/wp-dyn/content/article/2011/03/01/AR2011030101394.html> (reporting that Bhatti was the second high-level Pakistani official killed after speaking out against the country's blasphemy laws).

⁹⁶ HRC Resolution 16/18, *supra* note 83; see also G.A. Res. 66/167, U.N. GAOR 66th Sess., U.N. Doc A/RES/66/167 (Mar. 27, 2012).

⁹⁷ HRC Resolution 16/18, *supra* note 83, at ¶ 5-6.

⁹⁸ *Id.*

⁹⁹ *Id.* at ¶ 5(f).

generally.¹⁰⁰ However, this phrasing reflects the U.S. constitutional standard for banning speech that rises to the level of advocacy that constitutes incitement to imminent violence.¹⁰¹ The OIC Permanent Observer to the United Nations has made clear that the resolution was intended to reflect the U.S. constitutional standard.¹⁰²

B. *The Istanbul Process*

While countless human rights resolutions are adopted at the Human Rights Council and UN General Assembly each year, Resolution 16/18 stands alone as an instance in which states have gathered at the highest levels to launch an implementation process for a non-binding resolution. In July 2011, then-Secretary of State Hillary Clinton and the OIC Secretary General co-chaired an implementation launch event in Istanbul that the European Union Representative for Foreign Affairs and the foreign ministers and other representatives of twenty countries attended.¹⁰³ The event displayed the cross-regional political will to begin an implementation process for Resolution 16/18, which has since been called the Istanbul Process.

¹⁰⁰ See, e.g., Jonathan Turley, Op-Ed, *Criminalizing Intolerance*, L.A. TIMES, Dec. 12, 2011, available at 2011 WLNR 25651518.

¹⁰¹ *Bradenburg v. Ohio*, 395 U.S. 444, 447 (1969); Jerome Socolovsky, *Islamic Nations Relinquish Demand for Defamation Laws*, VOICE OF AM., Oct. 24, 2012, available at <http://www.voanews.com/content/islam-un-defamation/1532871.html>. This resolution was supported by the U.S. Commission on Religious Freedom as well as numerous human rights NGOs. See Press Release, U.S. Comm'n on Int'l Religious Freedom, USCIRF Welcomes Move Away from "Defamation of Religions" Concept (Mar. 24, 2011), <http://uscirf.gov/news-room/press-releases/3570-uscirf-welcomes-move-away-from-defamation-of-religions-concept.html>; *Freedom House Commends Positive Action at the UN Human Rights Council*, FREEDOM HOUSE, <http://www.freedomhouse.org/article/freedom-house-commends-positive-action-un-human-rights-council?page=70&release=1369>; *U.N. Third Committee Makes Decisive Break from "Defamation of Religion,"* HUMAN RIGHTS FIRST, Nov. 15, 2011, <http://www.humanrightsfirst.org/2011/11/15/u-n-third-committee-makes-decisive-break-from-%E2%80%9Cdefamation-of-religion%E2%80%9D/>; *A Year in the Life of the Human Rights Council: Achievements and Challenges*, HUMAN RIGHTS WATCH, Sept. 22, 2011, <http://www.hrw.org/node/101646/section/5>; *UN: States Should Support Draft Resolution Against Belief-Based Discrimination*, ARTICLE 19, Nov. 15, 2011, <http://www.article19.org/resources.php/resource/2845/en/un:-states-should-support-draft-resolution-against-belief-based-discrimination>).

¹⁰² See Ufuk Gokcen, *The Reality of Freedom of Expression in the Muslim World*, HILL (Oct. 19, 2012 9:00 AM), <http://thehill.com/blogs/congress-blog/foreign-policy/262855-the-reality-of-freedom-of-expression-in-the-muslim-world>.

¹⁰³ 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, available at <http://www.humanrights.gov/wp-content/uploads/2011/12/20111204-Istanbul-Process.pdf>.

Answering this call for action, the United States hosted the first implementation meeting in December 2011. The meeting focused on several of the practical measures set forth in the resolution, including prosecuting hate crimes, enforcing discrimination laws, and engaging communities in conflict.¹⁰⁴ The meeting focused on comparative legal frameworks and enforcement programs, as well as best practices for governmental engagement with religious communities.¹⁰⁵ It was attended primarily by domestic experts – police officers, prosecutors, and dispute resolution specialists – and held under the Chatham House Rule¹⁰⁶ to promote candid dialogue and a fruitful exchange of practices.¹⁰⁷ Since that first implementation meeting, the United Kingdom and Canada have co-hosted a meeting in London,¹⁰⁸ as has the OIC in Geneva.¹⁰⁹ Two other states, Qatar and Chile, have publicly committed to host further meetings to continue developing best practices for implementing the steps outlined in Resolution 16/18.¹¹⁰ These meetings of experts are intended to promote productive interaction among relevant officials working on these issues in their home countries, so that best practices for implementing the steps in Resolution 16/18 are used on the ground.

In addition to this effort, the United States has launched a series of

¹⁰⁴ U.S. DEP'T OF STATE, REPORT OF THE UNITED STATES ON THE FIRST MEETING OF EXPERTS TO PROMOTE IMPLEMENTATION OF UNITED NATIONS HUMAN RIGHTS COUNCIL RESOLUTION 16/18 (Dec. 2011), *available at* <http://geneva.usmission.gov/wp-content/uploads/2012/04/FINAL-Implementation-Meeting-Report-4-18.pdf> [hereinafter *Report on First 16/18 Implementation Meeting*].

¹⁰⁵ *Id.*

¹⁰⁶ *Chatham House Rule Translations*, CHATHAM HOUSE, www.chathamhouse.org/about-us/chathamhouserule-translations (last visited Oct. 24, 2013) (“When a meeting, or part thereof, is held under the Chatham House Rule, participants are free to use the information received, but neither the identity nor the affiliation of the speaker(s), nor that of any other participant, may be revealed.”).

¹⁰⁷ *See Report on First 16/18 Implementation Meeting*, *supra* note 104, at 4.

¹⁰⁸ Conference Report, Combating Intolerance and Promoting Freedom of Religion or Belief for All: Working on UN Human Rights Council Resolution 16/18 (Dec. 3-5, 2012), <https://www.wiltonpark.org.uk/wp-content/uploads/WP1187-Final-report.pdf>.

¹⁰⁹ Press Release, Organization of Islamic Cooperation, OIC Secretary General Traveling Today to Geneva for Meeting on Combatting Religious Intolerance (June 18, 2013), *available at* http://www.oic-oci.org/oicv2/topic/?t_id=8187&ref=3305&lan=en&x_key=istanbul%20process.

¹¹⁰ *See* Michael G. Kozak, Ambassador, Acting Principal Deputy Assistant Sec’y for Democracy, Human Rights, and Labor, Statement by the U.S. on the Way Forward with the Istanbul Process, Address Before Third International Expert Meeting on the Follow-Up of Implementation of HRC Resolution 16/18 (June 21, 2013), geneva.usmission.gov/2013/07/09/statement-by-the-u-s-on-the-way-forward-with-the-istanbul-process-2/.

workshops to allow experts from the United States to continue discussing Resolution 16/18 implementation measures in greater depth with counterparts from other interested states.¹¹¹ The first workshop was held in Bosnia and attended by senior members of the Department of Justice Civil Rights Division and the Office of Civil Rights and Civil Liberties at the Department of Homeland Security.¹¹² Workshop attendees discussed the best practices in combatting discrimination, as well as the distinction in U.S. law between violence or threats of physical harm and offensive speech against religious institutions and individuals. While violence or threats of physical harm can be prosecuted under U.S. law, offensive speech is protected and better dealt with through speech, education, and societal reactions.¹¹³ A similar workshop was held in Indonesia,¹¹⁴ and additional workshops are planned for states in North Africa and Europe.¹¹⁵

The ultimate goal of these efforts to promote the implementation of Resolution 16/18 is to diminish support for ineffective policies that restrict individual freedoms, such as blasphemy laws, and to promote effective and meaningful policies that protect human rights and promote religious tolerance. This initiative supplements other policy tools that the United States uses to address this issue, including direct bilateral and multilateral engagement, annual reports on human rights and religious freedom, and speaking out against such laws and practices. Some argue that Resolution 16/18 is not working because instances of intolerance have continued, thus demonstrating that new norms, or clarification of existing legal norms, are necessary. It is, however, unrealistic to think that Resolution 16/18 or any other single initiative could end all instances of religious intolerance throughout the world in such a short time, or ever. Combating intolerance and promoting religious freedom and freedom of expression is a long-term effort that requires consistent advocacy, collaboration, and attention, in addition to the use of a wide range of policy tools.

For Resolution 16/18 to have an effect, countries must engage in the implementation process more robustly. Measuring success includes analyzing whether Resolution 16/18 is influencing the ways in which

¹¹¹ *See id.*

¹¹² *Civil Rights Division Presents Workshop in Bosnia on Religious Liberty*, RELIGIOUS FREEDOM IN FOCUS (United States Department of Justice, Civil Rights Division), July 2013, at 4, available at http://www.justice.gov/crt/spec_topics/religiousdiscrimination/newsletter/focus_57.html.

¹¹³ *Id.*

¹¹⁴ *Civil Rights Division Participates in Religious Liberty Conference in Indonesia*, RELIGIOUS FREEDOM IN FOCUS (United States Department of Justice, Civil Rights Division), November 2013, available at http://www.justice.gov/crt/spec_topics/religiousdiscrimination/newsletter/focus_58.html.

¹¹⁵ *See Kozak, supra* note 111, at 82.

governments and leaders react to and address religious intolerance. At the very least, UN member states need to start reporting on their progress in implementing Resolution 16/18, which is required by UN resolutions.¹¹⁶ To date, only about 10% of UN member states are submitting such reports.¹¹⁷ Such reporting would help fill in the landscape of how countries are combatting intolerance and where gaps exist in the implementation of Resolution 16/18.

In addition, more countries should take initiative by hosting Resolution 16/18 implementation meetings to bring this conversation to more regions of the world. These meetings should consist primarily of domestic experts charged with implementing the specific measures called for in Resolution 16/18, such as officials from Ministries of Justice, Education, and Interior, so that domestic officials charged with implementing national policy are educated in the best practices for implementing the measures of Resolution 16/18. If the meetings are held by and attended solely by UN diplomats, rather than domestic policymakers, there is a high risk that they will merely return to the tired debates of the past. UN diplomats are not charged with the domestic implementation of anti-discrimination, hate crime, or other laws, which would mean Resolution 16/18 discussions would take place among officials without domestic authority, or those not charged with its implementation. There has been enough international debate on these issues; it is now time to redouble efforts to promote the domestic implementation of the consensus garnered in Resolution 16/18. While Resolution 16/18 has a long road ahead with respect to its implementation, the roadmap is in place; countries simply need to put in the effort to implement this toolkit.

V. CONCLUSION

In response to the question of why the United States cannot simply “agree to disagree” on blasphemy, the authors’ position is that blasphemy bans violate human rights and undermine the objectives they seek to achieve. The United States must continue its wide-ranging diplomatic efforts to tackle this sensitive and sometimes explosive issue by addressing the underlying issues of intolerance while promoting the broadest protections for religious freedom and free speech. Systemically raising the issue of blasphemy bans in its foreign policy is not a matter of cultural insensitivity on the part of the United States. Every region in the world currently has or has experienced blasphemy bans in its domestic legal

¹¹⁶ See, e.g., UN General Assembly Resolution A/RES/67/178 (Dec. 20, 2012), ¶ 12.

¹¹⁷ See U.N. Secretary-General, *Rep. of the Secretary-General on combating intolerance, negative stereotyping, stigmatization, discrimination, incitement to violence and violence against persons, based on religion or belief*, U.N. Doc. A/67/296 (Aug. 10, 2012).

system, including the United States. From the U.S. experience of struggling with blasphemy bans inherited from the British, U.S. officials know that such laws resulted in harsh punishments, including death sentences, for religious dissenters and others for merely expressing unpopular, offensive, or minority views.

Further, U.S. officials know that the treatment of blasphemy is a bellwether for the state of freedom of religion, freedom of speech, and treatment of minorities and dissenters in Arab Spring countries. Raising blasphemy issues with Muslim-majority and other countries is not an attempt to impose the U.S. vision of free speech on others. Rather, it is clear that banning speech merely because it is offensive or deemed “blasphemous” is not consistent with the existing international human rights law regime, which countries around the world – including Arab Spring countries – have voluntarily committed to.

In addition to continued U.S. efforts to protect freedom of expression and promote religious freedom, a viable route available for the international community to tackle these issues of religious intolerance and insensitivity while protecting human rights and fundamental freedoms is the Istanbul Process, which was launched to promote implementation of Resolution 16/18. It sets forth a package of time-proven action items that promote tolerance while protecting the fundamental freedoms of religion and expression. A successful outcome will require the robust and good faith participation of states in de-politicized Istanbul Process meetings, where domestic experts charged with implementation can meet, share best practices, and make progress on these issues in their home countries a reality.