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Meghan Fischer

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# **HATE SPEECH LAWS AND BLASPHEMY LAWS: PARALLELS SHOW PROBLEMS WITH THE U.N. STRATEGY AND PLAN OF ACTION ON HATE SPEECH**

*Meghan Fischer\**

## **ABSTRACT**

*In May 2019, the United Nations Secretary-General introduced the U.N. Strategy and Plan of Action on Hate Speech, an influential campaign that poses serious risks to religious and political minorities because its definition of hate speech parallels elements common to blasphemy laws. U.N. human rights entities have denounced blasphemy laws because they are vague, broad, and prone to arbitrary enforcement, enabling the authorities to use them to attack religious minorities, political opponents, and people who have minority viewpoints. Likewise, the Strategy and Plan of Action's definition of hate speech is ambiguous and relies entirely on subjective interpretation, opening the door to arbitrary and malicious accusations and prosecutions.*

*The campaign gives cover to countries that want to continue their blasphemy laws—under the guise of banning hate speech—with the endorsement of the United Nations. Indeed, examples of enforcement of hate speech laws in Indonesia, Russia, North Macedonia, and Denmark reveal that countries use these laws, just as they use blasphemy laws, to punish the expression of minority viewpoints.*

*This Article is the first to highlight the dangers posed to religious and political minorities by the U.N. Strategy and Plan of Action on Hate Speech, which will only become more influential within the United Nations and across U.N. Member States the longer it is left unchecked. This Article shows human rights advocates and Member States that support minority rights why they must immediately denounce and call for the revocation of the campaign.*

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\* Legal Counsel, Global Religious Freedom, ADF International; J.D., Harvard Law School, 2011.

## INTRODUCTION

In May 2019, United Nations Secretary-General António Guterres announced a U.N.-wide campaign called the Strategy and Plan of Action on Hate Speech.<sup>1</sup> The Strategy and Plan of Action is significant because it presented the first-ever definition of hate speech at the international or U.N. level—one that is vague and overbroad and opens the door wide to abuse, just as blasphemy laws have done. Blasphemy laws are widely condemned at the United Nations and by the international human rights community because they ban criticism of religions, require subjective interpretation, and are prone to arbitrary enforcement.<sup>2</sup> These laws are used to punish religious minorities and anyone who questions or disagrees with the state-sponsored or majority religion, as well as to suppress political opposition and to silence those who hold minority views.<sup>3</sup>

The definition of hate speech in the Strategy and Plan of Action is vague, subjective, and vulnerable to manipulation in ways that parallel blasphemy laws. Indeed, hate speech laws are already being used to prosecute blasphemy and quash minority viewpoints.<sup>4</sup> Further, some countries that have welcomed and encouraged the U.N.'s campaign to combat hate speech have made obvious their motivations to use hate speech laws similarly to protect religion and religious feelings.<sup>5</sup> In the midst of the proliferation around the world of laws targeting hate speech, the Strategy and Plan of Action is likely to draw serious attention and impact the development of laws and policies on expression, especially in countries that look to the United Nations for guidance and funding or that use U.N. pronouncements as justification for their actions.

This Article serves as a call to U.N. Member States and others who care about the rights of minorities to oppose the Strategy and Plan of Action on Hate Speech, as well as to recognize that laws regulating speech require subjective interpretation and are therefore able to be used to target religious minorities, political opponents, and people who have minority viewpoints. The Article examines the application of blasphemy laws in three countries, Indonesia, Pakistan, and Russia, to illustrate how they restrict criticism of religion and are

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<sup>1</sup> *United Nations Strategy and Plan of Action on Hate Speech*, <https://www.un.org/en/genocideprevention/hate-speech-strategy.shtml>. Guterres launched the Strategy and Plan of Action in June 2019. Secretary-General António Guterres, *Remarks at the Launch of the United Nations Strategy and Plan of Action on Hate Speech* (June 18, 2019), <https://www.un.org/sg/en/content/sg/speeches/2019-06-18/un-strategy-and-plan-of-action-hate-speech-remarks>.

<sup>2</sup> See *infra* Part I.B.

<sup>3</sup> See *infra* Part I.A.

<sup>4</sup> See *infra* Part II.

<sup>5</sup> See *infra* Part III.

targeted at people with unpopular or minority viewpoints. To elaborate on these problems, the Article next presents U.S. Commission on International Religious Freedom (USCIRF) and U.N. human rights entities' criticism of blasphemy laws, including their ambiguous elements and their arbitrary enforcement. It then introduces the U.N. Strategy and Plan of Action on Hate Speech and evaluates its definition of hate speech, which has striking parallels to blasphemy laws due to its vague terms and vulnerability to abuse by biased authorities. The Article then shows that while U.N. human rights entities have criticized vague and subjective elements in restrictions on speech, their criticism is insufficient as they fail to understand that these restrictions by their very nature are open to abuse, in ways that parallel blasphemy laws. Examples of enforcement of hate speech laws in Indonesia, Russia, North Macedonia, and Denmark confirm that these laws are being used to punish the expression of minority viewpoints and to harm political opponents, in the same ways blasphemy laws are used. Finally, the Article evaluates the motives of those supporters of the Strategy and Plan of Action on Hate Speech who are seeking tools comparable in outcome to blasphemy laws, that is, additional legislative means to squash minority viewpoints. Altogether, the U.N. Strategy and Plan of Action's definition of hate speech, the detailed hate speech cases, and the nefarious motives of certain proponents of the Strategy and Plan of Action demonstrate that hate speech laws are vulnerable to manipulation and are unlikely to protect religious, political, and other minorities. Therefore, the Article concludes that the Strategy and Plan of Action's stated intent to protect minorities is misguided and in fact will lead to further harm.

## I. BLASPHEMY LAWS AND THEIR CONDEMNATION BY THE UNITED NATIONS

Blasphemy is commonly understood as insulting a religion, religious figure, deity, or holy book. In 2017, USCIRF surveyed the world's blasphemy laws, which it defined as "provisions that sanction insulting or defaming religion and seek to punish individuals for allegedly offending, insulting, or denigrating religious doctrines, deities, symbols or 'the sacred,' or for wounding or insulting religious feelings."<sup>6</sup>

The USCIRF survey found that as of July 2017, sixty-nine countries had blasphemy laws, spread throughout the world, with 25.7% in the Middle East and North Africa, 25.7% in Asia-Pacific, 20% in Europe, and 11.5% in the

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<sup>6</sup> JOELLE FISS & JOCELYN GETGEN KESTENBAUM, USCIRF, RESPECTING RIGHTS? MEASURING THE WORLD'S BLASPHEMY LAWS 5 (JULY 2017) [hereinafter USCIRF 2017 BLASPHEMY LAWS SURVEY].

Americas.<sup>7</sup> During coding for the project, Malta and Denmark repealed their blasphemy laws,<sup>8</sup> and since publication, Greece,<sup>9</sup> Ireland,<sup>10</sup> Canada,<sup>11</sup> and New Zealand<sup>12</sup> have repealed their blasphemy laws, signifying a trend of rejection among liberal Western nations. Further, many Western nations that do have blasphemy laws rarely enforce them, if at all.<sup>13</sup> Yet many governments do enforce their blasphemy laws, most commonly to the detriment of religious minorities, political opponents, and people with minority viewpoints.

Indonesia, Pakistan, and Russia each have enforced their blasphemy laws in ways that cause serious harm to minorities. Cases from these countries, presented next in Part I.A, exemplify the problems that the USCIRF survey identified as common to blasphemy laws, which are detailed in Part I.B. United Nations human rights entities, such as Special Rapporteurs and the Human Rights Committee, have strongly rejected blasphemy laws, and their criticisms are detailed in Part I.B alongside the corresponding USCIRF criticisms.

## A. *The Application of Blasphemy Laws*

### 1. *Indonesia*

Indonesia's blasphemy law, Article 156(a) of the Criminal Code, provides for a punishment of up to five years' imprisonment for the deliberate public expression of feelings or commission of an act "a) which principally have the character of being at enmity with, abusing or staining a religion, adhered to in

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<sup>7</sup> The report analyzes seventy-one countries' blasphemy laws, but both Malta and Denmark had repealed their blasphemy laws by the time of the publication of the report. *Id.* at 5.

<sup>8</sup> *Id.*

<sup>9</sup> *Blasphemy to be Abolished in Greece Under New Criminal Code*, HUMANISTS UK (June 17, 2019), <https://humanism.org.uk/2019/06/17/blasphemy-to-be-abolished-in-greece-under-new-criminal-code/>.

<sup>10</sup> Emma Graham-Harrison, *Ireland Votes to Oust 'Medieval' Blasphemy Law*, GUARDIAN (Oct. 27, 2018), <https://www.theguardian.com/world/2018/oct/27/ireland-votes-to-oust-blasphemy-ban-from-constitution>. Ireland is the first country to have repealed its blasphemy law by referendum. *Ireland*, END BLASPHEMY LAWS, <https://end-blasphemy-laws.org/countries/europe/ireland/> (last updated July 14, 2020).

<sup>11</sup> *Canada Repeals Blasphemy Law*, BC HUMANIST ASS'N (Dec. 11, 2018), [https://www.bchumanist.ca/canada\\_repeals\\_blasphemy\\_law](https://www.bchumanist.ca/canada_repeals_blasphemy_law).

<sup>12</sup> Hon. Andrew Little, *Blasphemous Liberal Law Repealed*, NEW ZEALAND GOVERNMENT: RELEASES (Mar. 5, 2009), <https://www.beehive.govt.nz/release/blasphemous-libel-law-repealed>.

<sup>13</sup> The USCIRF survey only considered the laws as written, not as applied, and did not consider how often they are applied, if at all. Blasphemy laws that are never enforced are nevertheless problematic and should be repealed. "Dead letter" blasphemy laws can be resurrected if public opinion or political will changes. Further, the mere existence of such laws lends credence to the idea that speech critical of religion should be prohibited. These laws also legitimize blasphemy laws enforced in other countries. *What's Wrong With Blasphemy Laws?*, HUMANISTS INT'L: END BLASPHEMY LAWS, <https://end-blasphemy-laws.org/whats-wrong-with-blasphemy-laws>.

Indonesia; b) with the intention to prevent a person to adhere to any religion based on the belief of the almighty God.”<sup>14</sup> Indonesia recognizes six religions: Islam, Protestantism, Catholicism, Hinduism, Buddhism, and Confucianism.<sup>15</sup> As radical Islamic groups have gained support and Indonesia’s tradition of religious pluralism has waned, any teachings perceived as contrary to Islam expose religious minorities to prosecution.<sup>16</sup> Human Rights Watch estimated in October 2018 that there had been twenty-three convictions for blasphemy since current President Joko Widodo took office in 2014, including six up to that point in 2018, and 125 during the 2004–2014 presidency of Susilo Bambang Yudhoyono.<sup>17</sup> Only one person charged with blasphemy has ever been acquitted.<sup>18</sup> Christians, Shiite Muslims, Ahmadi Muslims, and Gafatar followers are particularly vulnerable.<sup>19</sup>

One of the most prominent blasphemy cases in the world, given the political position of the defendant, the egregiousness of the charges, and the presence of doctored evidence, is that of the ethnic Chinese and Christian former governor of Jakarta, Basuki Tjahaja Purnama, known by the nickname Ahok. At a campaign rally in September 2016, Ahok said to his Muslim supporters that a verse in the Quran was being used to encourage Muslims not to vote for him.<sup>20</sup> Footage of the speech was heavily edited to make it look as if Ahok had been disparaging the Quran.<sup>21</sup> Protests against Ahok drew hundreds of thousands of

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<sup>14</sup> USCIRF 2017 BLASPHEMY LAWS SURVEY, *supra* note 6, at 54.

<sup>15</sup> However, in 2017, the Indonesian Constitutional Court ruled for the first time that Indonesian citizens could identify as followers of native faiths. Devina Heriyanto, *Q&A: Indonesia’s Native Faiths and Religions*, JAKARTA POST (Nov. 14, 2017), <https://www.thejakartapost.com/academia/2017/11/14/qa-indonesias-native-faiths-and-religions.html>.

<sup>16</sup> See CHRISTIAN SOLIDARITY WORLDWIDE, INDONESIA: VISIT REPORT 10–23 MAY 2017, at 3 (2017) <https://www.csw.org.uk/2017/07/31/report/3648/article.htm>; CHRISTIAN SOLIDARITY WORLDWIDE, INDONESIA: PLURALISM IN PERIL 8–9 (2014), <https://www.csw.org.uk/2014/02/14/report/179/article.htm> [hereinafter INDONESIA: PLURALISM IN PERIL].

<sup>17</sup> Andreas Harsono, *The Human Cost of Indonesia’s Blasphemy Law*, HUM. RTS. WATCH (Oct. 25, 2018), <https://www.hrw.org/news/2018/10/25/human-cost-indonesias-blasphemy-law>.

<sup>18</sup> Kate Lamb, *Jakarta’s Christian Governor to Face Blasphemy Trial Over Islam Insult Claim*, GUARDIAN (Nov. 16, 2016), <https://www.theguardian.com/world/2016/nov/16/jakarta-christian-governor-to-face-blasphemy-trial-over-islam-insult-claim>.

<sup>19</sup> INDONESIA: PLURALISM IN PERIL, *supra* note 16, at 83.

<sup>20</sup> *Public Prosecutor v. Basuki Tjahaja Purnama aka “Ahok,”* COLUM. GLOB. FREEDOM EXPRESSION (May 19, 2017) <https://globalfreedomofexpression.columbia.edu/cases/public-prosecutor-v-basuki-tjahaja-purnama-aka-ahok>.

<sup>21</sup> *Id.*

Muslims,<sup>22</sup> and he was arrested for blasphemy and defaming Muslim leaders, which is prohibited by Article 156.<sup>23</sup>

At trial, members of the hardline Islam Defenders Front and the Anti-blasphemy Forum spoke against Ahok.<sup>24</sup> Meanwhile, Ahok and several other witnesses testified about his positive relationships with Muslims, from his Muslim schooling to his Muslim friends to the pro-Muslim programs he implemented as governor.<sup>25</sup> The prosecutors eventually dropped the blasphemy charge due to lack of evidence, but the court nevertheless unanimously determined in May 2017 that he had indeed committed blasphemy under Article 156(a) of the Criminal Code.<sup>26</sup> Prosecutors asked for a one-year sentence but the court sentenced him to two years' imprisonment, with the judge saying, "The defendant feels no remorse. His action caused unrest, 'hurt' Islam and divided Muslims and groups."<sup>27</sup>

Gafatar, or Gerakan Fajar Nusantara, a religious group founded in 2012 that takes its teachings from Islam, Christianity, and Judaism, has been a prominent victim of the blasphemy law in recent years.<sup>28</sup> The Gafatar leader considers himself a messiah and a prophet deserving the worship of the religion's followers, who often leave behind their families and join Gafatar communities, prompting family members to report them missing and to retaliate against the communities.<sup>29</sup> There have been attacks against Gafatar followers and looting and destruction of their property, especially in January 2016.<sup>30</sup> Gafatar is considered to be a reintroduction of another religious movement that had been banned officially a decade earlier.<sup>31</sup> Because Gafatar is not one of Indonesia's official religions, its teachings are considered deviant.<sup>32</sup>

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<sup>22</sup> Kathy Quiano & James Griffiths, *Indonesia: 200,000 Protest Christian Governor of Jakarta*, CNN (Dec. 2, 2016), <https://www.cnn.com/2016/12/02/asia/jakarta-indonesia-protest-ahok/index.html>.

<sup>23</sup> COLUM. GLOB. FREEDOM EXPRESSION, *supra* note 20, at 1.

<sup>24</sup> *Id.*

<sup>25</sup> *Id.*

<sup>26</sup> *Id.*

<sup>27</sup> *Id.*

<sup>28</sup> *Indonesia: Persecution of Gafatar Religious Group*, HUM. RTS. WATCH (Mar. 29, 2016), <https://www.hrw.org/news/2016/03/29/indonesia-persecution-gafatar-religious-group>.

<sup>29</sup> Jewel Topsfield & Amilia Rosa, *Indonesia Cracks Down on 'Deviant Sect' Gafatar After Village Burned Down by Mob*, SYDNEY MORNING HERALD (Jan. 26, 2016), <https://www.smh.com.au/world/indonesia-cracks-down-on-deviant-sect-gafatar-after-village-burned-down-by-mob-20160125-gmdj11.html>.

<sup>30</sup> Marguerite Afra Sapiie, *Gafatar is Heretical: MUI*, JAKARTA POST (Feb. 3, 2016), <https://www.thejakartapost.com/news/2016/02/03/gafatar-heretical-mui.html>; *Indonesia: Persecution of Gafatar Religious Group*, *supra* note 28.

<sup>31</sup> Ainur Rohmah, *Indonesia: Leaders of 'Deviant' Religious Group Jailed*, ANADOLU AGENCY (Mar. 7, 2017), <https://www.aa.com.tr/en/asia-pacific/indonesia-leaders-of-deviant-religious-group-jailed/765891>.

<sup>32</sup> Topsfield & Rosa, *supra* note 29. The Indonesia Ulema Council, the country's top Muslim clerical

Due to these allegedly deviant teachings, its founder, president, and vice-president were arrested in May 2016 on charges of blasphemy under Article 156(a) of the Criminal Code.<sup>33</sup> In March 2017, a Jakarta court sentenced two leaders to five years in prison, and a third to three years.<sup>34</sup> The judge claimed the trial proved the men “tarnished one of the religions in Indonesia deliberately in public[.]”<sup>35</sup>

Several new blasphemy cases arose in 2019.<sup>36</sup> Meanwhile, Indonesia is set to increase the scope of its blasphemy law to cover several more elements, including: “defaming a religion, persuading someone to be a non-believer, disturbing a religious ritual or making noise near a house of worship, and insulting a cleric while leading a ritual,” as well as “stealing religious artifacts and damaging a house of worship,” both of which are already criminal offenses.<sup>37</sup>

## 2. Pakistan

Pakistan, which has Islam as its official state religion,<sup>38</sup> is perhaps the most notorious country in the world for enforcing blasphemy laws, especially given recent cases that have received significant media attention.<sup>39</sup> Although ninety-six percent of its 210.8 million people are Muslim, there is a significant number of religious minorities.<sup>40</sup> Those identifying as Shia constitute fifteen to twenty percent of the Muslim population,<sup>41</sup> and as estimated by the government in 2014, there are 1.4 million Hindus, 1.3 million Christians, 126,000 Ahmadis, 34,000

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body, issued a fatwa in February 2016 stating that Gafatar is heretical and not consistent with Islam, and accordingly that any persons considering themselves Muslim involved in the movement should repent and leave. Sapiie, *supra* note 30.

<sup>33</sup> *Indonesia: Blasphemy Sentences are an Injustice that Must be Reversed*, AMNESTY INT’L (Mar. 7, 2017), <https://www.amnesty.org/en/latest/news/2017/03/indonesia-blasphemy-sentences-are-an-injustice-that-must-be-reversed>.

<sup>34</sup> Rohmah, *supra* note 31.

<sup>35</sup> *Id.*

<sup>36</sup> Andreas Harsono, *Indonesian Woman Tried for Blasphemy Over Mosque Incident*, HUM. RTS. WATCH (Oct. 11, 2019), <https://www.hrw.org/news/2019/10/11/indonesian-woman-tried-blasphemy-over-mosque-incident>.

<sup>37</sup> Andreas Harsono, *Indonesia to Expand Abusive Blasphemy Law*, HUM. RTS. WATCH (Oct. 31, 2019), <https://www.hrw.org/news/2019/10/31/indonesia-expand-abusive-blasphemy-law>.

<sup>38</sup> PAKISTAN CONST. art. 2.

<sup>39</sup> *See, e.g.*, Salman Masood, *American Accused of Blasphemy is Killed in Pakistan Courtroom*, N.Y. TIMES (July 30, 2020), <https://www.nytimes.com/2020/07/30/world/asia/pakistan-blasphemy-killing-american.html>; Shumaila Jaffery, *Asia Bibi: Pakistan’s Notorious Blasphemy Case*, BBC (Feb. 1, 2019), [https://www.bbc.co.uk/news/resources/idt-sh/Asia\\_Bibi](https://www.bbc.co.uk/news/resources/idt-sh/Asia_Bibi).

<sup>40</sup> U.S. DEP’T OF STATE, PAKISTAN 2019 INTERNATIONAL RELIGIOUS FREEDOM REPORT 3–4 (2020), <https://www.state.gov/reports/2019-report-on-international-religious-freedom/pakistan/> [hereinafter DOS 2019 PAKISTAN IRFR].

<sup>41</sup> *Id.* at 4. These numbers are considered by these minorities to be deliberately underestimated. *Id.*

Bahai'is, 6,000 Sikhs, and 4,000 Parsis.<sup>42</sup> In 2018 and 2019, Pakistan was designated as a “Country of Particular Concern” by the United States Department of State due to deteriorating religious freedom conditions, including its enforcement of its blasphemy laws.<sup>43</sup>

The Centre for Social Justice reported that from 1987 to 2017 there were 1,549 cases of blasphemy against Muhammad or desecration of the Quran: 720 accused were Muslim; 516 Ahmadi, whom Pakistan considers non-Muslims; 238 Christian; 31 Hindu; and 44 unknown.<sup>44</sup> The National Commission for Justice and Peace, a Pakistani Non-governmental Organization (NGO), estimates similar numbers.<sup>45</sup> Seventy-five people in those cases were killed by the police or by mobs.<sup>46</sup> From January to December 2018, there were eighteen new blasphemy cases, most of them in the Punjab province, according to the Pakistan Human Rights Commission.<sup>47</sup> USCIRF reported in its 2020 annual report that it knew of at least forty individuals at the time serving life sentences or sentenced to death for blasphemy.<sup>48</sup> The U.S. Department of State reported in its 2019 International Religious Freedom Report that at least eighty-four people were imprisoned on blasphemy charges at the time.<sup>49</sup>

Many of Pakistan's blasphemy cases are founded on false allegations or allegations with no evidence and with consistent denial by the accused of wrongdoing.<sup>50</sup> Blasphemy allegations frequently lead to mob violence, and many never go to court because mobs kill or seriously injure the accused,

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<sup>42</sup> U.S. DEP'T OF STATE, PAKISTAN 2018 INTERNATIONAL RELIGIOUS FREEDOM REPORT 4 (2019), <https://www.state.gov/reports/2018-report-on-international-religious-freedom/pakistan/>.

<sup>43</sup> Press Statement, Michael R. Pompeo, U.S. Sec'y of State, United States Takes Action Against Violators of Religious Freedom (Dec. 20, 2019), <https://www.state.gov/united-states-takes-action-against-violators-of-religious-freedom/>; *Pakistan Joins US List of Worst Religious Freedom Violators*, WORLD WATCH MONITOR (Dec. 13, 2018), <https://www.worldwatchmonitor.org/2018/12/pakistan-joins-us-list-of-worst-religious-freedom-violators>.

<sup>44</sup> Jaffery, *supra* note 39.

<sup>45</sup> *Long Read: The Forgotten Faces and Hidden History of Pakistan's Blasphemy Laws*, FREEDOM OF RELIGION OR BELIEF IN FULL: A BLOG BY CSW (Sept. 18, 2019), <https://forbinfull.org/2019/09/18/long-read-the-forgotten-faces-and-hidden-history-of-pakistans-blasphemy-laws> [hereinafter *Long Read*].

<sup>46</sup> Jaffery, *supra* note 39.

<sup>47</sup> HUM. RTS. COMM'N OF PAK., STATE OF HUMAN RIGHTS IN 2018 71 (2019), <http://hrpweb.org/hrpweb/wp-content/uploads/2019/04/State-of-Human-Rights-in-2018-English-1.pdf> [hereinafter HUM. RTS. COMM'N PAK.].

<sup>48</sup> U.S. COMM'N. ON INT'L. RELIGIOUS FREEDOM, 2020 ANNUAL REPORT 32 (2020) <https://www.uscifr.gov/publications/2020-annual-report> [hereinafter USCIRF 2020 ANNUAL REPORT].

<sup>49</sup> DOS 2019 PAKISTAN IRFR, *supra* note 40, at 10.

<sup>50</sup> *See generally Pakistan: Accusations of Blasphemy Continue to Endanger Lives*, AMNESTY INT'L (Aug. 25, 2020), <https://www.amnesty.org/en/latest/news/2020/08/accusations-of-blasphemy-in-pakistan-continue-to-endanger-lives/>.

whether the allegations were true or not.<sup>51</sup> One blasphemy defendant was shot dead in the courtroom during his blasphemy hearing in July 2020.<sup>52</sup> Lawyers and judges handling blasphemy cases are often threatened by extremists.<sup>53</sup> Further, seventy-five percent of respondents in Pakistan hold the view that “blasphemy laws are necessary to protect Islam in our country.”<sup>54</sup> Only six percent believe that “blasphemy laws unfairly target minority communities.”<sup>55</sup>

Pakistan has a number of broad and easily manipulable provisions criminalizing various types of blasphemy, including but not limited to “outraging” or “wounding” “religious feelings” by “insulting” religions or religious beliefs and using “derogatory remarks,” whether intentional or not, toward Islam’s Prophet Muhammad.<sup>56</sup> Possible punishments include life imprisonment or even death.<sup>57</sup>

In November 2010, Asia Bibi became the first woman in Pakistan to be sentenced to death for blasphemy when she was convicted of insulting Islam’s Prophet Muhammad under Section 295-C of the Penal Code.<sup>58</sup> In June 2009, she

<sup>51</sup> USCIRF 2020 ANNUAL REPORT, *supra* note 48, at 33; HUM. RTS. COMM’N PAK., *supra* note 47, at 42; *Long Read*, *supra* note 45.

<sup>52</sup> Masood, *supra* note 39.

<sup>53</sup> HUM. RTS. COMM’N PAK., *supra* note 47, at 42.

<sup>54</sup> PEW RSCH CTR., THE WORLD’S MUSLIMS: RELIGION, POLITICS AND SOCIETY 199 (2013), <https://www.pewforum.org/2013/04/30/the-worlds-muslims-religion-politics-society-overview>.

<sup>55</sup> *Id.*

<sup>56</sup> USCIRF 2017 BLASPHEMY LAWS SURVEY, *supra* note 6, at 75–76. Relevant provisions read in full:

295-A [Deliberate and malicious acts intended to outrage religious feelings of any class by insulting its religion or religious beliefs]

Whoever, with deliberate and malicious intention of outraging the religious feelings of any class of the citizens of Pakistan, by words, either spoken or written, or by visible representations insults the religion or the religious beliefs of that class, shall be punished with imprisonment of either description for a term which may extend to ten years, or with fine, or with both. . . .

295-C [Use of derogatory remarks, etc., in respect of the Holy Prophet]

Whoever by words, either spoken or written, or by visible representation or by any imputation, innuendo, or insinuation, directly or indirectly, defiles the sacred name of the Holy Prophet Muhammad (peace be upon him) shall be punished with death, or imprisonment for life, and shall also be liable to fine.

298 [Uttering words, etc., with deliberate intent to wound religious feelings]

Whoever, with the deliberate intention of wounding the religious feelings of any person, utters any word or makes any sound in the hearing of that person or makes any gesture in the sight of that person or places any object in the sight of that person, shall be punished with imprisonment of either description for a term which may extend to one year or with fine, or with both.

*Id.*

<sup>57</sup> *Id.*

<sup>58</sup> *More Than Six Months After Acquittal, Asia Bibi Finally Allowed to Leave Pakistan*, MORNING STAR NEWS (May 8, 2019), <https://morningstarnews.org/2019/05/more-than-six-months-after-acquittal-asia-bibi->

was working as a farm laborer when she took a drink of water before giving it to her Muslim co-laborers.<sup>59</sup> The women became angry because they considered it unclean for a non-Muslim to share with Muslims and an argument ensued.<sup>60</sup> The women said that Bibi spoke offensively about the Prophet Muhammad.<sup>61</sup> A village cleric accused her of blasphemy and she was beaten by a mob.<sup>62</sup> She allegedly confessed to blasphemy while being beaten, but there was no evidence Bibi said or did anything that could conceivably fall within the blasphemy law.<sup>63</sup> Her trial sparked violence, and two government officials who defended her and called for revision of the blasphemy laws were murdered.<sup>64</sup>

In October 2018, the Supreme Court of Pakistan acquitted Bibi due to lack of evidence, prompting immediate protests that she be put to death.<sup>65</sup> After eight years on death row she was taken to Karachi and kept in hiding until she was able to escape to Canada in May 2019.<sup>66</sup>

Bibi's story received widespread media attention, especially beginning in 2011, after Salman Taseer, the governor of the Punjab province, Pakistan's largest, was murdered for defending Bibi and pursuing a presidential pardon for her.<sup>67</sup> Shortly thereafter, Shahbaz Bhatti, a Christian member of the Prime Minister's Cabinet who advocated for an end to blasphemy laws, was murdered.<sup>68</sup> Christian organizations and human rights NGOs advocated for her release and pressured the government of Pakistan, especially through media and signature campaigns, creating an international spotlight on the tangible harms of blasphemy laws.<sup>69</sup>

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finally-allowed-to-leave-pakistan [hereinafter *More Than Six Months After Acquittal*]; Jaffery, *supra* note 39.

<sup>59</sup> *More Than Six Months After Acquittal*, *supra* note 58.

<sup>60</sup> *Id.*

<sup>61</sup> *Id.*

<sup>62</sup> Jaffery, *supra* note 39.

<sup>63</sup> *More Than Six Months After Acquittal*, *supra* note 58.

<sup>64</sup> *Id.*

<sup>65</sup> Jaffery, *supra* note 39.

<sup>66</sup> *More Than Six Months After Acquittal*, *supra* note 58.

<sup>67</sup> 'I am in my home with my kids': Asia Bibi Speaks out About Her New Life in Canada, GLOB. NEWS (Aug. 6, 2020), <https://globalnews.ca/news/7251880/asia-bibi-canada-interview>; Diaa Hadid, *Pakistan's High Court Acquits Asia Bibi, Christian Woman On Death Row For Blasphemy*, NPR (Oct. 31, 2018), <https://www.npr.org/2018/10/31/662417349/pakistan-acquits-asia-bibi-christian-woman-on-death-row-for-blasphemy>.

<sup>68</sup> 'I am in my home with my kids': Asia Bibi speaks out about her new life in Canada, *supra* note 67; Hadid, *supra* note 67.

<sup>69</sup> Hadid, *supra* note 67.

### 3. *Russia*

It is not just Muslim-majority countries that have blasphemy laws. Russia, which is sixty-five percent Russian Orthodox Christian and seven percent Muslim, with varying estimates of the number of Protestants and Roman Catholics,<sup>70</sup> has increasingly restricted the freedom of religion of religious minorities. Although officially secular, the government has a close relationship with the Russian Orthodox Church and has passed several laws that aim to protect the Church.<sup>71</sup> The U.S. Department of State has placed Russia on a Special Watch List for its “severe violations of religious freedom,”<sup>72</sup> and USCIRF considers Russia to be among the worst religious freedom violators, placing it on its Tier 1 list of Countries of Particular Concern.<sup>73</sup>

Russia enacted a law in 2013 in response to the punk rock group Pussy Riot’s performance of an obscene song in the largest Russian Orthodox church.<sup>74</sup> The band’s members were convicted of a different offense, “hooliganism,” in a trial that garnered international attention.<sup>75</sup> Blasphemy was already a civil offense, but the 2013 amendment to Article 148 of the Criminal Code criminalized “[p]ublic actions expressing overt disrespect for society and committed for the purpose of offending the religious feelings of believers,” with possible punishments including compulsory labor or imprisonment for up to three years.<sup>76</sup>

The law has led to widespread self-censorship by the media, such as avoiding reporting on activities that portray the Russian Orthodox Church in a negative

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<sup>70</sup> U.S. DEP’T OF STATE, RUSSIA 2019 INTERNATIONAL RELIGIOUS FREEDOM REPORT 3 (2020), <https://www.state.gov/reports/2019-report-on-international-religious-freedom/russia/> [hereinafter DOS 2019 RUSSIA IRFR]; *Kremlin Official Says Protestantism Among Russia’s Traditional Religions*, RFE/RL (Oct. 31, 2017), <https://www.rferl.org/a/russia-protestantism-traditional-religion-kiriyenko/28826783.html>; Oksana Kuropatkina, *Protestants in Russia: An Active Minority*, NEW EASTERN EUROPE (Oct. 12, 2017), <https://neweasterneurope.eu/2017/10/12/protestants-russia-active-minority>.

<sup>71</sup> Paul Coyer, *Un(Holy Alliance): Vladimir Putin, the Russian Orthodox Church and Russian Exceptionalism*, FORBES (May 21, 2015), <https://www.forbes.com/sites/paulcoyer/2015/05/21/unholy-alliance-vladimir-putin-and-the-russian-orthodox-church/?sh=b23bbb27d5b5>. See generally Russia Archives at Forum 18, <http://www.forum18.org/archive.php?country=10> for archived news.

<sup>72</sup> Press Statement, Michael R. Pompeo, *supra* note 43.

<sup>73</sup> USCIRF 2020 ANNUAL REPORT, *supra* note 48, at 80.

<sup>74</sup> *Pussy Riot v. Russia*, COLUM. GLOB. FREEDOM EXPRESSION (Aug. 17, 2012), <https://globalfreedomofexpression.columbia.edu/cases/pussy-riot-vs-russia/>; Ekaterina Buchneva, *Index on Censorship, Russia: Blasphemy Law Has Aided the Growth of Religious Censorship*, INDEX (Nov. 13, 2015), <https://www.indexoncensorship.org/2015/11/blasphemy-law-has-resulted-in-growth-of-religious-censorship-in-russia>.

<sup>75</sup> *Pussy Riot v. Russia*, *supra* note 74.

<sup>76</sup> USCIRF 2017 BLASPHEMY LAWS SURVEY, *supra* note 6, at 84–85.

light, avoiding the depiction of non-Orthodox religious symbols, and avoiding the use of euphemisms that involve religious terms.<sup>77</sup> There have been numerous criminal cases under the law, with convictions resulting in fines and suspended sentences.<sup>78</sup>

The first criminal blasphemy case was against Viktor Krasnov in 2014 after he wrote on social media that “God doesn’t exist.”<sup>79</sup> Two men filed a complaint with the authorities, leading to a charge against Krasnov of “insulting religious [] feelings.”<sup>80</sup> Krasnov lost his business after authorities seized his work laptop and placed him in a mental institution after a judge determined that a sane person would not insult the Orthodox Church.<sup>81</sup> In February 2017, the charges were dropped after the statute of limitations ran out.<sup>82</sup> Krasnov’s lawyer believes that the two alleged victims, who apparently testified in court about their religiosity—after being forced to appear against their will—were part of a government plan to garner convictions under the new law.<sup>83</sup>

Russian NGO SOVA Center for Information and Analysis regularly reports on cases under Article 148(1),<sup>84</sup> including the case of anarchist Dmitry Litvin, who in September 2019 was found guilty by an Irkutsk magistrate court of “insulting the feelings of believers” for posting an “anti-Christian meme[] . . . – an image of an indecent gesture with a church on the background.”<sup>85</sup> The court sentenced him to 100 hours of community service, but due to the statute of limitations released him from his sentence.<sup>86</sup> In another case, in May 2017 a district court in Belgorod sentenced a twenty-two-year-old woman to a fine of 15,000 rubles for posting on social media various photographs, including some of her “lighting up a cigarette from a candle in an Orthodox church.”<sup>87</sup> Another

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<sup>77</sup> Buchneva, *supra* note 74.

<sup>78</sup> USCIRF 2020 ANNUAL REPORT, *supra* note 48, at 85.

<sup>79</sup> Daria Litvinova, *Like, Share, Convict: Russian Authorities Target Social Media Users*, MOSCOW TIMES (Mar. 10, 2016), <https://www.themoscowtimes.com/2016/03/10/like-share-convict-russian-authorities-target-social-media-users-a52114>.

<sup>80</sup> *Id.*

<sup>81</sup> *Id.*

<sup>82</sup> Carl Schreck, *Holy Slight: How Russia Prosecutes for ‘Insulting Religious Feelings’*, RADIO FREE EUR. RADIO LIBERTY (Aug. 15, 2017), <https://www.rferl.org/a/russia-prosecuting-insults-to-religious-feelings/28678284.html>.

<sup>83</sup> Litvinova, *supra* note 79.

<sup>84</sup> For several posts mentioning Article 148, see SOVA CTR. FOR INFO. & ANALYSIS, <https://www.sova-center.ru/en/> (search entire site field for “article 148”).

<sup>85</sup> *Misuse of Anti-Extremism in September 2019*, SOVA CTR. FOR INFO. & ANALYSIS (Oct. 10, 2019), <https://www.sova-center.ru/en/misuse/news-releases/2019/10/d41559>.

<sup>86</sup> *Id.*

<sup>87</sup> Maria Kravchenko, *Inappropriate Enforcement of Anti-Extremist Legislation in Russia in 2017*, SOVA CTR. FOR INFO. & ANALYSIS (Apr. 24, 2018), <https://www.sova-center.ru/en/misuse/reports-analyses/2018/04/>

guilty verdict involved twenty-year-old Anton Ushachev, who wrote “insulting graffiti” on a church fence.<sup>88</sup> Even though the church said it was “just nastiness,” rather than a serious crime, a city court in Tatarstan sentenced him to 320 hours of community service because he acted “with the purpose of insulting the religious feelings of believers,” as well as for vandalism under Article 214(1) of the Criminal Code.<sup>89</sup> As he had spent more than six months in custody, he did not have to serve the sentence.<sup>90</sup>

These blasphemy prosecutions reveal the Russian government’s attempts, at various levels, to protect the Russian Orthodox Church, the de facto state church, from any criticism and to suppress any secularist protests.

### *B. United Nations Condemnation of Blasphemy Laws*

Blasphemy laws unambiguously violate Article 18 on freedom of religion and Article 19 on freedom of expression of the International Covenant on Civil and Political Rights (ICCPR), which U.N. human rights officials and entities have emphasized in strong terms. The right to freedom of religion necessitates freedom of expression,<sup>91</sup> given that a fundamental component of the freedom of religion is the “freedom, either individually or in community with others and in public or private, to manifest [one’s] religion or belief in worship, observance, practice and teaching.”<sup>92</sup> This includes being able, both privately and publicly, to evaluate, question, and criticize other faiths’ truth claims and teachings, as well as their leaders, deities, and prophets.

Blasphemy laws inherently restrict this fundamental freedom. The USCIRF project canvassed blasphemy laws from seventy-one countries and found that all deviate from international law on freedom of expression.<sup>93</sup> Ninety-four percent of these States “criminaliz[e] the expression of opinions that may be counter to

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<sup>88</sup> Maria Kravchenko, *Inappropriate Enforcement of Anti-Extremist Legislation in Russia in 2018*, SOVA CTR. FOR INFO. & ANALYSIS (Apr. 24, 2019), <https://www.sova-center.ru/en/misuse/reports-analyses/2019/04/d40937>.

<sup>89</sup> *Id.*

<sup>90</sup> *Id.*

<sup>91</sup> See Ahmed Shaheed (Special Rapporteur on Freedom of Religion or Belief), *Rep. of the Special Rapporteur on Freedom of Religion or Belief*, U.N. Doc. A/HRC/40/58 (Mar. 5, 2019) [hereinafter Shaheed, 2019 Report]; Heiner Bielefeldt (Special Rapporteur on Freedom of Religion or Belief), *Report of the Special Rapporteur on Freedom of Religion or Belief*, U.N. Doc. A/HRC/31/18 (Dec. 23, 2015) [hereinafter Bielefeldt, 2015 Report].

<sup>92</sup> International Covenant on Civil and Political Rights (ICCPR) Art. 18(1), *opened for signature* Dec. 19, 1966, 999 U.N.T.S. 171.

<sup>93</sup> USCIRF 2017 BLASPHEMY LAWS SURVEY, *supra* note 6, at 17.

a religion or belief” and the laws in ninety-two percent of these States could “impede on religious discourse.”<sup>94</sup> In criticizing blasphemy laws, Frank La Rue, former U.N. Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression, emphasized that the right to freedom of religion does “not include the right to have a religion or belief that is free from criticism or ridicule.”<sup>95</sup> Rather, “the right to freedom of expression includes the right to scrutinize, debate openly, make statements that offend, shock and disturb, and criticize belief systems, opinions and institutions, including religious ones[.]”<sup>96</sup>

Blasphemy laws impermissibly restrict the subject matter of speech. Special Rapporteur on Freedom of Religion or Belief Ahmed Shaheed has framed blasphemy laws as “giv[ing] States licence to determine which conversations on religion are admissible and which ones are too controversial to be voiced.”<sup>97</sup> The Human Rights Committee, the body charged with monitoring States’ implementation of ICCPR, emphasized in General Comment No. 34 on the interpretation of Article 19 that “blasphemy laws[] are incompatible with the Covenant” when they are “used to prevent or punish criticism of religious leaders or commentary on religious doctrine and tenets of faith.”<sup>98</sup> The Committee has told individual States, both Western and non-Western, in their concluding observations to repeal blasphemy laws, such as with Ireland in

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<sup>94</sup> *Id.* at 23. The coders determined that only two States’ laws, Germany and Israel, permissibly limited expression under international law standards. *Id.* This is presumably because they limit certain expression related to the Holocaust.

<sup>95</sup> Frank La Rue (Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression), *Rep. of the Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression*, ¶ 53, U.N. Doc. A/67/357 (Sept. 7, 2012) [hereinafter La Rue, 2012 Report].

<sup>96</sup> *Id.*

<sup>97</sup> Ahmed Shaheed (Special Rapporteur on Freedom of Religion or Belief), *Interim Report of the Special Rapporteur on Freedom of Religion or Belief*, ¶ 28, U.N. Doc. A/72/365 (Aug. 28, 2017).

<sup>98</sup> U.N. Hum. Rts. Comm., *General Comment No. 34: Article 19: Freedoms of Opinion and Expression*, ¶ 48, U.N. Doc. CCPR/C/GC/34 (Sept. 12, 2011).

2014,<sup>99</sup> Kuwait in 2016,<sup>100</sup> Italy in 2017,<sup>101</sup> Pakistan in 2017,<sup>102</sup> Bahrain in 2018,<sup>103</sup> Lebanon in 2018,<sup>104</sup> and Mauritania in 2019.<sup>105</sup>

Another trend the USCIRF survey identified is that blasphemy laws “contain ambiguous or indefinite language and often fail[] to specify intent, enumerate the acts prohibited, or place limits on the forum for prohibited acts.”<sup>106</sup> La Rue called them “inherently vague” and “open to abuse.”<sup>107</sup> This ambiguity allows for subjective interpretation, dependent on personal beliefs, religious views, and cultural norms, of what constitutes blasphemy. Former Special Rapporteur on Freedom of Religion or Belief Heiner Bielefeldt, in calling for the repeal of blasphemy laws,<sup>108</sup> recognized this concern: “[s]ubjective feelings of offensiveness [] should never guide legislative action, court decisions or other State activities.”<sup>109</sup>

This ambiguity also opens the door to abuse because authorities can impose any interpretation of what constitutes blasphemy on the accused. No country except for Canada, which has since repealed its blasphemy law, met USCIRF’s requirements for adequate “statutory language limiting the governmental authority’s ability to interpret the meaning of the word ‘blasphemy.’”<sup>110</sup> In other words, every country that currently has a blasphemy law gives leeway to the authorities to determine what constitutes blasphemy. This is inherently arbitrary and leads to abuse in many ways. Authorities can choose to favor a particular belief system, to appease potential voters, or to attack political opponents.

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<sup>99</sup> U.N. Hum. Rts. Comm., *Concluding Observations on the Fourth Periodic Report of Ireland*, ¶ 22, U.N. Doc. CCPR/C/IRL/CO/4 (Aug. 19, 2014).

<sup>100</sup> U.N. Hum. Rts. Comm., *Concluding Observations on the Third Periodic Report of Kuwait*, ¶¶ 38–41, U.N. Doc. CCPR/C/KWT/CO/3 (Aug. 11, 2016).

<sup>101</sup> U.N. Hum. Rts. Comm., *Concluding Observations on the Sixth Periodic Report of Italy*, ¶¶ 38–39 U.N. Doc. CCPR/C/ITA/CO/6 (May 1, 2017).

<sup>102</sup> U.N. Hum. Rts. Comm., *Concluding Observations on the Initial Report of Pakistan*, ¶¶ 33–34, U.N. Doc. CCPR/C/PAK/CO/1 (Aug. 23, 2017) [hereinafter *Concluding Observations on the Initial Report of Pakistan*].

<sup>103</sup> U.N. Hum. Rts. Comm., *Concluding Observations on the Initial Report of Bahrain*, ¶¶ 51–54, U.N. Doc. CCPR/C/BHR/CO/1 (Nov. 15, 2018).

<sup>104</sup> U.N. Hum. Rts. Comm., *Concluding Observations on the Third Periodic Report of Lebanon*, ¶¶ 45–46, U.N. Doc. CCPR/C/LBN/CO/3 (May 9, 2018).

<sup>105</sup> U.N. Hum. Rts. Comm., *Concluding Observations on the Second Periodic Report of Mauritania*, ¶¶ 42–43, U.N. Doc. CCPR/C/MRT/CO/2 (Aug. 23, 2019).

<sup>106</sup> USCIRF 2017 BLASPHEMY LAWS SURVEY, *supra* note 6, at 24.

<sup>107</sup> La Rue, *2012 Report*, *supra* note 95, ¶ 53.

<sup>108</sup> Bielefeldt, *2015 Report*, *supra* note 91, ¶ 84.

<sup>109</sup> *Id.* ¶ 61.

<sup>110</sup> USCIRF 2017 BLASPHEMY LAWS SURVEY, *supra* note 6, at 24.

Blasphemy laws do not have a requirement of tangible harm that would provide even a limited check on malicious, arbitrary, or even fabricated prosecutions, like that of Asia Bibi of Pakistan or of Ahok of Jakarta. Because there is no need for evidence of tangible harm, people often allege blasphemy to settle scores with neighbors over property disputes or to avenge their families, a common problem that the Supreme Court of Pakistan acknowledged in October 2015 and Amnesty International detailed in a 2016 report on blasphemy cases in Pakistan.<sup>111</sup> Moreover, blasphemy laws provide cover to religious extremists who wish to attack anyone who does not follow the majority religion. This ultimately weakens any religious harmony supporters of blasphemy laws argue the laws promote.

In banning the criticism of religions, religious leaders, and religious doctrines, blasphemy laws represent an attempt to give rights to religions and ideas, but the premise of the human rights project is that it is humans who have rights. The Universal Declaration of Human Rights, the first universal articulation of human rights after the formation of the United Nations, recognizes that “the foundation of freedom, justice and peace in the world” is the “recognition of the inherent dignity and of the equal and inalienable rights of *all members of the human family*.”<sup>112</sup> Ahmed Shaheed, Special Rapporteur on Freedom of Religion or Belief, stated that blasphemy laws are used “to uphold State-sponsored religion or truth claims (existing even in States that do not formally identify with one religion).”<sup>113</sup> Instead of protecting individuals, they “target political dissidents, humanists, non-believers or any religious thinker who expresses different theological views than the State-sponsored religion.”<sup>114</sup> Shaheed unequivocally called for their repeal “as a matter of priority.”<sup>115</sup>

Finally, many blasphemy laws lack a requirement of *mens rea*, or intent, on the part of the wrongdoer to commit the supposed wrong.<sup>116</sup> In 2017, USCIRF found that only thirty-four percent of countries with criminal blasphemy laws require this element.<sup>117</sup> Shaheed pointed out that blasphemy is usually a “strict

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<sup>111</sup> AMNESTY INT’L, “AS GOOD AS DEAD”: THE IMPACT OF BLASPHEMY LAWS IN PAKISTAN 9 (2016).

<sup>112</sup> G.A. Res. 217 (III) A, preamble, Universal Declaration of Human Rights (Dec. 10, 1948) (emphasis added).

<sup>113</sup> Ahmed Shaheed (Special Rapporteur on Freedom of Religion or Belief), *Report of the Special Rapporteur on Freedom of Religion or Belief*, ¶ 83, U.N. Doc. A/HRC/37/49 (Feb. 28, 2018).

<sup>114</sup> *Id.*

<sup>115</sup> *Id.*

<sup>116</sup> See generally USCIRF 2017 BLASPHEMY LAWS SURVEY, *supra* note 6, at 24; Ahmed Shaheed (Special Rapporteur on Freedom of Religion or Belief), *Report of the Special Rapporteur on Freedom of Religion or Belief*, ¶ 40, U.N. Doc. A/HRC/34/50 (Jan. 17, 2017) [hereinafter Shaheed, 2017 Report].

<sup>117</sup> USCIRF 2017 BLASPHEMY LAWS SURVEY, *supra* note 6, at 24.

liability offence[,]” meaning there is no requirement of intent.<sup>118</sup> Laws without a *mens rea* requirement can be arbitrarily applied, including punishment of expression that is merely perceived, rather than intended, as blasphemy, making baseless and malicious prosecution easier. However, the inclusion of intent in blasphemy laws does not negate the fact that they impermissibly restrict freedom of expression and freedom of religion for the other reasons outlined above. Regardless of whether they require intent, blasphemy laws violate human rights.

In summary, USCIRF and U.N. human rights entities have recognized that blasphemy laws’ restrictions on the rights to freedom of expression and freedom of religion are impermissible for several reasons as they:

- restrict the subject matter of speech, including criticism of religions;
- are ambiguous and therefore give authorities the power to determine which expressions are blasphemous, which allows them to target religious minorities, political opponents, and those with minority viewpoints;
- require no tangible harm, thereby enabling false accusations that cannot be disproven;
- protect religions and beliefs rather than individuals; and
- punish expression no matter the intent of the speaker.

### C. *Advocacy at the United Nations for Support of Blasphemy Laws*

While the U.N.’s Special Rapporteurs and Human Rights Committee, all of whom are put forth by the United Nations as independent human rights experts who represent the voice of the U.N. on specific topics,<sup>119</sup> have opposed blasphemy laws, other parts of the United Nations are Member State-driven,

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<sup>118</sup> Shaheed, *2017 Report*, *supra* note 116, ¶ 40.

<sup>119</sup> Special Rapporteurs are appointed by the Human Rights Council and members of human rights treaty bodies are appointed by States parties to the treaties. Their roles include reviewing and commenting on Member States’ human rights obligations, laws, and policies. *See, e.g., Special Procedures of the Human Rights Council*, OHCHR, <https://www.ohchr.org/EN/HRBodies/SP/Pages/Introduction.aspx>; *Human Rights Treaty Bodies*, OHCHR, <https://www.ohchr.org/EN/HRBodies/Pages/TreatyBodies.aspx>. However, they are considered independent and are not held accountable, which means they often make pronouncements that are not agreed to by a large number of Member States, particularly on social issues. *See, e.g.,* Meghan Grizzle Fischer, *The Rise of Faux Rights: How the UN Went From Recognizing Inherent Freedoms to Creating Its Own Rights*, ADF INT’L (2017), <https://adfinternational.org/resource/the-rise-of-faux-rights>. Their reports, concluding observations, and recommendations are often presented as official positions of the United Nations, however unrepresentative they are of the Member States’ positions.

such as the General Assembly and its subsidiary Human Rights Council.<sup>120</sup> Every year the Council is filled with countries that enforce blasphemy laws.<sup>121</sup> Not only do Member States such as Indonesia, Pakistan, and Russia have and enforce domestic blasphemy laws, they have advocated for support for these laws at the international level through their membership in the Council.<sup>122</sup>

From 1999 to 2010, the Council's failed predecessor<sup>123</sup> and the Council passed an annual non-binding resolution on the defamation of religions, originally introduced by Pakistan on behalf of the Organisation of Islamic Cooperation (OIC), with the goal of protecting Islam from criticism.<sup>124</sup> The first resolution expressed "deep concern at negative stereotyping of religions[]" and "concern at any role [of the media in inciting] acts of violence, xenophobia or related intolerance and discrimination towards Islam and any other religion[.]"<sup>125</sup> The resolution then called on States to legislate against "hatred, discrimination, intolerance and acts of violence, intimidation and coercion motivated by religious intolerance[.]"<sup>126</sup> Given the context, this can be understood as any such acts against religions and not just persons. The repeated passage of the resolution for over a decade effectively signaled an endorsement of individual Member States' efforts to punish and ban blasphemy.

Yet Western Member States increasingly opposed the resolution.<sup>127</sup> In 2010, the resolution passed with only twenty votes in favor—including Indonesia, Pakistan, and Russia—and seventeen against, with eight abstentions.<sup>128</sup> As a compromise between the OIC and Western Member States, the resolution was

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<sup>120</sup> The Human Rights Council comprises forty-seven U.N. Member States who serve staggered three-year terms. *Welcome to the Human Rights Council*, OHCHR, <https://www.ohchr.org/EN/HRBodies/HRC/Pages/AboutCouncil.aspx>.

<sup>121</sup> For example, 2020 members include Italy, Pakistan, Qatar, and Somalia, which are on USCIRF's 2017 list of the top ten countries with the worst blasphemy laws, as well as Afghanistan, Austria, Bahrain, Bangladesh, Eritrea, Germany, Indonesia, Libya, Mauritania, Nigeria, the Philippines, Poland, Spain, and Sudan, which have blasphemy laws enforced to varying degrees. *Current Membership of the Human Rights Council for the 14th Cycle, 1 January–31 December 2020*, OHCHR, <https://www.ohchr.org/EN/HRBodies/HRC/Pages/CurrentMembers.aspx>.

<sup>122</sup> See *supra* Part I.A.1–3.

<sup>123</sup> The Human Rights Council replaced the failed Commission on Human Rights in 2006. See *Welcome to the Human Rights Council*, *supra* note 120.

<sup>124</sup> While the subject was defamation of religions, the initial draft resolution title was "Defamation of Islam." U.N. ESCOR, Comm'n on Hum. Rts., 55th Sess., U.N. Doc. E/CN.4/1999/L.40 (Apr. 20, 1999) (draft resolution). Further, the only named religion in the first resolution was Islam. Comm'n on Hum. Rts. Res. 1999/82, U.N. Doc. E/CN.4/RES/1999/82 (Apr. 30, 1999).

<sup>125</sup> U.N. Off. of the High Comm'r for Hum. Rts., Defamation of Religions, ¶¶ 1,3, U.N. Doc. E/CN.4/RES/1999/82 (Apr. 28, 1999).

<sup>126</sup> *Id.* ¶ 4.

<sup>127</sup> See Human Rights Council Res. 13/16, U.N. Doc. A/HRC/RES/13/16, ¶ 21 (Apr. 15, 2010).

<sup>128</sup> *Id.*

replaced in 2011 with Resolution 16/18 on Combating Intolerance, Negative Stereotyping and Stigmatization of, and Discrimination, Incitement to Violence and Violence Against, Persons Based on Religion or Belief.<sup>129</sup> Resolution 16/18 denounces harm caused not to religions but instead to individual persons by acts named in the title of the resolution.<sup>130</sup> It continues to pass every year at the United Nations under different resolution numbers and with slightly varying language.<sup>131</sup>

Despite the stated shift in focus from protecting religions to protecting persons, Resolution 16/18 and subsequent resolutions have continued the emphasis on limiting freedom of expression, even if couched in language of tolerance. The very title of the resolution names the vague, undefined acts that the resolution suggests Member States should restrict, including negative stereotyping, stigmatization, and discrimination, and the resolution emphasizes as positive the OIC Secretary General's call for States to "[s]peak[ ] out against intolerance, including advocacy of religious hatred that constitutes incitement to discrimination, hostility or violence."<sup>132</sup> Given these vague terms, each Member State essentially interprets the resolution however it wants. For example, at a Council session, the United States lauded that the new resolution brought international consensus that intolerance is best tackled not by restricting speech but by allowing more of it.<sup>133</sup> Meanwhile, Pakistan said at the same session that the resolution speaks to the issue of the exploitation of freedom of expression "to incite hatred against any religion and violence against its followers."<sup>134</sup> That is, in Pakistan's view, the resolution condemns defamation of and blasphemy against a religion, just like the previous defamation of religions resolution.

Resolution 16/18 led to the creation of the Istanbul Process, through which the OIC, the European Union, the United States, and individual governments—many of them supporters of blasphemy laws, such as Pakistan<sup>135</sup>—gather to

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<sup>129</sup> Human Rights Council Res. 16/18, U.N. Doc. A/HRC/RES/16/18 (Apr. 12, 2011).

<sup>130</sup> *Id.*

<sup>131</sup> Human Rights Council Res. 43/34, U.N. Doc. A/HRC/RES/43/34 (June 22, 2020).

<sup>132</sup> Human Rights Council Res. 16/18, U.N. Doc. A/HRC/RES/16/18, ¶ 5(e) (Apr. 12, 2011).

<sup>133</sup> Jacob Mchangama, *A Questionable Victory for Free Speech*, NAT'L REV. (Mar. 4, 2013), <https://www.nationalreview.com/2013/03/questionable-victory-free-speech-jacob-mchangama>; Statement by Pakistan on behalf of the OIC at the High Level Panel on the VDPA (Feb. 25, 2013), [http://humanrightsvoces.org/assets/attachments/documents/11232\\_oic\\_march2013\\_Pakistan.pdf](http://humanrightsvoces.org/assets/attachments/documents/11232_oic_march2013_Pakistan.pdf) [hereinafter Statement by Pakistan].

<sup>134</sup> Statement by Pakistan, *supra* note 133.

<sup>135</sup> Pakistan was set to host the meeting in 2020, but it did not take place, likely due to restrictions surrounding the coronavirus pandemic. Naveed Siddiqui, *Pakistan to Host Istanbul Process Meeting on Countering Religious Tolerance Next Year*, DAWN (Nov. 18, 2019), <https://www.dawn.com/news/1517453/pakistan-to-host-istanbul-process-meeting-on-countering-religious-intolerance-next-year>.

discuss how to implement the resolution's murky terms.<sup>136</sup> Given the participating States, it is difficult to imagine that proposed solutions in this relatively closed-door process embrace freedom of expression.

The rejection of the defamation of religions resolution and the subsequent embrace of Resolution 16/18, which still urges Member States to restrict expression, reflect the unpopularity in the West of prohibiting blasphemy but at the same time the desire of many countries to prohibit speech that they do consider problematic. Yet it is not just the Member State-driven Human Rights Council that has emphasized the supposed need to tackle "hate speech." Leading the charge is the head of the United Nations, who has started a hate speech campaign<sup>137</sup> that inevitably will bolster the countries that seek to effectively continue their blasphemy laws.

## II. THE UNITED NATIONS' PROBLEMATIC CAMPAIGN AGAINST "HATE SPEECH"

While it strongly rejects blasphemy laws for violating freedom of expression and freedom of religion, the United Nations, across multiple bodies, agencies, and special rapporteurs, has embraced limiting these freedoms through other means: preventing, countering, and even prohibiting what it calls hate speech.<sup>138</sup> Contending that these means will help minorities, the United Nations has overlooked the stark reality that efforts to restrict hate speech in fact have put these minorities in grave danger.

The United Nations and its various entities have passed resolutions and issued documents on hate speech, although there has not been a unified approach to hate speech. In July 2019, the General Assembly passed its first-ever Resolution on Promoting Interreligious and Intercultural Dialogue and Tolerance in Countering Hate Speech.<sup>139</sup> Adama Dieng, the Secretary-General's Special Advisor on the Prevention of Genocide, is devoted to spreading the idea that hate speech leads to genocide. He shared, "We have to bear in mind that words kill. Words kill as bullets."<sup>140</sup> Special Rapporteurs have lamented the rise

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<sup>136</sup> *What is the Istanbul Process?*, ARTICLE 19 (Sept. 12, 2016), <https://www.article19.org/resources/un-hrc-6th-session-of-istanbul-process-focuses-on-practical-measures-to-implement-un-hrc-resolution-16-18/#:~:text=The%20Istanbul%20Process%20is%20a,violence%20against%2C%20persons%20based%20on>.

<sup>137</sup> *Hate Speech 'On Notice' as UN Chief Launches New Plan to 'Identify, Prevent and Confront' Growing Scourge*, UN NEWS (June 18, 2019), <https://news.un.org/en/story/2019/06/1040731>.

<sup>138</sup> See, e.g., *United Nations Strategy and Plan of Action on Hate Speech*, *supra* note 1.

<sup>139</sup> G.A. Res. 73/28, U.N. Doc. A/RES/73/328 (July 31, 2019).

<sup>140</sup> United Nations, *Words Kill as Bullets.*, FACEBOOK (July 1, 2019), <https://www.facebook.com/unitednations/videos/2069836236456392>.

of hate speech,<sup>141</sup> and the Special Rapporteur on the Freedom of Expression released a report in October 2019 calling for countries and companies to better regulate online hate speech.<sup>142</sup> The Human Rights Committee has rebuked States that it alleges have not combatted hate speech sufficiently, such as Norway,<sup>143</sup> Lithuania,<sup>144</sup> the Czech Republic,<sup>145</sup> and Portugal,<sup>146</sup> and has called for the introduction of hate speech laws.<sup>147</sup>

#### A. *The Problematic U.N. Strategy and Plan of Action on Hate Speech*

Most prominent—and most damaging—among U.N. hate speech initiatives is the U.N. Strategy and Plan of Action on Hate Speech, launched by U.N. Secretary-General António Guterres in May 2019 without any consultation with Member States.<sup>148</sup> The Strategy and Plan of Action proffered the first-ever international definition of hate speech—one that puts minorities at substantial risk as it blesses, in the name of the United Nations, a model of hate speech laws that are applied in the same ways as blasphemy laws.

As a document that bears the stamp of approval of the Secretary-General, the Strategy and Plan of Action on Hate Speech will likely provide guidance, however misguided, to States that look to the United Nations for policy recommendations. Desperately needed funding is often attached to the adoption of U.N.-recommended policies and U.N.-sponsored programs, prompting countries to do what U.N. entities tell them to do.<sup>149</sup> Indeed, the document

<sup>141</sup> *Joint Open Letter on the Concerns About the Global Increase in Hate Speech*, OHCHR, <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=25036&LangID=E>.

<sup>142</sup> David Kaye (Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression), *Report of the Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression*, U.N. Doc. A/74/486 (Oct. 9, 2019) [hereinafter Kaye, 2019 Report].

<sup>143</sup> U.N. Hum. Rts. Comm., *Concluding Observations on the Seventh Periodic Rep. of Nor.*, ¶¶ 16–17, U.N. Doc. CCPR/C/NOR/CO/7 (Apr. 25, 2018).

<sup>144</sup> U.N. Hum. Rts. Comm., *Concluding Observations on the Fourth Periodic Rep. of Lith.*, ¶¶ 11–12, U.N. Doc. CCPR/C/LTU/CO/4 (Aug. 29, 2018).

<sup>145</sup> U.N. Hum. Rts. Comm., *Concluding Observations on the Fourth Periodic Rep. of Czechia*, ¶¶ 16–17, U.N. Doc. CCPR/C/CZE/CO/4 (Dec. 6, 2019).

<sup>146</sup> U.N. Hum. Rts. Comm., *Concluding Observations on the Fifth Periodic Rep. of Port.*, ¶¶ 14–15, U.N. Doc. CCPR/C/PRT/CO/5 (Apr. 28, 2020).

<sup>147</sup> See U.N. Hum. Rts. Comm., *Concluding Observations on the Seventh Periodic Rep. of Nor.*, ¶ 2, U.N. Doc. CCPR/C/NOR/CO/7 (Apr. 25, 2018); U.N. Hum. Rts. Comm., *Concluding Observations on the Fourth Periodic Rep. of Lith.*, ¶ 2, U.N. Doc. CCPR/C/LTU/CO/4 (Aug. 29, 2018); U.N. Hum. Rts. Comm., *Concluding Observations on the Fourth Periodic Rep. of Czechia*, ¶ 2, U.N. Doc. CCPR/C/CZE/CO/4 (Dec. 6, 2019); U.N. Hum. Rts. Comm., *Concluding Observations on the Fifth Periodic Rep. of Port.*, ¶ 2, U.N. Doc. CCPR/C/PRT/CO/5 (Apr. 28, 2020).

<sup>148</sup> *United Nations Strategy and Plan of Action on Hate Speech*, *supra* note 1.

<sup>149</sup> See, e.g., ELYSSA KOREN, THE UNITED NATIONS AND THE ILLICIT PROMOTION OF ABORTION 28–32 (2019), <https://adfinternational.org/resource/the-united-nations-population-fund-and-the-illicit-promotion-of>

identifies the United Nations' key commitments on combatting hate speech, one of which is aiding Member States in policy development.<sup>150</sup> Presumably, policy development will be based on the definition of hate speech outlined in the Strategy and Plan of Action, so evaluating the definition is critical.

Under the Strategy and Plan of Action,

the term hate speech is understood as any kind of communication in speech, writing or behaviour, that attacks or uses pejorative or discriminatory language with reference to a person or a group on the basis of who they are, in other words, based on their religion, ethnicity, nationality, race, colour, descent, gender or other identity factor.<sup>151</sup>

This definition has strong and troubling parallels to the elements common to blasphemy laws. Like blasphemy laws, it covers a wide array of expression: “any kind of communication in speech, writing or behaviour”<sup>152</sup> could encompass nearly everything every person says, does, or writes, no matter the venue or whether public or private. Spoken or written speech can include anything from a private conversation in a home, to private religious instruction at a church, to a social media post, to even a piece of legislation.

Despite the common recognition that the ambiguous language in blasphemy laws opens the door to abuse,<sup>153</sup> this U.N. campaign appears to have little regard for this problem. For example, there is no clear standard by which to measure which speech is “pejorative” and “discriminatory,” allowing a person with minority political opinions to be arrested and prosecuted for a “discriminatory” statement about a political figure, simply because it is politically expedient for the authorities to do so.<sup>154</sup> Likewise, the terms pejorative and discriminatory require subjective interpretation by alleged victims, observers, members of the community, or authorities. The sharing of a sincerely-held religious viewpoint that questions or criticizes another religious tenet could be considered hate speech because it is understood as a pejorative opinion about the holder of those religious views, just as the speech might be prosecuted as blasphemous.

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abortion (discussing the practice whereby UNFPA, a UN agency, manipulates Member States to change their policies and positions to receive funding).

<sup>150</sup> *Id.* at 5.

<sup>151</sup> *United Nations Strategy and Plan of Action on Hate Speech*, *supra* note 1, at 2.

<sup>152</sup> *Id.*

<sup>153</sup> *What's Wrong with Blasphemy Laws?*, END BLASPHEMY LAWS, <https://end-blasphemy-laws.org/whats-wrong-with-blasphemy-laws/>.

<sup>154</sup> “Pejorative” and “discriminatory,” for example, are two words used in the United Nations Strategy and Plan of Action on Hate Speech, *supra* note 1, at 2 that are not clearly or adequately defined.

While the U.N. definition is so vague that it is impossible to ascertain exactly what is classified as hate speech, its provision of a list of several characteristics—“religion, ethnicity, nationality, race, colour, descent, gender or other identity factor”—essentially serves as a list of topics not to be referenced in a pejorative or discriminatory manner, with the inclusion of religion the most concerning for religious minorities.<sup>155</sup> Blasphemy laws similarly regulate the topics that may be discussed. The inclusion of “other identity factor[s]” as possible discrimination grounds includes every conceivable characteristic and every way a person identifies him- or herself, making any expression perceived as critical or uncharitable subject to being classified as hate speech. Additionally, while in theory this list is presented as a list of limitations on what can be classified as hate speech, classifying speech as hate speech necessarily requires subjective interpretation and therefore can include anything deemed pejorative or discriminatory.

Like blasphemy laws, the U.N. definition of hate speech has no requirement of tangible harm; it requires only subjective interpretation of its terms. Without the need for tangible harm, it is easy to make false accusations and to prosecute or convict someone for malicious reasons. The United Nations’ idea of hate speech could be used as a weapon against religious minorities, political opponents, and those with minority viewpoints in the same way as blasphemy laws. This is demonstrated by the evidence outlined in Part II from countries that employ hate speech laws.

There is also no requirement of intent in the definition. Unintentional actions or statements that are misperceived or misinterpreted by an alleged victim or even by a third party are included. The lack of a requirement of intent in blasphemy laws makes them prone to arbitrary enforcement, and the same is true of this hate speech definition. Under the Strategy and Plan of Action, what matters is solely the perspective of an alleged victim, third party, police officer, prosecutor, or judge. This is not easily remedied, as an intent element would be difficult to define given the subjective nature of the concept of hate speech.

Finally, the definition lacks a requirement of incitement that is found in ICCPR Article 20(2),<sup>156</sup> although as with the inclusion of intent, the inclusion of

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<sup>155</sup> *See id.*

<sup>156</sup> *See* ICCPR, *supra* note 92, art. 20(2). This also highlights the fact that UN human rights entities and Member States use many different terms that do not entail the same kinds of speech or thresholds for regulation, but that are often used interchangeably, or are understood differently by different entities and States, muddling any understanding of what is being discussed, such as “hate speech”—which often entails a very low threshold for restricting speech—incitement to hatred, and advocacy of hatred. *Id.*

ICCPR's incitement element would not render it acceptable.<sup>157</sup> Article 20(2) states, "Any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law."<sup>158</sup> Article 20(2) is often cited as the basis for hate speech legislation. It is one of the most debated provisions in international human rights law,<sup>159</sup> especially given its unclear terms, its drafting history,<sup>160</sup> and its inconsistency with the strong presumption in the ICCPR in favor of freedom of expression.

Article 19(2) guarantees a broad right to freedom of expression: "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."<sup>161</sup> Restrictions on this right must be limited, according to Article 19(3), to those that "are provided by law and are necessary: (a) For respect of the rights or reputations of others; (b) For the protection of

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<sup>157</sup> The blasphemy law analysis above does not discuss incitement because incitement is more commonly associated with hate speech laws, but blasphemy law supporters often argue that blasphemy laws are needed to combat incitement to discrimination, hostility, or violence under ICCPR Article 20(2). USCIRF 2017 BLASPHEMY LAWS SURVEY, *supra* note 6, at 6.

<sup>158</sup> ICCPR, *supra* note 92, art. 20(2).

<sup>159</sup> For example, the United States objected to the language of Article 20 and only agreed to prohibit incitement to imminent violence. Its reservation states "[t]hat article 20 does not authorize or require legislation or other action by the United States that would restrict the right of free speech and association protected by the Constitution and laws of the United States." United States Reservations, Chapter 4 ICCPR (June 8, 1992), [https://treaties.un.org/Pages/ViewDetails.aspx?chapter=4&clang=\\_en&mtmsg\\_no=IV-4&src=IND#EndDec](https://treaties.un.org/Pages/ViewDetails.aspx?chapter=4&clang=_en&mtmsg_no=IV-4&src=IND#EndDec). Other governments, such as Australia, Belgium, Luxembourg, and Malta, noted that their readings of Article 20 take into account the right to freedom of expression under Article 19. See Chapter 4 ICCPR [https://treaties.un.org/Pages/ViewDetails.aspx?chapter=4&clang=\\_en&mtmsg\\_no=IV-4&src=IND#EndDec](https://treaties.un.org/Pages/ViewDetails.aspx?chapter=4&clang=_en&mtmsg_no=IV-4&src=IND#EndDec) and scroll to the individual countries to see Australia Reservations, Belgium Declarations, Luxembourg, Malta Reservations.

<sup>160</sup> According to Jacob Mchangama,

When the current wording of Article 20 was put to a vote in the Third Committee of the General Assembly, it was adopted with 52 votes in favor, nineteen against, and twelve abstentions. Those in favor were primarily the communist states of Eastern Europe, as well as non-Western countries with very questionable human rights records[.] The nineteen countries that voted against included almost all Western liberal democracies—such as the United States, United Kingdom, Canada, Australia, New Zealand—the five Nordic countries, the Netherlands, and Ecuador, Uruguay, Japan, Malaysia, and Turkey. Eighteen countries (including the U.S.) entered reservations to Article 20 upon ratification. The voting record reveals the startling fact that the internationalization of hate-speech prohibitions in human rights law owes its existence to a number of states where both criticisms of the prevalent totalitarian ideology as well as advocacy for democracy were strictly prohibited. Moreover, the grandiose arguments these states advanced in favor of Article 20 seem—at best—highly disingenuous considering the systematic official propaganda of the communist states.

Jacob Mchangama, *The Sordid Origin of Hate Speech Laws*, HOOVER INST. (Dec. 1, 2011), <https://www.hoover.org/research/sordid-origin-hate-speech-laws>.

<sup>161</sup> ICCPR, *supra* note 92, art. 20(2).

national security or of public order (*ordre public*), or of public health or morals.”<sup>162</sup> The Human Rights Committee explained that Article 20(2), as a restriction on the freedom of expression guaranteed in Article 19(2), “must conform to the strict tests of necessity and proportionality[,]”<sup>163</sup> meaning that it must be narrowly interpreted.<sup>164</sup> The definition of hate speech in the Strategy and Plan of Action clearly is not narrow and clearly does not conform to strict tests of necessity and proportionality. Yet adding a requirement of “incitement to discrimination, hostility or violence” would not solve this problem. Although in theory it would create a higher threshold for hate speech than what is laid out in the Strategy and Plan of Action, the vague terms of discrimination and hostility, which are low thresholds for regulation of speech,<sup>165</sup> still would remain, and still would allow for arbitrary enforcement by biased authorities.<sup>166</sup> A broad reading of Article 20(2), one that gives authorities leeway to discriminate against minority viewpoints, is not compatible with the ICCPR.

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<sup>162</sup> ICCPR, *supra* note 92, art. 19(3).

<sup>163</sup> U.N. Hum. Rts. Comm., *Gen. Comment No. 34: Art. 19: Freedoms of Opinion & Expression*, *supra* note 98, ¶¶ 22, 50.

<sup>164</sup> According to the Rabat Plan of Action, which was developed by Special Rapporteurs,

Article 20 of the Covenant requires a high threshold because, as a matter of fundamental principle, limitation of speech must remain an exception. Such threshold must take into account the provisions of article 19 of the Covenant. Indeed the three-part test (legality, proportionality and necessity) for restrictions also applies to cases involving incitement to hatred, in that such restrictions must be provided by law, be narrowly defined to serve a legitimate interest, and be necessary in a democratic society to protect that interest. This implies, among other things, that restrictions are clearly and narrowly defined and respond to a pressing social need; are the least intrusive measure available; are not overly broad, so that they do not restrict speech in a wide or untargeted way; and are proportionate so that the benefit to the protected interest outweighs the harm to freedom of expression, including with respect to the sanctions they authorize.

U.N. Hum. Rts. Comm., *Ann. Rep. of the U.N. High Commissioner for Hum. Rts., Add.: Rep. of the U.N. High Commissioner for Hum. Rts. on the Expert Workshops on the Prohibition of Incitement to Nat'l, Racial or Religious Hatred*, ¶ 18, U.N. Doc. A/HRC/22/17/Add.4 (Jan. 11, 2013) [hereinafter Rabat Plan of Action].

<sup>165</sup> International freedom of expression expert Jeroen Temperman performed a textual analysis of Article 20(2) and found that “the threshold of the provision is very high indeed. This provision requires that legal prohibitions are in place to deal with *qualified* types of extreme speech; that is, only extreme speech that incites adverse responses—‘discrimination’, ‘hostility’ or ‘violence’—by others against a target group is to be banned.” JEROEN TEMPERMAN, *RELIGIOUS HATRED AND INTERNATIONAL LAW: THE PROHIBITION OF INCITEMENT TO VIOLENCE OR DISCRIMINATION* 164 (2016). But he then drew attention to the lack of definitions of the terms in the article, as well as the widely varying legal thresholds of the terms “discrimination,” “hostility,” and “violence,” and suggested that “violence” has the highest and clearest threshold of the three, and therefore is a less problematic standard for incitement laws than the others. *Id.* at 186–90.

<sup>166</sup> Incitement to violence, on the other hand, is a much clearer standard with a high threshold. *See id.* at 186–89. Prohibiting incitement to violence is in line with U.S. constitutional jurisprudence, that only incitement to imminent unlawful action—violence—can be prohibited. *See Brandenburg v. Ohio*, 395 U.S. 444 (1969).

In summary, the definition of hate speech in the U.N. Strategy and Plan of Action has strong parallels to blasphemy laws, and the same criticisms of blasphemy laws apply. “Hate speech” under the United Nations’ new and influential initiative covers a wide array of expression; limits expression related to religion and a limitless number of characteristics; is open to abuse because it is ambiguous and necessarily relies on the subjective interpretations of partial authorities, alleged victims, and third parties of what is pejorative or discriminatory; facilitates false accusations because it does not require any tangible harm; and lacks an intent requirement, which makes arbitrary and abusive enforcement easier.

### *B. Special Rapporteurs’ Criticism of Vague Hate Speech Restrictions*

The definition of hate speech in the U.N. Strategy and Plan of Action is severely lacking, and it is alarming that it may serve as the basis for policy recommendations to countries looking to implement speech restrictions. Several Special Rapporteurs have identified problems with vague terms in hate speech laws<sup>167</sup> and would likely condemn any laws that regulate hate speech as defined in the Strategy and Plan of Action.

Months before Guterres launched the Strategy and Plan of Action, the Special Rapporteur on Freedom of Religion or Belief, Ahmed Shaheed, warned that hate speech laws can be used as blasphemy laws, especially when developed and applied using “an uncritical approach” and “formulated in vague terms.”<sup>168</sup> He stated that hate speech laws that “limit the subject matter of free speech, rather than contextual assessments to decide whether violence is imminent or whether there is intent to incite discrimination or hostility through free speech . . . are often applied to reinforce the dominant political, social and moral narrative and opinions of a given society,” and therefore are used “against the very minorities those laws have been designed to protect.”<sup>169</sup> Likewise, the Rabat Plan of Action on the prohibition of advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence recognizes, “[t]he broader the definition of incitement to hatred is in domestic legislation, the more it opens the door for arbitrary application of the laws.”<sup>170</sup>

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<sup>167</sup> See generally Shaheed, *2019 Report*, *supra* note 91; Bielefeldt, *2015 Report*, *supra* note 91.

<sup>168</sup> Shaheed, *2019 Report*, *supra* note 91, ¶ 33.

<sup>169</sup> *Id.*

<sup>170</sup> Rabat Plan of Action, *supra* note 164, ¶ 15. The Rabat Plan of Action was initiated by the Office of the High Commissioner for Human Rights, the top human rights official of the U.N. Secretariat, and was developed with the contributions of several Special Rapporteurs. *Id.*, Appendix.

Shaheed suggested that this problem could be avoided with the use of more-difficult-to-meet standards and “explicit” definitions of the terms found in ICCPR Article 20(2).<sup>171</sup> As shown above, the United Nations does not come close to meeting this recommendation in its Strategy and Plan of Action on Hate Speech, as it does not even use the terms in Article 20(2).

David Kaye, current Special Rapporteur on Freedom of Expression, pointed out in his 2019 report on online hate speech that the definition of hate speech in the U.N. Strategy and Plan of Action on Hate Speech has no place in legal prohibitions since it falls short of ICCPR Article 20(2).<sup>172</sup>

Meanwhile, in a 2015 report, Heiner Bielefeldt, then-Special Rapporteur on Freedom of Religion or Belief, recognized the serious problems “vaguely defined” incitement laws—a term used for hate speech laws—cause religious minorities: they “open[] the way to arbitrary application of such laws, often to the disadvantage of those who would actually need protection from incitement to acts of hatred, including members of religious minorities, dissenters, critics, converts, atheists and others.”<sup>173</sup>

The Rabat Plan of Action also laments that “members of minorities are de facto persecuted, with a chilling effect on others, through the abuse of vague domestic legislation, jurisprudence and policies.”<sup>174</sup>

### *C. The Insufficiency of Special Rapporteurs’ Criticism*

While Special Rapporteurs have criticized vague hate speech definitions, they have failed to recognize that even hate speech legislation that follows their caveats is not enough to protect minorities from being punished. Shaheed’s warning is insufficient because he fails to acknowledge the inherent subjectivity of the “contextual assessments” he argues should replace subject matter-focused

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<sup>171</sup> Shaheed, *2019 Report*, *supra* note 91, ¶ 34. Shaheed suggested States use definitions of ICCPR Article 20(2) terms from the non-binding Camden Principles on Freedom of Expression and Equality: hostility is “intense and irrational emotions of opprobrium, enmity and detestation towards the target group”; advocacy “requir[es] an intention to publicly promote hatred towards the target group”; and incitement “should refer to statements about national, racial or religious groups that create an imminent risk of discrimination, hostility or violence against persons belonging to those groups.” *Id.*

<sup>172</sup> Kaye, *2019 Report*, *supra* note 142, ¶¶ 19–20. Even the ICCPR article 20(2) standard still suffers from the inevitable problems of subjectivity that arise with any hate speech restriction laws that go beyond incitement to imminent violence. The United States placed a reservation on article 20(2) at the time of its ratification of the ICCPR because it was unlikely to comport with the free speech requirements of the First Amendment of the U.S. Constitution.

<sup>173</sup> Bielefeldt, *2015 Report*, *supra* note 91, ¶ 64.

<sup>174</sup> Rabat Plan of Action, *supra* note 164, ¶ 11.

restrictions, and the “explicit” definitions he suggests, while a higher bar than that of the Strategy and Plan of Action, also rely on subjective ideas, such as “intense and irrational emotions.”<sup>175</sup>

The Rabat Plan of Action also suggests that “robust” definitions are necessary, but fails to acknowledge the subjectivity of determining what constitutes “hatred” and “hostility.”<sup>176</sup>

No matter how strictly defined a hate speech law is, it still relies on entirely subjective interpretation about whether a certain expression should be classified as hate speech, and it does not require tangible harm. It is problematic for anyone to be in the position to make such a subjective interpretation, but it is especially easy for someone who is not well-meaning to abuse this power to enforce a hate speech law to similar effect as the enforcement of blasphemy laws. The Rabat Plan of Action calls for “a competent, independent and impartial tribunal[.]”<sup>177</sup> while Bielefeldt, the former Special Rapporteur on Freedom of Religion or Belief, and La Rue, the former Special Rapporteur on Freedom of Expression, recognized the problems with drawing lines, and so claimed that “[a]n independent judiciary and respect for the rules of due process are therefore essential preconditions when prohibiting certain forms of expression.”<sup>178</sup> But there are no truly independent arbiters when it comes to making such subjective, culturally-weighted interpretations as to whether an expression amounts to hate speech. Indeed, Bielefeldt and La Rue acknowledge that subjectivity is inherent, yet they do not conclude that it calls into question the prudence of restricting freedom of expression in this way.<sup>179</sup>

Meanwhile, Kaye suggested that “States and companies should combat” the “attitudes” identified in the Strategy and Plan of Action on Hate Speech “with education, condemnation and other tools,”<sup>180</sup> but this suggestion legitimizes the vague definition of hate speech. Means like education and public condemnation will likely move public opinion even closer to the idea that the expression of certain views—such as those perceived by the government or dominant companies as blasphemous, offensive, or hateful—is impermissible. This is particularly dangerous in communities in which religious or political minorities are persecuted.

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<sup>175</sup> Shaheed, *2019 Report*, *supra* note 91, ¶ 33.

<sup>176</sup> *Id.* ¶ 21.

<sup>177</sup> Rabat Plan of Action, *supra* note 164, ¶ 31.

<sup>178</sup> Heiner Bielefeldt & Frank La Rue, OHCHR Expert Workshops on the Prohibition of Incitement to National, Racial or Religious Hatred: Expert Workshop on the Americas 13 (Oct. 12–13, 2011).

<sup>179</sup> *Id.*

<sup>180</sup> Kaye, *2019 Report*, *supra* note 142, ¶ 19.

Given U.N. Special Rapporteurs' strong—although insufficient—criticism of unclear hate speech laws, the U.N. Secretary-General's weak definition of hate speech in the Strategy and Plan of Action is particularly negligent. Some countries will look to the United Nations for policy guidance and earnestly adopt legislation that is vague and overbroad and restricts freedom of expression to the detriment of minorities. Others will capitalize on the United Nations' weak definition of hate speech to punish the expression of minority viewpoints. In both instances, the United Nations will have abdicated its responsibility to adhere, at a minimum, to the standards set by its own human rights experts.

### III. THE APPLICATION OF HATE SPEECH LAWS AND PARALLELS TO BLASPHEMY LAWS

Indeed, many States already have adopted hate speech laws and used them in parallel ways to blasphemy laws, disproportionately harming religious minorities, political opponents, and people with minority viewpoints. They will be encouraged by the United Nations' weak definition of hate speech. These countries claim that they are banning language that targets and hurts minorities in particular, but in reality, hate speech laws are enforced in ways that punish minorities, just as with blasphemy laws. Examples from Indonesia, Russia, North Macedonia, and Denmark show that the Strategy and Plan of Action's tacit endorsement of hate speech legislation as a means to protect minorities from harm is misguided and in fact extremely dangerous, since it is those very minorities who are frequently targeted with enforcement of the laws.

#### A. *Indonesia*

Indonesia has used its Law No. 11 of 2008 on Information and Electronic Transaction (“the ITE Law”) to punish perceived blasphemy.<sup>181</sup> Article 28(2) is written as a hate speech provision because of its focus on “inflicting hatred or dissension”:

Any Person who deliberately and without authority disseminates information with intention for inflicting hatred or dissension on individuals and/or certain groups of community based on ethnic groups, religions, races, and inter-groups (SARA) shall be punished by a maximum imprisonment of six years or a maximum fine of IDR [1,000,000,000,000] (one trillion Rupiahs).<sup>182</sup>

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<sup>181</sup> INDONESIA CRIMINAL LAW UPDATE, INDONESIA'S LEGAL FRAMEWORK ON HATE SPEECH 8 (2018), <https://icjr.or.id/indonesias-legal-framework-on-hate-speech/>.

<sup>182</sup> *Id.*

Amnesty International reported in 2014 that Indonesian authorities are increasingly turning to this law in blasphemy cases because it provides greater penalties than does Article 156(a) of the Criminal Code.<sup>183</sup> The ITE Law is not included in USCIRF's 2017 investigation of the world's blasphemy laws, presumably because the text of Article 28(2) does not say anything about insulting religions, deities, or sacred things, but its enforcement shows that it is a blasphemy provision masquerading as a hate speech provision. Indonesia's plan to expand its blasphemy law<sup>184</sup> reflects increasing pressure to punish disfavored religious speech, which makes this hate speech provision all the more dangerous, as its use to punish perceived blasphemy is likely to increase.

In May 2018, Abraham Ben Moses, a convert to Christianity from Islam, was sentenced to four years in prison and ordered to pay a fine for violating Article 28(2) of the ITE Law.<sup>185</sup> Abraham, a Christian cleric, would record conversations online with an anonymous taxi driver, and in one video uploaded to Facebook he quoted the Quran and attempted to convince the driver to convert to Christianity, leading the police to arrest him in December 2017.<sup>186</sup>

Sebastian Joe bin Abdul Hadi, a Muslim who, according to a hardline Islamist group, posted insulting statements about Islam on Facebook, was convicted under both the ITE law hate speech provision and the blasphemy law.<sup>187</sup> At trial, Sebastian Joe invoked the Indonesian Constitution's guarantee of the right to freedom of religion, but in November 2012 the court sentenced him to four years' imprisonment for blasphemy under Criminal Code Article 156(a).<sup>188</sup> A few months later, a high court added a year to his sentence for "disseminating information aimed at inciting religious hatred or hostility" under Article 28(2) of the ITE Law.<sup>189</sup>

Alexander An was charged with the same provision under the ITE law and blasphemy under Article 156(a) of the Criminal Code.<sup>190</sup> He had posted on his personal Facebook page and on an atheist group's Facebook page about how he did not believe in God, as well as statements perceived to be insulting Islam and

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<sup>183</sup> AMNESTY INT'L, PROSECUTING BELIEFS: INDONESIA'S BLASPHEMY LAWS 13 (2014), <https://www.amnesty.org/en/documents/ASA21/018/2014/en/> [hereinafter PROSECUTING BELIEFS].

<sup>184</sup> Harsono, *supra* note 37.

<sup>185</sup> *Man Sentenced to Four Years in Prison for Religious Defamation*, JAKARTA POST (May 7, 2018), <https://www.thejakartapost.com/news/2018/05/07/man-sentenced-to-four-years-in-prison-for-religious-defamation.html>.

<sup>186</sup> *Id.*

<sup>187</sup> PROSECUTING BELIEFS, *supra* note 183, at 20.

<sup>188</sup> *Id.* at 21.

<sup>189</sup> *Id.*

<sup>190</sup> *Id.*

the Prophet Muhammad.<sup>191</sup> He was threatened by a mob after his colleagues distributed his postings.<sup>192</sup> In June 2012, he received a sentence of 2.5 years' imprisonment and a fine for violating the ITE law, with the court chiding him for violating the constitution's alleged requirement of believing in God because of his atheistic views.<sup>193</sup>

### B. Russia

Russia's 2013 criminalization of blasphemy through insulting religious feelings has resulted in fines and suspended sentences, but it is Russia's hate speech law that is primarily deployed to punish expression perceived as blasphemy, especially on social media posts.<sup>194</sup> Until the end of 2018, Article 282 of Russia's Criminal Code criminalized

actions aimed at the incitement of hatred or enmity, or the abasement of the dignity of a person or a group of persons on the basis of sex, race, nationality, language, origin, attitude to religion, or affiliation with any social group, in public or with the use of mass media, including the Internet.<sup>195</sup>

Penalties for "incitement of hatred" ranged from a fine of 300,000–500,000 rubles to imprisonment for up to five years to compulsory labor for up to four years.<sup>196</sup> In late December 2018, President Vladimir Putin signed a law changing the first offense under this article to an administrative offense; criminal penalties would now apply only after a second offense of the same nature.<sup>197</sup>

According to USCIRF, Russia's "anti-extremism" legislation, including the hate speech law, has the aim of giving "Russian law enforcement agencies generous leeway to exert influence over unwelcome religious trends," including "suspicious" or "unusual religious practices or principles inconvenient for the state (for example, refusal to serve in the military)"; Muslims are a common

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<sup>191</sup> *Id.*; Joe Cochrane, *Embrace of Atheism Put an Indonesian in Prison*, N.Y. TIMES (May 3, 2014), <https://www.nytimes.com/2014/05/04/world/asia/indonesian-who-embraced-atheism-landed-in-prison.html>.

<sup>192</sup> PROSECUTING BELIEFS, *supra* note 183, at 21; Cochrane, *supra* note 191.

<sup>193</sup> PROSECUTING BELIEFS, *supra* note 183, at 21.

<sup>194</sup> Carl Schreck, *Another Russian Faces Criminal Probe Over Social-Media Memes*, RADIO FREE EUR./RADIO LIBERTY (Aug. 3, 2018), <https://www.rferl.org/a/russian-faces-criminal-probe-social-media-memes/29410323.html>. Often charges are brought under both Article 148 on blasphemy and Article 282 on hate speech.

<sup>195</sup> *Putin Signs Law Partially Decriminalizing Article 282 of Russian Criminal Code on Extremism*, INTERFAX (Dec. 28, 2018), <https://interfax.com/newsroom/top-stories/21714/>.

<sup>196</sup> DOS 2019 RUSSIA IRFR, *supra* note 70, at 5.

<sup>197</sup> *Putin Signs Law Partially Decriminalizing Article 282 of Russian Criminal Code on Extremism*, *supra* note 195.

target.<sup>198</sup> A 2018 USCIRF report on Russia's anti-extremism activities and their impact on freedom of religion includes a number of examples of criminal charges and convictions under Article 282.<sup>199</sup> For example, 21-year-old activist Maxim Kormelitsky was sentenced in May 2016 to one year in prison for "inciting religious hatred" for a social media post criticizing the practice of jumping into cold water on Epiphany, a common Orthodox practice, accompanied by crude language and mockery.<sup>200</sup> Kormelitsky was a former member of an opposition party.<sup>201</sup>

In August 2016, Russian blogger Ruslan Sokolovsky filmed himself playing the popular smartphone game Pokémon Go in a Russian Orthodox church; in the video, which he posted to YouTube alongside several other videos, he swore and stated it was easier to find Pokémon in the church than Jesus.<sup>202</sup> He was arrested and ultimately given a suspended sentence of 3.5 years for both "insult[ing] the religious feelings of believers" under Article 148(2) of the Criminal Code and "inciting religious hatred" under Article 282.<sup>203</sup> In July 2017, his sentence was reduced to two years and three months,<sup>204</sup> yet he was placed on an official list of terrorists and extremists.<sup>205</sup>

Amnesty International Russia's director pointed out that Sokolovsky was targeted for political reasons, not because of his insensitive religious comments, as the authorities learned of him only once he publicly began criticizing the legislation on insulting religious believers.<sup>206</sup> He emphasized, "With Sokolovsky's conviction, the Russian authorities send a strong message to anyone who wants to challenge the country's grotesque 'blasphemy' law. Make

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<sup>198</sup> MARIA KRAVCHENKO, INVENTING EXTREMISTS: THE IMPACT OF RUSSIAN ANTI-EXTREMISM POLICIES ON FREEDOM OF RELIGION OR BELIEF 3 (USCIRF, 2018).

<sup>199</sup> *Id.*

<sup>200</sup> *Id.* at 31–32; HUM. RTS. WATCH, ONLINE AND ON ALL FRONTS: RUSSIA'S ASSAULT ON FREEDOM OF EXPRESSION 63 (2017), <https://www.hrw.org/report/2017/07/18/online-and-all-fronts/russias-assault-freedom-expression> [hereinafter ONLINE AND ON ALL FRONTS].

<sup>201</sup> ONLINE AND ON ALL FRONTS, *supra* note 200, at 63.

<sup>202</sup> *Id.* at 60–62; Carl Schreck, *Colleagues Defend Russia's 'Pokemon Go' Blogger Listed Alongside Terrorists and Extremists*, RFE/RL (July 17, 2017), <https://www.rferl.org/a/russia-clleagues-defend-pokenon-blogger-extremist-terrorist/28620930.html>; *Russian Pokémon Go Blogger Convicted of Inciting Religious Hatred After Playing Game in Church*, TELEGRAPH (May 11, 2017), <https://www.telegraph.co.uk/news/2017/05/11/russian-pokemon-go-blogger-convicted-inciting-religious-hatred>.

<sup>203</sup> ONLINE AND ON ALL FRONTS, *supra* note 200, at 60.

<sup>204</sup> *Russian Pokémon Go Blogger Has Sentence Reduced*, MOSCOW TIMES (July 7, 2017), <https://www.themoscowtimes.com/2017/07/07/pokemon-58330-a58330>.

<sup>205</sup> Schreck, *supra* note 202.

<sup>206</sup> *Russian Youtuber Convicted of Blasphemy After Playing Pokémon Go in a Church*, AMNESTY INT'L (May 11, 2017), <https://www.amnesty.org/en/latest/news/2017/05/russian-youtuber-convicted-of-blasphemy-after-playing-pokemon-go-in-a-church>.

no mistake, this is neither piety nor a genuine effort to protect the freedom of religion in Russia[.] This is another assault on freedom of expression.”<sup>207</sup>

Eighteen-year-old student Alexander Razhin was sentenced under Article 282 to correctional labor in 2016 for posting on social media about the cancellation of a Marilyn Manson concert due to Orthodox pressure, which allegedly “humiliated the dignity” of Russian Orthodox Christians.<sup>208</sup> Publisher Boris Obratsov was sentenced under Article 282 to a fine in 2011 for “using mass media to humiliate the dignity of a group of people on the basis of their attitude toward religion” after publishing a commentary critical of the Russian Orthodox Church and religious people.<sup>209</sup>

### C. North Macedonia

In North Macedonia,<sup>210</sup> where as of the 2002 census sixty-five percent of the 2.1 million people are Orthodox Christian and thirty-three percent are Muslim, the Macedonian Orthodox Church-Ohrid Archbishopric has a close relationship with the government and receives special treatment, including funding and the free use of public properties.<sup>211</sup> The Macedonian Constitution names five religious groups and states that other religious groups have rights,<sup>212</sup> but the government has continued to deny registration and legal status to several smaller religious groups, including the Serbian Orthodox Church, in violation of a judgment from the European Court of Human Rights.<sup>213</sup> Religious affiliation and ethnicity are correlated, as are religious affiliation and political affiliation.<sup>214</sup>

In 2009, Asma Jahangir, then-U.N. Special Rapporteur on Freedom of Religion or Belief, criticized a vague article in the Macedonian Criminal Code criminalizing “hate speech,” in Jahangir’s words.<sup>215</sup> Article 319 criminalized,

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<sup>207</sup> *Id.*

<sup>208</sup> KRAVCHENKO, *supra* note 198, at 31.

<sup>209</sup> *Id.* at 28.

<sup>210</sup> In February 2019, Macedonia changed its name to North Macedonia. Stephanie Halasz et al., *Macedonia Officially Changes Name to North Macedonia, Drawing Line Under Bitter Dispute*, CNN (Feb. 13, 2019), <https://www.cnn.com/2019/02/13/europe/north-macedonia-name-change-intl/index.html>.

<sup>211</sup> U.S. DEP’T OF STATE, NORTH MACEDONIA 2019 INTERNATIONAL RELIGIOUS FREEDOM REPORT 2, 7 (2020), <https://www.state.gov/reports/2019-report-on-international-religious-freedom/north-macedonia/> [hereinafter DOS, NORTH MACEDONIA 2019 IRFR].

<sup>212</sup> MACED. CONST., Amendment VII(1).

<sup>213</sup> DOS, NORTH MACEDONIA 2019 IRFR, *supra* note 211, at 5.

<sup>214</sup> *Id.* at 2.

<sup>215</sup> Asma Jahangir (Special Rapporteur on Freedom of Religion or Belief), *Rep. on Freedom of Religion or Belief, Addendum: Mission to the Former Yugoslav Republic of Macedonia*, ¶¶ 47–48, U.N. Doc. A/HRC/13/40/Add.2 (Dec. 28, 2009).

with penalties of up to ten years' imprisonment, various actions, including "caus[ing] or excit[ing] national, racial or religious hate, discord or intolerance," whether "by force, mistreatment, endangering the security, ridicule of the national, ethnic or religious symbols, by damaging other people's objects, by desecration of monuments, graves, or in some other manner[.]"<sup>216</sup> On its face, the article includes elements of a blasphemy law, given that it identifies ridicule of religious symbols as possible grounds for inciting national, racial, or religious hate. It has also been applied to prohibit activity that undermines the Macedonian Orthodox Church.

In 2002, Archbishop Jovan (christened Zoran Vraniškovski) left the Macedonian Orthodox Church to join the Serbian Orthodox Church.<sup>217</sup> A Macedonian court sentenced him in August 2004, at a time of targeted government discrimination against the Serbian Orthodox Church and attacks on its churches, to eighteen months in prison for "instigation of ethnic, racial and religious hatred, discord and intolerance" under Article 319.<sup>218</sup> Religious freedom NGO Forum 18 reported that the Supreme Court of Macedonia upheld two of the grounds for his conviction, namely "accepting to become exarch of the Ohrid Archbishopric, and for having church calendars (small booklets with holy dates, prayers and saints' pictures) at his church services when he was arrested."<sup>219</sup> The calendar allegedly "slander[ed]" the Macedonian Orthodox Church by, among other "untruths," calling out its bishops for failing in their duties, and hurting the religious feelings of the Macedonian population by assailing the sacredness of the Macedonian Orthodox Church.<sup>220</sup>

In evaluating the judgment of the lower court, the Panel of Experts on Freedom of Religion or Belief of the Office for Democratic Institutions and Human Rights of the Organization for Security and Cooperation in Europe determined that "any form of religious activity that has the effect of challenging the legitimacy and supremacy of the [Macedonian Orthodox Church] as the dominant religion is to be considered as causing religious hatred."<sup>221</sup>

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<sup>216</sup> See the earlier version of the Criminal Code at Criminal Code, [http://www.derechopenalenlared.com/legislacion/codigo\\_penal\\_macedonia.pdf](http://www.derechopenalenlared.com/legislacion/codigo_penal_macedonia.pdf) (Maced.).

<sup>217</sup> Branko Bjelajac, *MACEDONIA: Serbian Bishop Remains in Prison as Appeal Fails*, FORUM 18 (Sept. 20, 2005), [http://www.forum18.org/archive.php?article\\_id=655](http://www.forum18.org/archive.php?article_id=655).

<sup>218</sup> Orthodox Ohrid Archbishopric, Decision, [http://poa-info.org/archbishop/testimonies/verdict\\_racial\\_hatred.html](http://poa-info.org/archbishop/testimonies/verdict_racial_hatred.html).

<sup>219</sup> Bjelajac, *supra* note 217.

<sup>220</sup> Orthodox Ohrid Archbishopric, *supra* note 218.

<sup>221</sup> OSCE/ODIHR, OPINION ON THE CASE OF BISHOP JOVAN (ZORAN VRANISKOVSKI) ¶ 8 (July 27, 2005), <https://www.legislationline.org/download/id/762/file/d5f56c87fb455c31d66cc0b9aa7f.pdf>.

In 2014, Article 319 of the Criminal Code was expanded to add many other “discriminatory grounds” on which hatred could be caused, including:

gender, race, color of the skin, membership in marginalized group, ethnic membership, language, nationality, social background, religious belief, other beliefs, education, political affiliation, personal or social status, mental or physical impairment, age, family or marital status, property status, health condition, or in any other ground foreseen by law on ratified international agreement[.]<sup>222</sup>

#### D. Denmark

Although Denmark repealed its little-used blasphemy law in 2017,<sup>223</sup> it has turned to using its hate speech law to punish blasphemy, particularly against Islam.<sup>224</sup> Denmark is unique among countries examined here because it does not punish blasphemy against a majority religion—only 5.5% of the population is Muslim.<sup>225</sup> However, political consensus in Denmark is that language regarded as anti-immigrant or anti-Muslim should be prohibited, and therefore Denmark does punish expression of minority viewpoints that are perceived by some of its population as blasphemous.<sup>226</sup> Like in other countries examined here, Danish authorities and courts have enforced a ban on hate speech to protect a religious group from criticism.

Denmark’s hate speech law is found in Section 266b of the Criminal Code, which reads:

Whoever publicly, or with intention to disseminating in a larger circle makes statements or other pronouncement, by which a group of persons is threatened, derided or degraded because of their race, colour

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<sup>222</sup> Criminal Code of Macedonia, art. 319 (2009, amended 2018) <https://www.legislationline.org/documents/section/criminal-codes/country/31/North%20Macedonia/show>; *Hate Speech is Considered a Crime in the Republic of Macedonia*, MEDIA FACT CHECKING SERV. (Mar. 6, 2014), <http://factchecking.mk/hate-speech-is-considered-a-crime-in-the-republic-of-macedonia/>.

<sup>223</sup> *Denmark Revokes 334-Year-Old Blasphemy Law*, LOCAL DK (June 2, 2017), <https://www.thelocal.dk/20170602/denmark-revokes-334-year-old-blasphemy-law>.

<sup>224</sup> Jacob Mchangama, *Something’s Rotten: How Denmark Is Criminalizing Blasphemy Through Hate Speech Law*, COLUM. GLOB. FREEDOM EXPRESSION (Feb. 29, 2016), <https://globalfreedomofexpression.columbia.edu/updates/2016/02/somethings-rotten-denmark-criminalizing-blasphemy-hate-speech-law> [hereinafter Mchangama, *Something’s Rotten*].

<sup>225</sup> U.S. DEP’T OF STATE, DENMARK 2019 INTERNATIONAL RELIGIOUS FREEDOM REPORT 2 (2020), <https://www.state.gov/reports/2019-report-on-international-religious-freedom/denmark/>.

<sup>226</sup> One motivation is to prevent terrorism, since unpunished expressions of blasphemy may attract extreme reactions. Kimiko de Freytas-Tamura, *Danish Man Who Burned Quran Is Prosecuted for Blasphemy*, N.Y. TIMES (Feb. 23, 2017), <https://www.nytimes.com/2017/02/23/world/europe/denmark-quran-burning.html>.

of skin, national or ethnic background, faith or sexual orientation, will be punished by fine or imprisonment for up to 2 years.<sup>227</sup>

Danish free speech advocate Jacob Mchangama shared that a man who uploaded a video of himself burning a Quran accompanied by the message “[t]hink of your neighbours, it stinks when it burns” was charged by the police in February 2016 with violating Section 266b.<sup>228</sup> Mchangama argued that the man’s action was blasphemous— “[i]t is difficult to imagine an act more insulting to a religious dogma than burning its sacred book”—but was not an attack on Muslims as a group, which is what the hate speech law criminalizes.<sup>229</sup> Mchangama explained that the blasphemy law, still on the books at the time, had not been used in decades and its application would have been untenable to the public, hence the shift to using the hate speech law to punish blasphemy.<sup>230</sup> A full year after the shift to using the hate speech law, the man’s hate speech charge was changed to blasphemy.<sup>231</sup> However, when the blasphemy law was repealed, all charges against the man were dismissed.<sup>232</sup>

Another incident identified by Mchangama that involved what he calls “scope-creep” was the conviction under Section 266b of a man who had written on Facebook in response to a discussion about an Islamist group’s domination of a local tenants’ association.<sup>233</sup> The man wrote: “The ideology of Islam is as abominable, atrocious, oppressive and as misanthropic as Nazism. The massive immigration of Islamists into Denmark is the most destructive thing to happen to Danish society in recent history.”<sup>234</sup> The man posted a negative comment a few minutes later about Islam’s views on democracy.<sup>235</sup> The District Court of Elsinore found in February 2016 that the defendant’s “statements ‘as a whole’ constituted ‘generalizing claims that are insulting and degrading towards the adherents of Islam.’”<sup>236</sup>

Mchangama’s conclusion about the court’s ruling is that blasphemy in Denmark will now be banned under the hate speech law:

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<sup>227</sup> DENMARK CRIMINAL CODE, 27:266b (Den.).

<sup>228</sup> Mchangama, *Something’s Rotten*, *supra* note 224.

<sup>229</sup> *Id.*

<sup>230</sup> *Id.*

<sup>231</sup> de Freytas-Tamura, *supra* note 226.

<sup>232</sup> *Denmark Ditches Blasphemy Laws*, UNCOMMON GROUND (June 3, 2017), <https://uncommongroundmedia.com/Denmark-Ditches-Blasphemy-Laws/>.

<sup>233</sup> Mchangama, *Something’s Rotten*, *supra* note 224.

<sup>234</sup> *Id.*

<sup>235</sup> *Id.*

<sup>236</sup> *Id.*

By equating degrading and insulting comments aimed at Islam, with anti-Muslim hate speech, the Court in *Elsinore* has in fact expanded the Danish hate speech ban to cover blasphemy. This marks the clearest departure in some 70 years during which pure criticism of religion, no matter how harsh, was thought to be protected by freedom of expression.<sup>237</sup>

Mchangama lamented that because the penalty for violating the law was only a few hundred dollars, an appeal is difficult, “increasing the likelihood that the decision will create precedent and encourage further prosecutions of criticism of religion.”<sup>238</sup>

#### *E. Parallels to Blasphemy Laws*

All of these hate speech cases display parallels to cases under blasphemy laws, both in the elements involved and the apparent motives for prosecution. The fact patterns of these hate speech cases are similar to those of blasphemy cases, wherein the defendant has said something perceived as negative toward a religion or religious beliefs or apparently undermines a religion or religious beliefs, whether intentionally or not. Motives for prosecution and punishment are also similar—motives that are widely regarded by international human rights advocates and U.N. experts as illegitimate, such as suppressing political opponents and targeting religious minorities. Most significantly, these hate speech cases reveal that as with blasphemy laws, the nature of the prohibited speech under these hate speech laws is inherently subjective, which renders the laws prone to arbitrary and abusive application. Thus, the seeming support for the use of hate speech legislation to shield minorities from harm in the U.N. Strategy and Plan of Action on Hate Speech will, in fact, cause minorities more harm, as they are subjected to more arbitrarily-applied, abusive legislation.

### IV. ANTI-BLASPHEMY MOTIVES

Some countries that enforce blasphemy laws and support the U.N.’s campaign against hate speech have made clear that they believe that what they perceive as blasphemy constitutes hate speech. These anti-blasphemy motives for supporting the campaign expose how hate speech laws are vulnerable to abuse, casting further doubt on the idea that the Strategy and Plan of Action on Hate Speech and hate speech laws will protect minorities.

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<sup>237</sup> *Id.*

<sup>238</sup> *Id.*

One of the most vocal supporters of the United Nations' preoccupation with countering hate speech is Pakistan, the notorious defender of blasphemy laws. Pakistan's support for hate speech laws deserves strong skepticism. At a high-level roundtable discussion called "Countering Hate Speech," co-hosted by Pakistan and Turkey at the United Nations in September 2019,<sup>239</sup> Prime Minister Imran Khan quickly revealed his goals.<sup>240</sup> Although the event was billed as focusing on hate speech, Khan focused almost exclusively on how problematic he considers blasphemy against Islam and the Prophet Muhammad.<sup>241</sup>

Khan, who ardently supported blasphemy laws to gain support from the religious right during his campaign the previous year,<sup>242</sup> repeatedly conflated hate speech with blasphemy. He claimed that if someone is called an "Islamic radical," it hurts Islam by associating Islam with terrorism.<sup>243</sup> He also highlighted Salman Rushdie's Satanic Verses,<sup>244</sup> after the publication of which Iranian Ayatollah Khomeini issued a fatwa calling for Rushdie's death due to his irreverence toward Islam and the Prophet Muhammad.<sup>245</sup> Khan said that people in the West could not understand the pain Satanic Verses caused Muslims, because European society considers religion differently.<sup>246</sup> Muslims, conversely, experience deep pain "because the Prophet lives in our hearts."<sup>247</sup> He said Western leaders must be as sensitive to Muslims when someone "ridicules [or] blasphemes our Prophet" as they are to Jews when the Holocaust is addressed.<sup>248</sup> To him, speech becomes hate speech when it insults or mocks someone's religion. He communicated the same sentiments at his speech before the General Assembly.<sup>249</sup>

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<sup>239</sup> President of Turkey & Prime Minister of Pakistan, Invitation for High-Level Round Table on Countering Hate Speech of the Seventy-Fourth Session of the U.N. G.A. (Sept. 25, 2019), <https://www.unaoc.org/event/high-level-round-table-on-countering-hate-speech>.

<sup>240</sup> See Samaa TV, *Terrorism Has No Religion: PM Imran Khan | SAMAA TV | 26 September 2019*, YOUTUBE (Sept. 26, 2019), <https://www.youtube.com/watch?v=fgQvXhHiY18>.

<sup>241</sup> *Id.*

<sup>242</sup> Memphis Barker, *Imran Khan Criticised For Defence Of Pakistan Blasphemy Laws*, GUARDIAN (July 9, 2018), <https://www.theguardian.com/world/2018/jul/09/imran-kahn-accused-over-defence-of-pakistan-blasphemy-laws>.

<sup>243</sup> Samaa TV, *supra* note 240, at 1:50.

<sup>244</sup> *Id.* at 5:20.

<sup>245</sup> Index on Censorship, *Thirty Years On: The Salman Rushdie Fatwa Revisited*, X INDEX THE VOICE OF FREE EXPRESSION (Feb. 13, 2019), <https://www.indexoncensorship.org/2019/02/student-reading-list-salman-rushdie-fatwa>.

<sup>246</sup> Samaa TV, *supra* note 240, at 5:20.

<sup>247</sup> *Id.* at 7:15.

<sup>248</sup> *Id.* at 7:32.

<sup>249</sup> *Takeaways from Imran Khan's Speech at UN General Assembly*, GULF NEWS (Sept. 28, 2019), <https://gulfnnews.com/world/asia/takeaways-from-imran-khans-speech-at-un-general-assembly-1.1569641835080>.

Khan's politically expedient position that speech perceived as critical towards Islam is per se hate speech against Muslims is unfortunately a widespread belief in many Muslim-majority countries, although many Muslims reject his position. But the United Nations' support of hate speech restrictions, which depend on subjective interpretation, opens the door to the justifications pushed by Khan, even if U.N. officials might otherwise disagree with Khan's view.

In fact, in 2017, the U.N. Human Rights Committee issued concluding observations on Pakistan's human rights record in which it condemned the country's blasphemy laws while simultaneously exhorting it to prosecute hate speech.<sup>250</sup> In the same paragraph it recommended that Pakistan repeal its blasphemy laws, the Committee told Pakistan that it should "[e]nsure that all cases of hate speech and hate crimes are thoroughly and promptly investigated and that perpetrators are prosecuted and, if convicted, punished[.]"<sup>251</sup> The Committee issued its recommendations despite overwhelming evidence of the inevitable use of hate speech laws in Pakistan to protect Islam and to punish anyone who disagrees—and with the apparent blessing of the United Nations.

The OIC has also been a major proponent of banning hate speech, and its own advocacy for hate speech restrictions clearly reveals its motivations to protect Islam. Thirty-one of the OIC's fifty-seven members have blasphemy laws.<sup>252</sup> Nine of the ten countries that have blasphemy prohibitions that "most run counter to international law principles"—that is, the worst blasphemy laws, according to USCIRF—are in OIC countries: Iran, Pakistan, Yemen, Somalia, Qatar, Egypt, Algeria, Comoros, and Libya.<sup>253</sup> Meanwhile, of the countries with the ten lowest scores, only Guyana and Tunisia are OIC members.<sup>254</sup>

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<sup>250</sup> *Concluding Observations on the Initial Report of Pakistan*, *supra* note 102, ¶ 34(a), 34(d).

<sup>251</sup> *Id.* ¶ 34(d).

<sup>252</sup> The countries are Afghanistan, Algeria, Bahrain, Bangladesh, Brunei, Comoros, Egypt, Guyana, Indonesia, Iran, Iraq, Jordan, Kazakhstan, Kuwait, Lebanon, Libya, Malaysia, Morocco, Nigeria, Oman, Pakistan, Qatar, Saudi Arabia, Somalia, Sudan, Suriname, Syria, Tunisia, Turkey, United Arab Emirates, and Yemen. USCIRF 2017 BLASPHEMY LAWS SURVEY, *supra* note 6, at 19; Member States, ORG. ISLAMIC COOP., <https://www.oic-oci.org/states/?lan=en>. The USCIRF report did not analyze the laws of the West Bank and Gaza, given that the U.S. does not consider the Palestinian Territories a country. However, the West Bank and Gaza do have prohibitions on blasphemy. Palestine, END BLASPHEMY LAWS, <https://end-blasphemy-laws.org/countries/middle-east-and-north-africa/palestine> (last updated June 18, 2020). The OIC members that do not have blasphemy laws are Albania, Azerbaijan, Benin, Burkina Faso, Cameroon, Chad, Djibouti, Gabon, The Gambia, Guinea, Guinea-Bissau, Ivory Coast, Kyrgyzstan, Maldives, Mali, Mauritania, Mozambique, Niger, Senegal, Sierra Leone, Tajikistan, Togo, Turkmenistan, Uganda, and Uzbekistan.

<sup>253</sup> USCIRF 2017 BLASPHEMY LAWS SURVEY, *supra* note 6, at 18–20.

<sup>254</sup> *Id.* at 21.

At its 15th Regular Session, the OIC Independent Permanent Human Rights Commission “stressed the need to cooperate with OIC and other international stakeholders to campaign to legislate laws that criminalize all forms of hate speech, including Islamophobia.”<sup>255</sup> Hate speech, in the eyes of the Commission, includes Islamophobia, which the OIC identifies as including the defamation of Islam.<sup>256</sup> This is unsurprising given how many OIC members have blasphemy laws.

Another example of how the OIC conflates hate speech with criticism of religion can be found in a report from the 8th Regular Session of the Commission, which included a debate on freedom of expression and hate speech.<sup>257</sup> The report switches among the terms hate speech, defamation, and Islamophobia in discussing negative attitudes and expression toward Islam and toward Muslims.<sup>258</sup> It claims that “defamation of religions and discrimination against Muslims are interlinked and cannot be dealt in isolation, hence the need to tackle both, though with different strategies.”<sup>259</sup> The report focuses more on the interlinkage:

Negative stereotyping and stigmatization of religions or religious symbols have consequential impact on their followers as it directly impinges on their right to freedom of religion as well as subjects them to negative stereotyping that leads to various forms of discrimination and violence against them. A true understanding of the nature of Islamophobia is also crucial to setting the priorities of an action plan. In fact, this phenomenon attempts to distort the image of Islam and by extension abuse *all* Muslims irrespective of their geographical location. Islamophobia is also in violation of many human rights of Muslim individuals and communities of Muslims living in Western societies.<sup>260</sup>

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<sup>255</sup> *OIC Independent Permanent Human Rights Commission Concludes Its 15th Regular Session Held in Jeddah from 21-25 April 2019*, OIC IPHRC (Apr. 25, 2019), [https://oic-iphrc.org/web/index.php/site/view\\_news?id=438](https://oic-iphrc.org/web/index.php/site/view_news?id=438).

<sup>256</sup> For example, in a declaration on countering Islamophobia, OIC Ministers of Foreign Affairs stated, “[w]e strongly believe that defamation of Islam geared towards denigrating and dehumanizing Muslims, their beliefs and sacred personalities, insults the deep-seated religious feelings, undermines their dignity and violates their fundamental human rights thus threatening the multicultural fabric of the societies.” *Declaration by the Annual Coordination Meeting of Ministers of Foreign Affairs of OIC Member States on Countering Islamophobia*, ORGANISATION ISLAMIC CONF. (Sept. 24, 2010), <http://ww1.oic-oci.org/english/conf/fm/aem2010/en/ACM-2010-DEC-English.pdf>.

<sup>257</sup> OIC IPHRC, COUNTERING ISLAMOPHOBIA: AN UNFINISHED BUSINESS (2015) [hereinafter COUNTERING ISLAMOPHOBIA].

<sup>258</sup> *Id.*

<sup>259</sup> *Id.* at 66.

<sup>260</sup> *Id.*

This argument is in line with Prime Minister Khan's claim that criticizing Islam harms Muslims.<sup>261</sup> The Commission argues that criticism of the religion itself leads to discrimination against individual adherents of the religion.<sup>262</sup> If hate speech includes speech that leads to discrimination against persons, then by this logic criticism of the religion is hate speech.

This dangerous argument can be used to justify a broad ban on any speech criticizing or questioning a religious belief because in theory it could cause harm to an adherent of that belief. Any speech critical of a religion would be deemed hate speech. Again, this points to the problem that the determination of what exactly can be classified as hate speech is dependent on cultural and religious backgrounds, and thus no matter how hate speech is defined, laws prohibiting it will be applied in ways similar to blasphemy laws.

### CONCLUSION

In countries where religious and political minorities suffer, there are people who want to see the repeal of blasphemy laws and the flourishing of religious and political pluralism and freedom. But extremism continues to prevail. Government officials who speak out against blasphemy laws and discrimination against minorities face serious threats, the loss of jobs, and even death.

The U.N. Strategy and Plan of Action on Hate Speech, which was unveiled the same month Asia Bibi finally was allowed to leave Pakistan after almost a decade on death row for alleged blasphemy,<sup>263</sup> hinders religious freedom efforts by these advocates and harms the very minorities the United Nations claims to protect. It gives cover to extremists who want to continue to quash viewpoints that go against the status quo or that threaten their position of power, and to politicians who find it politically expedient to appease extremists, or who themselves want to suppress political opposition.

The problems with the Strategy and Plan of Action will not be solved with a more rigorous definition of hate speech. Flaws in the definition in the Strategy and Plan of Action are fundamental to restrictions on hate speech. By their very nature hate speech laws rely on subjective interpretation, which facilitates arbitrary and often malicious enforcement against minorities, in the same ways blasphemy laws are used. The insistence by Special Rapporteurs that problems

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<sup>261</sup> See generally *Samaa TV*, *supra* note 240.

<sup>262</sup> See generally *COUNTERING ISLAMOPHOBIA*, *supra* note 257.

<sup>263</sup> See Secretary-General António Guterres, *supra* note 1; *More Than Six Months After Acquittal*, *supra* note 58.

with vague hate speech laws can be solved with stricter definitions and independent judiciaries ignores the realities that there is no impartial arbiter of what constitutes hate and that, in fact, in many cases the arbiter is politically or religiously motivated against minorities.

U.N. Member States and human rights advocates who claim to care about minority rights need to oppose in strong terms and disassociate from the Secretary-General's Strategy and Plan of Action on Hate Speech. The longer the Strategy and Plan of Action exists, the more it will permeate agencies, programs, and funds throughout the United Nations. These entities then will influence perhaps unwitting Member States, through U.N. funding, programming, and policy development in those countries, to adopt laws and policies that are vulnerable to abuse. Meanwhile, Member States that punish blasphemy will capitalize on the Strategy and Plan of Action's ambiguous and subjective terms to justify their violations of the rights of minorities. The Strategy and Plan of Action on Hate Speech is disastrous for these minorities, and Member States must put an end to the campaign immediately.