

2008

Inappropriate Renderings: The Danger of Reductionist Resolutions

John Cerone

Follow this and additional works at: <https://brooklynworks.brooklaw.edu/bjil>

Recommended Citation

John Cerone, *Inappropriate Renderings: The Danger of Reductionist Resolutions*, 33 Brook. J. Int'l L. (2008).
Available at: <https://brooklynworks.brooklaw.edu/bjil/vol33/iss2/11>

This Article is brought to you for free and open access by the Law Journals at BrooklynWorks. It has been accepted for inclusion in Brooklyn Journal of International Law by an authorized editor of BrooklynWorks.

INAPPROPRIATE RENDERINGS: THE DANGER OF REDUCTIONIST RESOLUTIONS

John Cerone*

INTRODUCTION

In September 2007, major international news outlets reported that “al-Qaeda in Iraq” had offered a reward for the murder of a Swedish cartoonist who had drawn the Prophet Muhammad’s head on a dog’s body.¹ Western media cast the incident as an assault on the freedom of expression launched by religiously motivated fanatics, as has been the pattern in reporting recent similar incidents. A stark contrast is portrayed between the open rational discourse that Western media see themselves as fostering on the one side and those who claim that their belief systems demand suppression of any expression they find blasphemous or otherwise unacceptably offensive on the other.

Since the Danish cartoon controversy first grabbed the international spotlight in early 2006,² the media has reported on hostile or anticipated hostile responses from Muslim individuals and groups to various forms of expression, including a speech by Pope Benedict,³ the honoring of Salman Rushdie,⁴ and the cancellation of a German opera due to security

* Associate Professor of Law & Director of the Center for International Law & Policy, New England School of Law. The Author was a Fulbright Guest Professor at the Danish Institute for Human Rights in 2004. This Article is based on remarks delivered at a panel discussion at the Palais des Nations during the inaugural session of the Human Rights Council in June 2006. The Author would like to thank Angela Davis, Sandy Lamar, Sarah Salter, and Barry Stearns for editorial assistance.

1. See, e.g., *Bounty Set Over Prophet Cartoon*, BBC NEWS, Sept. 15, 2007, http://news.bbc.co.uk/2/hi/middle_east/6996553.stm; Louise Nordstrom, *Artist Displays Muhammad Cartoon Despite Al-Qaida Threat; Leader of Terror Group Offers Reward for Killing Vilks, Paper’s Editor*, CHI. SUN-TIMES, Sept. 19, 2007, at 35. For further background on the Danish cartoon controversy, see John Cerone, *The Danish Cartoon Controversy & the International Regulation of Expression*, ASIL INSIGHT, Feb. 7, 2006, <http://www.asil.org/insights/2006/02/insights060207.html>.

2. The Danish cartoon controversy stems from the September 30, 2005 issue of *Jyllands-Posten*, a Danish newspaper. This issue contained an article entitled *Muhammeds Ansigt (The Face of Mohammed)*, and it was accompanied by twelve cartoons depicting the prophet Mohammed in various fashions. Flemming Rose, *Muhammeds ansigt [The Face of Mohammed]*, JYLLANDS-POSTEN (Den.), Sept. 30, 2005, at KulturWeekend 3. This publication outraged both Muslim and non-Muslim communities worldwide. See also Stéphanie Lagoutte, *The Cartoon Controversy in Context: Analyzing the Decision Not to Prosecute Under Danish Law*, 33 BROOK. J. INT’L L. 379, 381 (2008).

3. *Muslim Anger Grows at Pope Speech*, BBC NEWS, Sept. 15, 2006, <http://news.bbc.co.uk/2/hi/europe/5347876.stm>.

4. *Rushdie Title ‘May Spark Attacks’*, BBC NEWS, June 18, 2007, http://news.bbc.co.uk/2/hi/south_asia/6763119.stm.

concerns.⁵ Despite attempts to cultivate a more nuanced understanding of these phenomena, they continue to be illustrated in broad strokes that reduce any discussion to a confrontation between competing values backed by different camps with increasingly entrenched positions.

In response to the flare-up over the dog cartoon, the Swedish government immediately moved to ease tensions by expressing “regret” and meeting with relevant foreign diplomats and other concerned groups.⁶ While this prompt action seems to indicate that the Swedish government learned something from the Danish government’s diplomatic failures a year earlier, the articulation of the underlying issues remains muddled. As a spokeswoman for the Swedish Foreign Ministry stated, “[w]e can’t apologise for the cartoons because we did not publish them.”⁷ She noted that the government could not influence the publication of such cartoons because of rules concerning media freedom in the country,⁸ echoing the Danish government’s response to the earlier controversy.⁹

The Human Rights Council has adopted a very different, but equally unsatisfactory, approach. On March 30, 2007, during its fourth Regular Session, the council adopted a resolution condemning “religious defamation” as a human rights violation.¹⁰ In contrast to the Scandinavian government’s elevation of the freedom of expression, the approach manifested in this instrument is the primacy of religious conviction resonating within the freedom of religion.

The two positions, both purportedly rooted in a system of theoretically universal values, seem diametrically opposed, thus raising at least the specter of incoherence and, more seriously, an outright rejection of the notion of common humanity. Yet a closer examination of the relevant rules of human rights law reveals that neither of these extreme positions flows naturally from the wellspring of fundamental human rights. Although the corpus of international human rights law is far from a perfect

5. *Beheaded Prophet Opera Dropped*, BBC NEWS, Sept. 26, 2006, <http://news.bbc.co.uk/2/hi/entertainment/5382554.stm>. The opera was ultimately rescheduled and performed a few months later. George Jahn, *Berlin Opera Re-Stages 'Idomeneo'*, WASH. POST, Dec. 28, 2006, <http://www.washingtonpost.com/wp-dyn/content/article/2006/12/18/AR2006121800917.html>.

6. *Sweden 'Regrets' Prophet Cartoon*, BBC NEWS, Aug. 31, 2007, <http://news.bbc.co.uk/2/hi/europe/6972093.stm>.

7. *Id.*

8. *Id.*

9. *Danish Firm Seeks Muslim Row End*, BBC NEWS, Jan. 28, 2006, <http://news.bbc.co.uk/2/hi/europe/4656664.stm>.

10. United Nations [U.N.] Human Rights Council, *Report to the General Assembly on the Fourth Session of the Human Rights Council*, G.A. Res. 4/9, U.N. Doc. A/HRC/4/123 (Mar. 30, 2007) [hereinafter Human Rights Council Resolution].

system, it provides a framework for articulating the full range of underlying issues. Ultimately, such examination can lead to a more satisfactory spectrum of responses to the problems that have arisen.

I. BEYOND ABSTENTION: THE INTERNATIONAL REGULATION OF EXPRESSION

International human rights law imposes an array of obligations on states in relation to the expression of individuals and groups. The norms constituting this array range from obligations of abstention, requiring the state to refrain from interfering with the freedom of expression, to positive obligations, including the obligation to criminally punish certain types of expression.¹¹

The International Covenant on Civil and Political Rights (“ICCPR”)¹² and the principal regional human rights treaties¹³ all require state parties to protect freedom of expression. Article 19(2) of the ICCPR proclaims that “[e]veryone 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.”¹⁴ At the same time, these treaties contain limitation clauses, recognizing the right of the state to impose restrictions on that freedom.¹⁵ The jurisprudence of human rights bodies has distinguished various types of expression, providing different levels of protection for each.¹⁶

11. All of the rules discussed in this Section have their basis in human rights treaties, though some may have also acquired the status of customary law. The resulting framework of rules, drawing as it does from a number of separately negotiated treaties, is not necessarily coherent. Human rights bodies, conscious of this issue, have attempted to harmonize the different treaty regimes. *See, e.g.,* *Jersild v. Denmark*, 298 Eur. Ct. H.R. (ser. A) at 22 (1994) (“Denmark’s obligations under Article 10 (art. 10) must be interpreted, to the extent possible, so as to be reconcilable with its obligations under the UN Convention.”).

12. International Covenant on Civil and Political Rights art.19, *opened for signature* Dec. 16, 1966, 999 U.N.T.S. 171 [hereinafter ICCPR].

13. European Convention for the Protection of Human Rights and Fundamental Freedoms art.10, Nov. 4, 1950, 213 U.N.T.S. 222 [hereinafter ECHR]; American Convention on Human Rights art. 13, Nov. 22, 1969, 1144 U.N.T.S. 123 [hereinafter ACHR]; African Charter on Human and Peoples’ Rights art. 9(2), June 27, 1981, OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 [hereinafter ACHPR].

14. ICCPR, *supra* note 12, art. 19(2).

15. ECHR, *supra* note 13, art. 10(2); ACHR, *supra* note 13, art. 13(2); ACHPR, *supra* note 13, art. 9(2).

16. *See, e.g.,* *Feldek v. Slovakia*, 2001-VIII Eur. Ct. H.R. 87, 106; *Otto-Preminger Institut v. Austria*, 295 Eur. Ct. H.R. (ser. A) at 17–18 (1994); *Thorgeirson v. Iceland*,

However, human rights law also contains rules requiring the suppression of expression. As opposed to the limitation clauses indicated above, which permit, but do not require, state parties to limit the freedom of expression, rules such as those set forth in article 20 of the ICCPR impose obligations to prohibit certain types of expression.¹⁷ Article 20 requires parties to “prohibit[] by law,” *inter alia*, “[a]ny advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence”¹⁸ Similarly, the Convention on the Elimination of All Forms of Racial Discrimination (“CERD”) requires parties to “condemn all propaganda and all organizations which are based on ideas or theories of superiority of one race or group of persons of one colour or ethnic origin, or which attempt to justify or promote racial hatred and discrimination in any form.”¹⁹ In particular, it obliges parties to criminalize “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,” as well as participation in “propaganda activities, which promote and incite racial discrimination.”²⁰ One particular type of expression has been singled out for the strongest suppression obligation. The Convention on the Prevention and Punishment of the Crime of Genocide (“Genocide Convention”) obliges all states to criminalize, prosecute, and punish the international crime of incitement to genocide.²¹

In light of this spectrum of obligations relating to expression, it goes without saying that compliance with human rights standards in this arena cannot be reduced to obligations of abstention. At a minimum, states cannot claim that human rights law constitutes an impenetrable barrier to the regulation of expression.

While the examples surveyed in the Introduction to this Article would not constitute incitement to genocide, they may implicate other human

239 Eur. Ct. H.R. (ser. A) at 27 (1992); *Muller v. Switzerland*, 133 Eur. Ct. H.R. (ser. A) at 19 (1988).

17. ICCPR, *supra* note 12, art. 20.

18. *Id.*

19. International Convention on the Elimination of All Forms of Racial Discrimination art. 4, Dec. 12, 1965, 660 U.N.T.S. 195 [hereinafter CERD].

20. *Id.*

21. Convention on the Prevention and Punishment of the Crime of Genocide art. 3, Dec. 9, 1948, 102 Stat. 3045, 78 U.N.T.S. 277 [hereinafter Genocide Convention]. The International Court of Justice (“ICJ”) has held that the rules enshrined in the Genocide Convention have acquired the status of customary international law, binding all states. Reservations to Convention on Prevention and Punishment of the Crime of Genocide, Advisory Opinion, 1951 I.C.J. 15, 23 (May 28).

rights standards, such as the freedom of religion and the principle of nondiscrimination.

II. FREEDOM OF EXPRESSION AND ITS RELATIONSHIP WITH OTHER HUMAN RIGHTS

As noted above, each treaty that sets forth the freedom of expression also contains a limitation clause. For example, article 19(3) of the ICCPR expressly permits parties to impose restrictions on the exercise of the right to freedom of expression.²² However, article 19(3) also limits the type and scope of permissible restriction. In order to be valid under article 19(3), a given restriction must be “provided by law” and must be “necessary” to achieve certain purposes.²³ These purposes include respecting “the rights or reputations of others” and “the protection of national security or of public order (*ordre public*), or of public health or morals.”²⁴ The principal regional human rights treaties contain analogous provisions.²⁵

Human rights bodies mandated to oversee compliance with these treaties have grappled with a number of cases in which states have suppressed expression deemed to be discriminatory, blasphemous, or otherwise offensive to a religious community. In some cases the suppression was found to violate the freedom of expression, in other cases the suppression was deemed a permissible limitation, and in at least one case, the expression was held to be ineligible for protection under the relevant treaty.

A. *The Human Rights Committee*

The Human Rights Committee, the treaty-body mandated to monitor implementation of the ICCPR, has issued general comments on articles 19 and 20, elaborating its views on the content of the obligations set forth therein.²⁶ In its General Comment No. 11, the committee noted that the article 20 obligations to prohibit certain forms of expression “are fully compatible with the right of freedom of expression as contained in article 19, the exercise of which carries with it special duties and responsibilities.”²⁷ The committee also opined that states should enact a law “making

22. ICCPR, *supra* note 12, art. 19(3).

23. *Id.*

24. *Id.*

25. *See supra* note 13 and authorities cited therein.

26. U.N. Human Rights Comm., General Comment 11: Prohibition of Propaganda for War and Inciting National, Racial or Religious Hatred (Arts. 19–20) at 12, U.N. Doc. HRI/GEN/1/Rev.7 (July 29, 1983).

27. *Id.* art. 20.

it clear that propaganda and advocacy as described therein are contrary to public policy and providing for an appropriate sanction in case of violation."²⁸ The jurisprudence of the Human Rights Committee in individual cases has provided further insight into its view of the interaction between the freedom of expression and the rights of others.²⁹

Early on, the committee found that certain types of expression may be removed from the ambit of protection provided by article 19 by the operation of article 20. In the case of *J.R.T. & the W.G. Party v. Canada*, the committee found a criminal prosecution for hate speech to be compatible with the ICCPR.³⁰ It opined that the petitioner's public dissemination of anti-Semitic views fell within article 20 and was thus ineligible for protection under article 19.³¹ While the committee's views in this case give some indication of the limits of article 19, its brief analysis offers little guidance on the relationship between the freedom of expression and the obligation to prevent discrimination.

A decade later, the committee had the opportunity to consider this issue in greater depth in the context of a Holocaust denial case. In *Faurisson v. France*, the complainant alleged that his conviction under French law for contesting the existence of the Holocaust constituted a violation of his freedom of expression.³² In concluding that the ICCPR had not been violated, the Human Rights Committee considered a number of factors, including the broader social context in which the expression was made.³³ The committee noted, in particular, the statement of the French government that "characterized the denial of the existence of the Holocaust as the principal vehicle for anti-Semitism."³⁴ As such, the prosecution was justified as "necessary" within the meaning of article 19(3).³⁵

28. *Id.*

29. The jurisprudence of the committee takes the form of "views" expressed in response to petitions from individuals alleging violations of the ICCPR by State parties to its first Optional Protocol ("OP"). See Optional Protocol to the International Covenant on Civil and Political Rights art. 5, Dec. 19, 1966, 999 U.N.T.S. 302.

30. *J.R.T. & the W.G. Party v. Canada*, ¶ 8(b), U.N. Human Rights Comm., U.N. Doc. CCPR/C/18/D/104/1981 (declared inadmissible Apr. 6, 1983).

31. *Id.* The committee's failure to test this restriction of expression against the requirements of art. 19(3) was criticized by commentators. See, e.g., MANFRED NOWAK, U.N. COVENANT ON CIVIL AND POLITICAL RIGHTS: CCPR COMMENTARY 367-36 (N.P. Engel 1993). In recent years, the practice of the Human Rights Committee has been to consider any state interference with expression as a potential violation of freedom of expression, and thus to examine the restriction under article 19(3).

32. *Faurisson v. France*, ¶ 2.1, U.N. Human Rights Comm., U.N. Doc. CCPR/C/58/D/550/1993 (1996).

33. *Id.* ¶ 9.6.

34. *Id.* ¶ 9.7.

35. *Id.*

In both cases, the committee found restrictions on the freedom of expression to be compatible with the ICCPR because they were directed toward protecting a group from discrimination. The committee also demonstrated, in the context of the *Faurisson* case, the importance of considering the broader context in which the relevant expression was made. The importance of this contextual factor is similarly reflected in the jurisprudence of the European Court of Human Rights.

B. The European Court of Human Rights

Of all international human rights mechanisms, the institutions established under the European Convention for the Protection of Human Rights and Fundamental Freedoms (“ECHR”)³⁶ have produced the most extensive freedom of expression jurisprudence. Although the European Convention formally applies only to Council of Europe Member States,³⁷ its provisions closely resemble the provisions of the ICCPR. Thus, decisions of the European Court of Human Rights, as authoritative interpretations of comparable provisions by an international judicial body, provide persuasive guidance in the interpretation of the ICCPR and may also contribute to the development of customary law standards.³⁸

Article 10 of the ECHR closely resembles article 19 of the ICCPR. Article 10 expressly provides for the right to freedom of expression, and then qualifies this right with a limitation clause.³⁹ Unlike the ICCPR, however, the ECHR contains no provision expressly requiring state parties to prohibit certain types of expression. Nonetheless, it does contain a provision that has been interpreted to exclude certain types of expression from protection. Article 17 of the ECHR states:

Nothing in this Convention may be interpreted as implying for any State, group or person any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms set forth herein or at their limitation to a greater extent than is provided for in the Convention.⁴⁰

Although rarely invoked as an express basis for justifying interference with freedom of expression, the court has acknowledged that, pursuant to article 17, remarks directed against the ECHR’s underlying values “could

36. ECHR, *supra* note 13. The ECHR entered into force in 1953 and serves as a supranational system for the protection of human rights in Europe.

37. *Id.* art 1.

38. See RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW §§ 102–103 (1987) (the judgments and opinions of international judicial tribunals as to the meaning of international agreements are accorded substantial weight).

39. ECHR, *supra* note 13, art. 10(2).

40. ECHR, *supra* note 13, art. 17.

not be allowed to enjoy the protection afforded under Article 10.⁴¹ In particular, it has held that “there is a ‘category of clearly established historical facts—such as the Holocaust—whose negation or revision would be removed from the protection of Article 10 by Article 17.’”⁴²

In *Garaudy v. France*, the court rejected as inadmissible the applicant’s claim that his prosecution for Holocaust denial violated article 10 of the ECHR.⁴³ The court found that the applicant, in the book upon which his prosecution was based, “systematically denied the crimes against humanity perpetrated by the Nazis against the Jewish community.”⁴⁴ The court found that “in accordance with Article 17 of the Convention,”⁴⁵ such expression was ineligible for protection under article 10, and it dispensed with its usual analysis under article 10’s limitation clause.⁴⁶

Nonetheless, in excluding Holocaust denial from the protection of the ECHR, the court relied on many of the factors that would typically be employed in such an analysis. It noted that Holocaust denial was one of the most serious forms of incitement to hatred of Jewish people, that it infringes the rights of others, and that it constitutes a serious threat to public order.⁴⁷ In any event, the court has only exceptionally adopted this

41. See *Lehideux & Isorni v. France*, 92 Eur. Ct. H.R. 2864, 2886 (1998) (citation omitted). The court stated that “there is no doubt that, like any other remark directed against the Convention’s underlying values, the justification of a pro-Nazi policy could not be allowed to enjoy the protection afforded by Article 10.” *Id.* See also Eur. Consult. Ass., *Recommendation No. R. (97) 20 of the Comm. of Ministers*, Principle 4 (Oct. 30, 1997). This recommendation states that:

National law and practice should bear in mind that specific instances of hate speech may be so insulting to individuals or groups as not to enjoy the level of protection afforded by Article 10 of the European Convention on Human Rights to other forms of protection. This is the case where hate speech is aimed at the destruction of the rights and freedoms laid down in the Convention or at their limitation to a greater extent than provided therein.

Id.

42. *Garaudy v. France*, 2003-IX Eur. Ct. H.R. 369, 396 (quoting *Lehideux & Isorni*, 92 Eur. Ct. H.R. at 2884).

43. *Id.*

44. *Id.*

45. *Id.* at 397.

46. *Id.*

47. *Id.* The court stated that:

Denying crimes against humanity is therefore one of the most serious forms of racial defamation of Jews and of incitement to hatred of them. The denial or rewriting of this type of historical fact undermines the values on which the fight against racism and anti-Semitism are based and constitutes a serious threat to

approach of excluding expression from the protection of the ECHR. Indeed, this appears to be the only case in which the court has relied on article 17 in its *ratio decidendi* for rejecting a freedom of expression claim. This is likely a consequence of the unique significance of the Holocaust in European history and is thus part of the broader social context against which the limits of free expression in Europe are tested.

This exceptional use of article 17 must also be viewed against the backdrop of the otherwise lofty status the court accords to article 10. The court has consistently held that “freedom of expression, as secured in paragraph 1 of Article 10, constitutes one of the essential foundations of a democratic society and one of the basic conditions for its progress and for each individual’s self-fulfilment.”⁴⁸ It has further found that, subject to the limitations of article 10(2), this freedom is “applicable not only to ‘information’ or ‘ideas’ that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb.”⁴⁹ Therefore, the offensive character of a given expression cannot itself justify suppression unless it can be subsumed under one of the grounds for limitation set forth in article 10(2).⁵⁰

Thus, apart from the example of Holocaust denial mentioned above, the court analyzes restrictions on virtually any other type of expression for compliance with article 10’s limitation clause.⁵¹ Article 10(2) states:

The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confi-

public order. Such acts are incompatible with democracy and human rights because they infringe the rights of others. Their proponents indisputably have designs that fall into the category of aims prohibited by Article 17 of the Convention.

Id.

48. *Lingens v. Austria*, 103 Eur. Ct. H.R. (ser. A) at 26 (1986).

49. *Id.*

50. *Id.* at 18.

51. For example, even in cases where the expression at issue was deemed by the court to amount to an “appeal to bloody revenge,” the court did not apply article 17 of the European Convention, but instead analyzed the restriction under article 10(2). *See Surek v. Turkey* (No. 1), 1999-IV Eur. Ct. H.R. 355, 382.

dence, or for maintaining the authority and impartiality of the judiciary.⁵²

In considering applications alleging a breach of article 10, the court has developed a standard framework of analysis. The court ascertains whether there has been an interference with the article 10(1) freedom of expression. It has found that virtually any prohibition or punishment of expression constitutes an interference with the freedom of expression.⁵³ Once the court finds such interference, it applies a three-part test under article 10(2) to determine whether the interference is permissible. In order to be in compliance with the Convention, the interference must be prescribed by law, for one of the enumerated aims, and necessary in a democratic society.⁵⁴ In applying this test, the court affords national authorities a margin of appreciation (i.e., the scope of discretion left to the state).⁵⁵ However, that margin of appreciation has not prevented the court from making a full assessment of all of the facts.⁵⁶ The court must still satisfy itself, in light of those facts, that the reasons proffered for the restriction are relevant and sufficient to confirm the existence of a pressing social need, corresponding to one of the listed aims, and to demonstrate that the interference is required to meet and is proportionate to that need.⁵⁷

Apart from the very narrow category of expression to which article 17 has been applied, no categorical line is drawn between types of expression that will or will not be protected from interference by national authorities. The court examines the content of the expression in its broader context, including both the form in which it appears and the local situation to which it pertains.⁵⁸ In so doing, the court examines a number of factors, including the nature of the expression, the position of the

52. ECHR, *supra* note 13, art. 10(2).

53. *See, e.g.*, *Surek v. Turkey* (No. 1), 1999-IV Eur. Ct. H.R. 355; *Jersild v. Denmark*, 298 Eur. Ct. H.R. (ser. A) (1994); *Lingens v. Austria*, 103 Eur. Ct. H.R. (ser. A) (1986).

54. *See Surek*, 1999-IV Eur. Ct. H.R. at 382; *Jersild*, 298 Eur. Ct. H.R. (ser. A) at 20; *Lingens*, 103 Eur. Ct. H.R. (ser. A) at 26.

55. *Surek*, 1999-IV Eur. Ct. H.R. at 382; *Jersild*, 298 Eur. Ct. H.R. (ser. A) at 21; *Lingens*, 103 Eur. Ct. H.R. (ser. A) at 25.

56. *Surek*, 1999-IV Eur. Ct. H.R. at 382; *Jersild*, 298 Eur. Ct. H.R. (ser. A) at 23; *Lingens*, 103 Eur. Ct. H.R. (ser. A) at 25.

57. *Surek*, 1999-IV Eur. Ct. H.R. at 382; *Jersild*, 298 Eur. Ct. H.R. (ser. A) at 23; *Lingens*, 103 Eur. Ct. H.R. (ser. A) at 25.

58. *Surek*, 1999-IV Eur. Ct. H.R. at 382; *Jersild*, 298 Eur. Ct. H.R. (ser. A) at 23; *Lingens*, 103 Eur. Ct. H.R. (ser. A) at 25.

speaker, the target of any criticism, the intended audience, the type of publication in which it appears, and the nature of the interference.⁵⁹

Where the expression implicates the role of the press as public watchdog, is political, or concerns a matter of public interest, the margin of appreciation is narrowed.⁶⁰ When the expression at issue incites violence, the authorities will be granted a wider margin of appreciation, indicating a greater deference to the judgment of national authorities and effectively lessening the degree of international protection afforded the expression.⁶¹

III. THE PROTECTION OF THE RIGHTS OF OTHERS

As noted above, one of the aims pursuant to which restrictions on freedom of expression may be imposed is the protection of the rights of others. The rights most directly implicated by the types of expression at issue in the relevant controversies described above are freedom from discrimination and freedom of religion.

A. Freedom from Discrimination

In *Jersild v. Denmark*, the Danish government interfered with a journalist's freedom of expression by prosecuting and convicting him for disseminating the racist expressions of others in a television documentary.⁶² While recognizing that this interference pursued the legitimate aim of protecting the rights of others, the European Court of Human Rights found that criminal prosecution was not "necessary in a democratic society" to achieve that aim, and it thus constituted a violation of article 10 of the ECHR.⁶³

The Danish Prime Minister may have had this case in mind in early 2006 when he responded to outrage over the Mohammed cartoons by reaffirming Denmark's commitment to a free press.⁶⁴ However, there are a number of important distinctions between the *Jersild* case and the Danish cartoon controversy.

In the course of its analysis in *Jersild*, the court emphasized several key factors: the fact that the applicant was functioning in his capacity as a journalist, the context in which the statements were broadcast, and the

59. *Surek*, 1999-IV Eur. Ct. H.R. at 382; *Jersild*, 298 Eur. Ct. H.R. (ser. A) at 24-25; *Lingens*, 103 Eur. Ct. H.R. (ser. A) at 25.

60. *Jersild*, 298 Eur. Ct. H.R. (ser. A) at 22.

61. See generally *Surek v. Turkey*, 1999-IV Eur. Ct. H.R. 353.

62. *Jersild*, 298 Eur. Ct. H.R. (ser. A) at 15.

63. *Id.* at 26.

64. Anders Fogh Rasmussen, Prime Minister of Denmark, Press Conference Opening Statement (Feb. 7, 2006), <http://www.stm.dk/> (follow "taler" or "speeches" hyperlink in the left column).

purpose of the documentary.⁶⁵ With regard to the applicant's role as a member of the press, the court recalled the importance of a free press in a democratic society and noted that "[a] significant feature of the present case is that the applicant did not make the objectionable statements himself but assisted in their dissemination in his capacity of television journalist responsible for a news programme"⁶⁶ In examining the context in which the news program was broadcast, the court disagreed with the finding of the Danish courts that there had been no "attempt to counterbalance the extremist views expressed."⁶⁷ The court noted that "the TV presenter's introduction and the applicant's conduct during the interviews clearly dissociated him from the persons interviewed," that Jersild had "rebutted some of the racist statements" made, and that, "taken as a whole, the filmed portrait surely conveyed the meaning that the racist statements were part of a generally anti-social attitude" on the part of the extremists.⁶⁸

The court ultimately found that the program, viewed as a whole,

could not objectively have appeared to have as its purpose the propagation of racist views and ideas. On the contrary, it clearly sought—by means of an interview—to expose, analyse and explain this particular group of youths, limited and frustrated by their social situation, with criminal records and violent attitudes, thus dealing with specific aspects of a matter that already then was of great public concern.⁶⁹

In relying on the facts that the news item at issue did not have as its purpose the promotion of racial discrimination and that Jersild had provided a degree of balance to the racist statements made—statements that the court noted would be unprotected by article 10⁷⁰—the court left open the possibility that governmental restraints may be justifiably imposed when the press simply acts as a mouthpiece for the dissemination of racist views.⁷¹

65. *Jersild*, 298 Eur. Ct. H.R. (ser. A) at 23.

66. *Id.*

67. *Id.* at 25. See also Lagoutte, *supra* note 2, at 398.

68. *Id.*

69. *Id.* at 24.

70. *Jersild*, 298 Eur. Ct. H.R. (ser. A) at 25 (dictum indicating that the scope of expression to which the court is prepared to apply article 17 may not be limited to the singular case of Holocaust denial).

71. The court emphasized that it was "particularly conscious of the vital importance of combating racial discrimination in all its forms and manifestations" and affirmed that its interpretation was not incompatible with Denmark's obligations under the CERD. *Id.* at 22.

B. Freedom of Religion

The European Court of Human Rights has also had the opportunity to examine freedom of expression in relation to religious freedom. The court has described the latter freedom in similarly lofty terms, finding the freedom of religion to be not only “one of the foundations of a ‘democratic society,’” but also “one of the most vital elements that go to make up the identity of believers and their conception of life.”⁷²

There are a variety of ways in which freedom of expression and freedom of religion may interact. A state might enact laws that permit, prohibit, or require expression that conflicts with religious tenets or that creates an environment that otherwise inhibits religious practices. In *Kokkinakis v. Greece*, the court held that a state may legitimately consider it necessary to take measures aimed at repressing certain forms of conduct, including the imparting of information and ideas judged incompatible with respect for the freedom of thought, conscience, and religion of others.⁷³

However, much of the court’s jurisprudence on the interaction of these rights has centered on the “protection of religious feelings,” which the court has found to be a component of the freedom of religion.⁷⁴ The court has invoked the aim of protecting religious feelings in a string of cases concerning blasphemy laws.

In *Otto-Preminger-Institut v. Austria*, handed down the day after *Jersild*, the court found no violation in the forfeiture and seizure of a film that the Austrian government deemed to be “an attack on the Christian religion.”⁷⁵ The court found the seizure to be “necessary in a democratic society” to achieve, inter alia, the legitimate aim of protecting the rights of others.⁷⁶ It interpreted the latter as including “the right of citizens not to be insulted in their religious feelings by the public expression of views of other persons.”⁷⁷

At the same time, however, the court made clear that the protection of religious feelings could not be invoked to justify a ban on all criticism of religion. It stated:

Those who choose to exercise the freedom to manifest their religion, irrespective of whether they do so as members of a religious majority or

72. *Otto-Preminger Institut v. Austria*, 295 Eur. Ct. H.R. (ser. A) at 17–18 (1994).

73. *Kokkinakis v. Greece*, 260-A Eur. Ct. H.R. (ser. A) at 20 (1993).

74. *See, e.g., Otto-Preminger Institut*, 295 Eur. Ct. H.R. (ser. A) at 17–18; *Wingrove v. United Kingdom* (No. 2), 1996-V Eur. Ct. H.R. 1937, 1957.

75. *Otto-Preminger Institut*, 295 Eur. Ct. H.R. (ser. A) at 20.

76. *Id.* at 20–21.

77. *Id.* at 18.

a minority, cannot reasonably expect to be exempt from all criticism. They must tolerate and accept the denial by others of their religious beliefs and even the propagation by others of doctrines hostile to their faith.⁷⁸

In the subsequent case of *Wingrove v. The United Kingdom*, the court again invoked the protection of religious feelings as justifying what amounted to a total ban of a video containing content deemed blasphemous under relevant British law.⁷⁹ The British authorities had determined that the video, which portrayed sexual conduct between individuals revered in Christianity, would “outrage the feelings of Christians, who would reasonably look upon it as being contemptuous” of fundamental religious tenets.⁸⁰

The court noted that the purpose of the restriction was to protect against the contemptuous treatment of a religious subject that was bound to “outrage” Christians and that this goal “undoubtedly corresponds to that of the protection of ‘the rights of others.’”⁸¹ It concluded this was “fully consonant with the aim of the protections afforded . . . to religious freedom.”⁸²

In assessing whether the ban was “necessary in a democratic society,” the court began by noting that “a wider margin of appreciation is generally available to the Contracting States when regulating freedom of expression in relation to matters liable to offend intimate personal convictions within the sphere of morals or, especially, religion,” indicating the broad discretion it would afford the state in this matter.⁸³ The court reasoned that

State authorities are in principle in a better position than the international judge to give an opinion on the exact content of these requirements with regard to the rights of others as well as on the “necessity” of a “restriction” intended to protect from such material those whose deepest feelings and convictions would be seriously offended.⁸⁴

However, the court also made clear that there remained limits to that discretion, and that European supervision was “all the more necessary given the breadth and open-endedness of the notion of blasphemy and the risks of arbitrary or excessive interferences with freedom of expres-

78. *Id.* at 17–18.

79. *Wingrove*, 1996-V Eur. Ct. H.R. at 1960.

80. *Id.* at 1947–49.

81. *Id.* at 1955.

82. *Id.*

83. *Id.* at 1958.

84. *Id.* at 1957–58.

sion under the guise of action taken against allegedly blasphemous material.”⁸⁵ In ultimately finding the ban justified, the court relied on several factors that may indicate limits on the state’s discretion: whether it was a total prohibition, whether it was content neutral, and whether there were safeguards against its arbitrary application.⁸⁶

In applying these criteria to the facts of the case before it, the court emphasized that the relevant domestic law did not “prohibit the expression, in any form, of views hostile to the Christian religion.”⁸⁷ The law sought only to control the manner in which the views were advocated, as opposed to the content of the views themselves.⁸⁸ Further, the primary “safeguard against arbitrariness” identified by the court was the “high degree of profanation that must be attained” in order for expression to constitute blasphemy.⁸⁹ The court noted that the extent of insult to religious feelings must be significant, referring to the domestic courts’ use “of the adjectives ‘contemptuous’, ‘reviling’, ‘scurrilous’, [and] ‘ludicrous’ to depict material of a sufficient degree of offensiveness.”⁹⁰

The court adopted a similar approach in the more recent case *I.A. v. Turkey*, in which it found a criminal prosecution for blasphemy to be consistent with article 10.⁹¹ In particular, the court found that Turkey was justified in imposing a fine on the author of a book for his “abusive attack on the Prophet of Islam,”⁹² noting that believers might legitimately have felt themselves “to be the object of unwarranted and offensive attacks” by some of the book’s passages.⁹³

In each of these cases, the European Court of Human Rights found the suppression of expression justified in order to protect the religious freedom of others. In particular, the states had imposed restrictions directed toward the protection of the religious feelings of adherents to the majority religion in each state. To the extent that these restrictions are grounded in the protection of the rights of others, as opposed to, for ex-

85. *Id.*

86. *Id.*

87. *Id.* at 1958.

88. *Id.*

89. *Id.*

90. *Id.*

91. *I.A. v. Turkey*, App. No. 42571/98, Eur. Ct. H.R. (2005), <http://cmiskp.echr.coe.int/tkp197/view.asp?action=html&documentId=786558&portal=hbkm&source=externalbydocnumber&table=F69A27FD8FB86142BF01C1166DEA398649> (last visited Nov. 7, 2007).

92. *Id.* ¶ 29.

93. *Id.*

ample, the prevention of disorder,⁹⁴ they would seem even more justified for the protection of religious minorities, who are generally more vulnerable.

The jurisprudence of the court makes clear that the freedom of expression cannot be invoked to allow the creation or perpetuation of a discriminatory environment or one that inhibits the exercise of freedom of religion. At the same time, its tendency to find blasphemy laws consistent with the ECHR indicates that the court may have lost its sense of the balance between these freedoms. Indeed, at times it seems as though the court is permitting the suppression of expression without any showing that the rights of others were actually or even potentially infringed. For example, in the cases described above, the court did not endeavor to demonstrate a clear link between the protection of religious feelings and the exercise of freedom of religion—a link that may be particularly tenuous when the feelings of a dominant majority are at issue.

Restrictions on expression serve human rights principles when they are applied to protect a vulnerable group from discrimination or to protect the ability of its members to practice their religion. Blasphemy laws that serve only to prevent expression deemed offensive by a majority population are less defensible. From a human rights perspective, this is one of the fundamental problems with blasphemy laws; they tend to focus on protection of the group's feelings, and as such are concerned with how that group may respond to the expression at issue. The more important inquiry for the purposes of human rights law is how the expression affects the attitude of *others* vis-à-vis that group.⁹⁵ Does it incite discrimination against members of that group? Does it create a social environment in which members of that group are unable to practice their religion? Indeed, some of the court's more recent judgments indicate that the court may be backing away from the level of protection accorded to religious feelings in the absence of some more tangible interference with religious freedom.⁹⁶ The Human Rights Council, on the other hand,

94. The prevention of disorder has also been invoked as a justification for suppression of expression under blasphemy laws. Indeed, in *Otto-Preminger*, the court noted that "[i]n seizing the film, the Austrian authorities acted to ensure religious peace in that region." *Otto-Preminger Institut v. Austria*, 295 Eur. Ct. H.R. (Ser. A) at 20–21 (1994). This approach, however, seems to disserve human rights by enabling the anger of the majority to limit the rights of a minority.

95. Distinguish the mere depiction of Mohammed, which is liable to offend some Muslims, from the depiction of Mohammed in a manner that incites discrimination against Muslims, e.g., by inviting the viewer to associate Islam with terrorism and Muslims with violence.

96. See *Gieniowski v. France*, App. No. 64016/00, Eur. Ct. H.R. (2006), <http://cmiskp.echr.coe.int/tkp197/view.asp?action=html&documentId=791924&portal=hbkm&source=>

seems to have picked up where the European Court of Human Rights left off and has taken the protection of religious feelings a step further.

IV. THE HUMAN RIGHTS COUNCIL APPROACH—COMBATING DEFAMATION OF RELIGIONS

Since its creation in the spring of 2006, the Human Rights Council has taken a keen interest in the issue of defamation of religions. During its inaugural session in June 2006, the council requested that two of its Special Rapporteurs report on the issue at its next session.⁹⁷ The decision to request the report was taken against the backdrop of the Danish cartoon controversy and was led by council members that are also members of the Organization of the Islamic Conference (“OIC”).⁹⁸ The decision was opposed by twelve members of the Council who, as a group, were predominantly representatives of Western countries.⁹⁹

A similar voting pattern was evident in March 2007 when the council adopted Resolution 4/9 on “Combating Defamation of Religions.”¹⁰⁰ This resolution was introduced by Pakistan on behalf of the OIC.¹⁰¹ The resolution conceives of defamation of religions as a lynchpin human rights issue. Its preamble “[n]ot[es] with concern that defamation of religions is among the causes of social disharmony and leads to violations of human rights.”¹⁰²

While many of its provisions are couched in general terms applicable to all religions, the resolution focuses primarily on defamation of Islam. Thus, in an apparent reference to the Danish cartoon controversy, the council “deplores the use of the print, audio-visual and electronic media,

externalbydocnumber&table=F69A27FD8FB86142BF01C1166DEA398649 (last visited May 14, 2008) (conviction for religious defamation found to violate article 10); Klein v. Slovakia, App. No. 72208/01, Eur. Ct. H.R. (2007), <http://cmiskp.echr.coe.int/tkp197/view.asp?action=html&documentId=809920&portal=hbkm&source=externalbydocnumber&table=F69A27FD8FB86142BF01C1166DEA398649> (last visited May 14, 2008) (conviction for religious defamation found to violate article 10).

97. See U.N. Human Rights Council Decision 1/107, *Incitement to Racial and Religious Hatred and the Promotion of Tolerance*, U.N. Doc. A/HRC/DEC/1/107 (Nov. 13, 2006) [hereinafter Human Rights Council Decision].

98. *Id.* See also Organization of the Islamic Conference, www.oic-oci.org/oicnew/member_states.asp (last visited Feb. 8, 2008).

99. Human Rights Council Decision, *supra* note 97.

100. Human Rights Council Resolution, *supra* note 10. On the voting pattern, see U.N. Human Rights Council, *Summary Record of the 31st Meeting* ¶ 73, U.N. Doc. A/HRC/4/SR.31 (Sept. 21, 2007) [hereinafter Human Rights Council 31st Meeting]. See also U.N. Human Rights Council, *Summary Record of the 24th Meeting* ¶ 41, U.N. Doc. A/HRC/1/SR.24 (July 18 2006).

101. Human Rights Council 31st Meeting, *supra* note 100, ¶ 60.

102. Human Rights Council Resolution, *supra* note 10, pmb1.

including the Internet, and any other means to incite acts of violence, xenophobia or related intolerance and discrimination towards Islam or any other religion.”¹⁰³ Similarly, the council expressed “deep concern at attempts to identify Islam with terrorism, violence and human rights violations”¹⁰⁴ and noted with “deep concern the intensification of the campaign of defamation of religions, and the ethnic and religious profiling of Muslim minorities, in the aftermath of the tragic events of 11 September 2001.”¹⁰⁵ It also requested the United Nations (“U.N.”) Special Rapporteur on Contemporary Forms of Racism, Racial Discrimination, Xenophobia and Related Intolerance “report on all manifestations of defamation of religions and in particular on the serious implications of Islamophobia on the enjoyment of all rights.”¹⁰⁶

The council’s singular preoccupation with Islamophobia becomes more acute in light of the fact that efforts to include protection of other specifically identified religions were blocked by supporters of the resolution. At the same time, the singling out of a particular religion for special attention is not necessarily problematic to the extent it is necessary to address issues particular to that religion.¹⁰⁷

Far more problematic is the resolution’s overall tendency to conceive of defamation of religions as a human rights violation or as a discrete evil on par with human rights violations. Certainly some expressions that could be characterized as religious defamation could also constitute human rights violations, but not so every defamatory expression. A human rights issue arises when the expression incites discrimination against members of that religion or when it otherwise interferes with their religious freedom.¹⁰⁸ It is not the mere fact that the expression is defamatory that makes it a human rights issue.

The fact that religious defamation is not itself a human rights issue is implicit in the way in which the resolution recalls the freedom of expression. In paragraph 10, the council:

Emphasizes that everyone has the right to freedom of expression, which should be exercised with responsibility and may therefore be subject to limitations as provided by law and necessary for respect of the rights or

103. *Id.* ¶ 11. *See also id.* ¶¶ 2, 3, 5, and 12.

104. *Id.* ¶ 2.

105. *Id.* ¶ 3.

106. *Id.* ¶ 12.

107. The international law of nondiscrimination recognizes that special positive measures are at times required in order to ensure substantive equality. *See, e.g.*, CERD, *supra* note 19, arts. 1(4), 2(2).

108. *See supra* Section III.B.

reputations of others, protection of national security or of public order, public health or morals and respect for religions and beliefs.¹⁰⁹

Significantly, “respect for religion and beliefs” is included as an additional aim pursuant to which restrictions on the freedom of expression may be justified.¹¹⁰ This language does not appear in the limitation clauses of any human rights treaties.¹¹¹ The fact that it is listed separately from the “rights or reputations of others” implies that it could serve as an independent basis for limiting the freedom of expression.¹¹²

The inclusion of this phrase is troubling because it could be read to license broad-based and wide-ranging blasphemy laws. By including the aim of respect for religion and beliefs without a nexus to types of expression that in fact infringe upon the rights of others, the resolution opens the door to proscriptions encompassing any criticism of religion. This interpretation is all the more feasible in light of the final preambular paragraph, in which the Council “[n]ot[es] with deep concern the increasing trend in recent years of statements attacking religions, Islam and Muslims in particular, in human rights forums,”¹¹³ and it is all the more threatening to a proper understanding of freedom of expression in countries where the power of the state is closely tied to religious authority.

CONCLUSION

The battle lines are still being drawn. Tehran holds a conference that focuses on questioning the existence of the Holocaust¹¹⁴ and the U.N. General Assembly, in a resolution introduced by the United States, “[c]ondemns without any reservation any denial of the Holocaust.”¹¹⁵ In the September 2007 session of the Human Rights Council, Pakistan warned against revision of the Human Rights Committee’s General Comment on article 20, fearing that Western influence in the committee

109. Human Rights Council Resolution, *supra* note 10, ¶ 10 (emphasis in original).

110. *Id.*

111. It should also be noted that in paragraph 7, the council “[u]rges States to take resolute action to prohibit the dissemination, including through political institutions and organizations, of racist and xenophobic ideas and material aimed at any religion or its followers that constitute incitement to racial and religious hatred, hostility or violence,” in language that sweeps more broadly than article 20(2) of the ICCPR. *See id.* ¶ 7; ICCPR, *supra* note 12, art. 20(2).

112. *Id.* ¶ 10.

113. Human Rights Council Resolution, *supra* note 10, pmb1.

114. *Holocaust Meeting Stirs Passions*, BBC NEWS, Dec. 13, 2006, http://news.bbc.co.uk/2/hi/middle_east/6175353.stm.

115. G.A. Res. 61/255 ¶ 1, U.N. Doc. A/RES/61/255 (Jan. 26, 2007).

would lead to a narrowing of the types of expression required to be suppressed.¹¹⁶

In early 2008, after Danish authorities uncovered a plot to kill the illustrator of one of the more controversial cartoons, newspapers throughout Denmark reprinted the cartoons, citing as justification the defense of the freedom of expression.¹¹⁷ At the same time, a member of the Dutch parliament released a controversial film associating recent terrorist violence with Islam.¹¹⁸ These developments fueled a divisive debate in the March 2008 session of the Human Rights Council, which led to a modification of the mandate of the Special Rapporteur on Freedom of Expression.¹¹⁹ The draft of this resolution, initially introduced by Canada, renewed the mandate of the Special Rapporteur.¹²⁰ Over the protest of the Canadian delegate, as well as objections by a number of other, mostly Western, countries that had initially sponsored the resolution, the mandate was amended to include reporting on “instances where the abuse of the right of freedom of expression constitutes an act of racial or religious discrimination.”¹²¹ Decrying the amendment as seriously undermining the

116. U.N. Human Rights Council, *Summary Record of the 3rd Meeting* ¶ 39, U.N. Doc. A/HRC/6/SR.3 (Sept. 25, 2007).

117. *Danish Cartoons 'Plotters' Held*, BBC NEWS, Feb. 12, 2008, <http://news.bbc.co.uk/1/hi/world/europe/7240481.stm> (last visited Apr. 7, 2008).

118. *Dutch MP Posts Islam Film on Web*, BBC NEWS, Mar. 27, 2008, <http://news.bbc.co.uk/2/hi/europe/7317506.stm> (last visited Apr. 7, 2008).

119. U.N. Human Rights Council, *Promotion and Protection of All Human Rights, Civil, Political, Economic, Social and Cultural Rights, Including the Right to Development* ¶¶ 4(a)–(e), U.N. Doc. A/HRC/7/L.24 (Mar. 20, 2008).

120. *Id.*

121. U.N. Human Rights Council, *Promotion and Protection of All Human Rights, Civil, Political, Economic, Social and Cultural Rights, Including the Right to Development* ¶ 4C-bis, U.N. Doc. A/HRC/7/L.39 (Mar. 20, 2008). Council members voting in favor of the Egyptian amendment were: Angola, Azerbaijan, Bangladesh, Cameroon, China, Cuba, Djibouti, Egypt, Gabon, Ghana, Indonesia, Jordan, Madagascar, Malaysia, Mali, Mauritius, Nicaragua, Nigeria, Pakistan, Philippines, Qatar, the Russian Federation, Saudi Arabia, Senegal, South Africa, Sri Lanka and Zambia. Those voting against were: Bosnia and Herzegovina, Brazil, Canada, France, Germany, Guatemala, India, Italy, Mexico, the Netherlands, Peru, Romania, Slovenia, Switzerland, Ukraine, the United Kingdom and Uruguay. Bolivia, Japan, and South Korea abstained. After the adoption of the Egyptian amendment, Cuba then introduced an oral amendment that would insert language recognizing “the importance for all forms of media to repeat and to deliver information in a fair and [im]partial manner” into the preambular text of the resolution. This amendment too was adopted despite the no-votes of Canada and fourteen other council members. Press Release, United Nations, Human Rights Council Extends Mandates on Freedom of Opinion and Expression, Racism and Racial Discrimination, Somalia and Myanmar (Mar. 28, 2008), available at <http://www.unhcr.ch/hurricane/huri->

mandate's focus, a number of countries, led by Canada, withdrew their sponsorship of the resolution and abstained from the vote to renew the mandate.¹²²

These recent events reflect the continued entrenchment of both sides of the debate;¹²³ neither of these extreme positions capture the complexity of the underlying issues. Human rights law provides a framework that can accommodate this complexity.

In assessing the permissibility of restrictions on the freedom of expression, it is essential to consider the relevant context. In light of the prevalence of discrimination against Muslims in many Western countries, invocation of the right to freedom of expression in response to dissemination of material likely to further incite discrimination loses something of its legitimacy and, indeed, its legality.¹²⁴ While criminal sanctions may be unwarranted, there are a variety of other means that may be employed by states, including simple condemnation of the expression, explicit attempts to counter the message so disseminated, or the provision of civil remedies.

At the same time, it is important to maintain the grounding of the human rights framework in human rights principles. For example, the scope of protection of freedom of expression, while justifiably limited by the human rights of others, should not turn on the propensity for hostility of those offended by the expression. The latter is even less justifiable when the offended group represents a majority population.

Of even greater concern is the attempt by the Human Rights Council to rhetorically link religious defamation to human rights violations while at the same time asserting the former as an independent basis for justifiably restricting freedom of expression. At its most nefarious, the resolution

cane.nsf/view01/D6AAED437FC007C1C125741A0071E9CB?opendocument (last visited Apr. 7, 2008) [hereinafter U.N. Press Release].

122. U.N. Press Release, *supra* note 121.

123. *See supra* notes 6–10 and accompanying text (discussing the Swedish government's invocation of the freedom of expression and the Human Rights Council's condemnation of religious defamation as a human rights violation).

124. The position of a Muslim in Denmark vis-à-vis the Mohammed cartoons differs significantly from that of a Muslim in Morocco. *See Ben El Mahi v. Denmark*, App. No. 5853/06, Eur. Ct. H.R. (2006), <http://cmiskp.echr.coe.int/tkp197/view.asp?action=html&documentId=812270&portal=hbkm&source=externalbydocnumber&table=F69A27FD8FB86142BF01C1166DEA398649> (last visited Nov. 7, 2007). This decision rejected on jurisdictional grounds the application of a Moroccan national living in Morocco who alleged that Denmark violated the Convention by allowing the Mohammed cartoons to be published. *Id.* While the issue of defining minority status in an increasingly globalized world is coextensively complex, the situation of the offended Moroccan remains somewhat less sympathetic.

could be interpreted to enable states to suppress criticism of the exercise of power by a dominant religious majority wholly in the name of defending human rights.

There are, of course, innumerable political factors that have influenced the decision to create a battle. The purpose of this Article is merely to illustrate that this battle results neither from any inadequacy in the framework of international human rights law nor from fundamental disagreement over the values underlying human rights law.