



This report has been prepared at the request the Office of the High Commissioner for Human Rights,
Civil Society Section, by,

Grégor Puppinck, PhD
Director of the European Centre for Law and Justice

Tiffany N. Barrans, Esq.
Associate Counsel

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European Centre for Law and Justice
<http://www.eclj.org>

INTRODUCTION

The European Centre for Law and Justice (ECLJ) is an international non governmental organization dedicated to the preservation and advancement of human rights in Europe and across the world. The ECLJ engages legal, legislative, and cultural issues by implementing an effective strategy of advocacy, education, and litigation. The ECLJ advocates in particular the protection of religious freedom with the European Court of Human Rights and the other mechanisms afforded by the United Nations, the Council of Europe, the European Parliament, the Organization for Security and Cooperation in Europe (OSCE), and others. Additionally, the ECLJ has Special Consultative Status with ECOSOC of the United Nations and is accredited to the European Parliament. Most recently, on September 29th of 2010, the ECLJ filed a report with the Office of the High Commissioner for Human Rights, Civil Society Section, at their request, in preparation for the 2011 Expert workshops on the Prohibition of Incitement to National, Racial, or Religious Hatred.

The ECLJ submits this Report in response to the invitation of the Office of the High Commissioner for Human Rights, Civil Society Section, to contribute and participate, particularly with regard to religious expression on Draft General Comment No. 34. The Draft Comment, in its attempt to clarify the precise metes and bounds of the freedom of expression, does not go far enough to preserve expression. In an effort to preserve freedom of expression, the ECLJ makes several recommendations to improve the Draft Comment:

- **Paragraph 25:** Clearly state that religious laws, or official ideologies, are not “laws” under the meaning of article 19(3).
- **Paragraph 29:** Explain that the term “others” in article 19(3)(a) does not permit restrictions of expression to protect the integrity of a religious ideology. Clearly state that no right exists to protect the reputation of an ideology, and although the term “others” may relate to members of a community defined by its religious faith, it refers to the rights of the *individual* members to freely exercise their freedom of religion as expressed in article 18 and freedom of expression as expressed in article 19.
- **Paragraph 49:** Expressly state that criminal defamation laws are incompatible with the Covenant and other human rights laws. Remove the words “should consider” from the sentence that starts, “States parties should consider decriminalisation of defamation,” and replace with the word “shall,” creating an affirmative state obligation to decriminalise defamation.
- **Paragraph 50:** Affirm that blasphemy and defamtion laws regarding religious expressions are incompatible with the Covenant. Remove the word “should” from the sentence that begins, “Blasphemy laws should not be used to prevent or punish,” and replace with “shall,” creating an affirmative obligation on the States Parties.
- **Paragraphs 52-54:** Articulate that article 20, as it relates to article 19, targets only malicious expressions and expressions that objectively incite imminent violence.

ANALYSIS

I. Human Rights Stem from the Inherent Dignity of Human Beings and the Rights Articulated in Article 19 Are Meant to protect Persons Not Ideologies.

The Universal Declaration of Human Rights (Declaration)¹ enumerates the rights of human beings. The International Covenant on Civil and Political Rights (Covenant)² establishes the obligation of the States to respect those rights, but does not create additional rights not already enumerated in the Declaration. Since their inception, these documents have expressed the universal understanding that human rights stem from individual dignity. The Covenant and the Declaration only put pen to paper what the inherent dignity of humankind possesses.

To interpret the Covenant or the Declaration to include rights belonging to ideologies or belief systems would violate principles of the Vienna Convention. In reviewing the metes and bounds of article 19, the Committee must consider the Vienna Convention on the Law of Treaties, which, reflecting customary international law, states that a treaty “shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.”³ The context of the Convention, for the purposes of interpretation, comprises “the text, including its preamble and annexes.”⁴ The Declaration and the Covenant cast human rights as rights belonging to individual human beings. The Preamble of the Covenant recognizes that “these rights derive from the inherent dignity of the human *person*.”⁵ Article 2 of the Declaration declares that “*everyone* is entitled to all the rights and freedoms set forth in this declaration.”⁶ Like the Declaration, the Covenant employs the singular pronoun “everyone” when addressing the applicability of freedom of expression and dissemination of information in article 19.⁷ In offering the final draft of the Covenant to the General Assembly, the Third Committee’s Rapporteur stated, “There has been an awakening of the world conscience to the duty that cannot be denied, and awakening of peoples to a clear right—that of strengthening the foundations of justice, society based on equality, the obligation of States to promote conditions that will permit *every person* the full enjoyment of *his* rights.”⁸ The terms “everyone” and “human person” must be interpreted in good faith in accordance with their ordinary meaning,⁹ a meaning which does not include ideologies.

¹ Universal Declaration of Human Rights, G.A. Res. 217 (III) A, U.N. Doc. A/RES/217(III) (Dec. 10, 1948) [hereinafter Declaration].

² International Covenant on Civil and Political Rights, G.A. Res. 2200 (XXI) A, U.N. Doc. A/RES/2200(XXI), at pmbl. (Mar. 23, 1976) [hereinafter Covenant].

³ Vienna Convention on the Law of Treaties art. 31(1), 23 May 1969, 1155 U.N.T.S. 331 [hereinafter VCLT].

⁴ *Id.* art. 31(2) (emphasis added).

⁵ Covenant, *supra* note 2, at pmbl.

⁶ Declaration, *supra* note 1, art. 2 (emphasis added).

⁷ Covenant, *supra* note 2, at pmbl.

⁸ U.N. GAOR, 21st Sess., 1495th plen. mtg. ¶ 71, U.N. Doc. A/PV.1496 (Dec. 16, 1966) (emphasis added).

⁹ The ordinary meaning that must be given to the term “everyone” is *every person*. *Merriam-Webster Dictionary*, MERRIAM-WEBSTER.COM, <http://www.merriam-webster.com/dictionary/everyone> (last visited Jan. 20, 2011).

While certain expressions can at times be reprehensible and deliberately provocative, it is essential to distinguish those expressions from the kind of expressions that may be restricted legitimately under international law. Freedom of expression includes the right to be controversial, insulting, or offensive, even when such expression targets ideas that are devoutly held beliefs. Analogous guarantees of the right to freedom of expression can be found in the Universal Declaration of Human Rights,¹⁰ the American Convention on Human Rights,¹¹ the European Convention on Human Rights,¹² and the African Charter on Human and Peoples' Rights.¹³ Across the board, these instruments recognize a broad right to freely express

not only to “information” or “ideas” that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb the State or any sector of the population. Such are the demands of that pluralism, tolerance and broadmindedness without which there is no “democratic society.”¹⁴

Moreover, the former Special Rapporteur on freedom of expression, Ambeyi Ligabo, reported in his 2008 annual report to the Human Rights Council that “the constant confrontation of ideas, even controversial ones, is a stepping stone to vibrant democratic society.”¹⁵

Consistent with article 32 of the Vienna Convention, “the preparatory work of the treaty and the circumstances of its conclusion”¹⁶ support that human rights are intended for human beings not ideologies, and can only be restricted to protect rights equally held by another human being. The *Travaux Préparatoires* affirm this proposition. Although early drafts and proposals of article 19 used varying terminology to protect persons, the drafts consistently used terms signifying rights for persons, not for collective groups or ideologies. Many early draft proposals used the term every “person” (including proposals from France¹⁷ and the United Nations Conference on Freedom of Information¹⁸). States specifically and consistently rejected proposals to extend the protection of article 19 to groups or ideologies. When the Committee debated what restrictions to include in article 19, it highlighted that “the basic purpose of article 19 was to protect the right of the *individual* to freedom of opinion and expression and that the article should therefore contain as few restrictions as possible.”¹⁹

To preserve freedom of expression, the cornerstone of a vibrant democratic society, the restrictions found in article 19(3) must be read narrowly. These narrow restrictions on freedom

¹⁰ Declaration, *supra* note 1, art. 19.

¹¹ Organization of American States, American Convention on Human Rights art.13(1), Nov. 22, 1969, O.A.S.T.S. No. 36, 1144 U.N.T.S.123.

¹² European Convention for the Protection of Human Rights and Fundamental Freedoms art. 10(1), Nov. 4, 1950, 213 U.N.T.S. 221.

¹³ African Charter on Human and Peoples' Rights art. 9, June 27, 1981, 21 I.L.M. 58.

¹⁴ *Handyside v. United Kingdom*, no. 5493/72, § 49, ECHR 1972.

¹⁵ Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression, ¶ 85, U.N. Doc. A/HRC/7/14 (Feb. 28, 2008) (by Ambeyi Ligabo).

¹⁶ VCTL, *supra* note 3, art. 32.

¹⁷ M.J. Bossuyt, GUIDE TO THE “TRAVAUX PRÉPARATOIRES” OF THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS 374 (1987). The French version of the Covenant uses the words “*toute personne*”

¹⁸ *Id.*

¹⁹ *Id.* at 398 (emphasis added).

of expression, and those restrictions employed in the Declaration and analogous international laws, are based on the respect of rights belonging to other persons.²⁰ When the Declaration guarantees negative rights, it does so using the terminology “no one.”²¹ The term “others” in article 19(3)(a) of the Covenant does not permit restricting expression to protect the integrity of a religious ideology. The phrase “religious ideologies” is conspicuously absent from the text of the Covenant. Original drafts of article 19(3) consistently included the word persons after “others,” to read that freedom of expression may be restricted when proscribed by law and necessary to protect “the reputation or rights of other persons.”²² The word “persons” appears to have been dropped from the text only because it was commonly understood that rights belonged to human beings.²³ The French version uses the word *autrui* which clearly means other persons. The narrow restrictions found in article 19(3) must not swallow up individual rights by restricting expression based on the non-existent rights of an ideology. Given the object and purpose of the Covenant—that free human beings can enjoy civil and political freedom—the scope of protection must be assumed as broad as possible and the restrictions must be interpreted as narrowly as possible.²⁴ The Draft Comment should clearly state that although the term “others” may relate to members of a community defined by its religious faith it refers to the rights of the *individual* members (as human beings) to freely exercise their religion, as expressed in article 18, and freedom of opinion and expression, as expressed in article 19, and it does not permit restricting a person’s expression to protect the reputation of an ideology.

II. Restrictions on Freedom of Expression Based on Religious Laws are Incompatible with the Covenant and the Universal Declaration of Human Rights.

The Draft Comment should contain a clear statement that restricting expressions on the basis of religious laws is incompatible with the Covenant and Declaration. Although by citing generally to General Comment No. 32 (see paragraph 25, footnote 57), the Draft Comment proposes that the term “customary law” necessarily includes religious law, this point is not clear and could lead to confusion.

Comment No. 32 does not discuss whether religious law, either in the form of arbitrary interpretations or a blanket statute that states a certain religious ideology governs, constitutes “law” under article 19(3) such that a state may rely on it to impose a restriction on expression.

²⁰ Declaration, *supra* note 1, art. 29(2) (“In the exercise of his rights and freedoms, everyone shall be subject only to such limitations as are determined by law solely for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society.”); American Convention, *supra* note 11, art. 13(2); European Convention, *supra* note 12, art. 10(2) 10(1); Resolution on the Adoption of the Declaration of Principles on Freedom of Expression in Africa (2002) (Res. 62(XXXII)02), Principle II(2) (“Any restrictions on freedom of expression shall be provided by law, serve a legitimate interest and be necessary and in a democratic society.”).

²¹ *See, e.g.*, Declaration, *supra* note 1, art. 4 (“no one shall be held in slavery or servitude.”); *id.* art. 5 (“no one shall be subjected to torture or to cruel punishment.”); *id.* art. 9 (“no one shall be subjected to arbitrary arrest, detention or exile.”).

²² Bossuyt, *supra* note 17, at 374 (submitted by France); *id.* at 373 (“reputations of other persons” (submitted by Great Britain)); *id.* at 375 (“Expression about other persons natural or legal which defame their reputations” (submitted by the UN Conference on Freedom of Information)).

²³ *See id.* at 388.

²⁴ *Cf.* U.N. Commission on Human Rights, *Siracusa Principles on the Limitation and Derogation of Provisions in the International Covenant on Civil and Political Rights*, Part I, Annex, U.N. Doc. E/CN.4/1985/4 (Sept. 28, 1984).

This point is particularly relevant in light of article 19's limitation to protect the rights or reputation of others. Hypothetically, if a minority faith espouses a truth claim that contradicts the official ideology, such expression may, in the eyes of the state, harm the reputation of the official state religion. If States Parties confuse an official ideology as "law," the states may arbitrarily rely on indeterminate religious texts to justify restrictions on expressive freedom, frequently to the detriment of the religious minority. It is essential that the Committee expressly declare that restrictions based on either customary or religious law are incompatible with the Covenant.

III. Blasphemy Prohibitions and Other Prohibitions of Disrespect to a Religion or Belief System are Incompatible with the Principles and Objectives of the Covenant.

Blasphemy prohibitions and laws regarding the defamation of religions violate the very foundations of the human rights tradition by protecting ideas instead of the person who hold those ideas. By elevating the integrity of an ideology at the expense of a person's free expression, these laws fundamentally contravene the principles outlined in the United Nations' founding and legal documents. Human rights stem from the inherent dignity unique to *human beings*. International human rights laws have never recognized an inherent dignity in religious ideologies or interpretations.

A religious ideology or interpretation, which is not recognized as possessing rights in and of itself, should not be elevated above a persons's right to free expression. Human rights law, by its very name, was intended to protect persons not ideologies. "There is no question that discrimination based on religion or belief is a genuine grievance for many and in some instances leads to limitations on freedom of religion. However, the notion that insults or criticism aimed at a religion or religious doctrine somehow restrict adherents' ability to freely practice their religion has been rejected by renowned experts and human rights activists, who have emphasized the interdependence and indivisibility of freedom of expression, freedom of religion, and all other human rights."²⁵ Meanwhile, a person's right to freedom of expression is considered a "cornerstone right" without which other rights fall into jeopardy. Although this right is limited under narrow exceptions, words that offend or criticize an ideology do not fall within those narrow exceptions. The Draft Comment's language that "[b]lasphemy laws *should* not be used to prevent or punish criticism of religious leaders or commentary on religious doctrine or tenants of faith,"²⁶ misses the mark. Such an appeasing statement only encourages existing domestic blasphemy laws, which in practice empower ruling majorities against weak minorities and dissenters. Instead, the Draft Comment should emphatically state that blasphemy prohibitions and other prohibitions of disrespect to a religion or ideology are inconsistent with the aims and objectives of the Covenant.

A. The *Travaux Préparatoires* prove that States Categorically Rejected Protecting Ideologies from Blasphemous, Slanderous, or Defamatory Expression.

²⁵ Freedom House, *Policing Belief: The Impact of Blasphemy Laws on Human Rights* 2 (2010).

²⁶ Draft Comment, ¶ 50 (emphasis added).

In drafting article 19(3), a minority of States proposed language that freedom of expression should not be “exploited . . . for the dissemination of slanderous rumors.”²⁷ The drafters, however, rejected this proposal because it was “not susceptible of precise interpretation and that, furthermore, [it] might justify the establishment of censorship.”²⁸ The Committee considered a list of possible limitations on article 19. Included in this list was a restriction proposed by the Union of South Africa:

Restrictions upon the publication of a picture or a public entertainment where the picture or entertainment is calculated to give offense to the religious convictions or feelings of any section of the public, or where it is calculated to bring any section of the public into ridicule or contempt, or is contrary to the public interest of good morals.²⁹

Rejecting this proposal, the Committee noted that there would be an issue as to “what authority would be empowered to decide such issues” and expressed that governments could abuse such a limitation to exclude disfavoured speech.³⁰ Committee members were concerned about silencing a person’s point of view because that point of view *could* be interpreted as slanderous or discriminating. The Committee concluded that “propaganda, prejudice and similar evils were best overcome by giving free play to all views, thus permitting truth to prevail.”³¹

Because the right to freedom of religion is grounded upon a person’s right to choose his or her own religion, article 18 of the Covenant makes clear that this right must be accompanied by a full and free discourse as to the advantages and disadvantages of individual religions. Religious blasphemy and defamation of religion laws are inconsistent with such a full and free discourse and, therefore, do not fall within the narrow exceptions set forth in articles 18(3), 19(3) or 20. As Special Rapporteurs have noted,

[T]he right to freedom of religion or belief, as enshrined in relevant international legal standards, does not include the right to have a religion or belief that is free from criticism or ridicule

Defamation of religions may offend people and hurt their feelings but it does not necessarily or at least directly result in a violation of their rights, including their right to freedom of religion. Freedom of religion primarily confers a right to act in accordance with one’s religion but does not bestow a right for believers to have their religion itself protected from all adverse comment.³²

Echoing these sentiments, in February 2010, a joint declaration by the U.N. Special Rapporteur on Freedom of Opinion and Expression, the Organization for Security and Co-operation in Europe (OSCE) Representative on Freedom of the Media, and the Organization of American

²⁷ Bossuyt, *supra* note 17, at 392.

²⁸ *Id.*

²⁹ *Id.* at 375.

³⁰ *Id.*

³¹ *Id.*

³² Special Rapporteur on Freedom of Religion or Belief and the Special Rapporteur on Contemporary Forms of Racism, Racial Discrimination, Xenophobia and Related Intolerance, ¶¶ 36-37, U.N. Doc. A/HRC/2/3 (Sept. 20, 2006) [hereinafter 2006 Statement of Special Rapporteur].

States (OAS) Special Rapporteur on Freedom of Expression, and the African Commission on Human and Peoples' Rights (ACHPR) Special Rapporteur on Freedom of Expression and Access to Information, declared concern for blasphemy laws that protect beliefs, schools of thought, ideologies, religions, religious symbols or ideas.³³

B. In Reality Blasphemy Prohibitions and Defamation Laws Related to Religious Expression Protect the Violent Reactions to Critical Speech Under a Theory of Public Order.

Blasphemy prohibitions or defamation of religion laws should not be confused with “incitement” laws. It is not enough, as the Draft Comment proposes, that “States parties should repeal criminal law provisions on blasphemy . . . other than the specific context of compliance with article 20.” Most countries with active criminal blasphemy provisions justify such laws under article 20, yet liberally and arbitrarily apply the law to protect violent actors who have taken offence on behalf of their associated religious ideology. These countries abuse the understanding of “incitement” in an effort to protect the majority religion, justify oppressive laws, and even defend violent acts of the majority believer. But the limitations found in articles 19(3) and 20 have always been narrow exceptions to the fundamental individual freedoms of expression meant to protect people from violence or discrimination, not to protect religious beliefs from criticism or to protect an aggressor who acted out because his religious views were offended.

Under article 20, “incitement” refers to instances where one party instigates another party to commit an act of physical violence or discrimination against a third party. Governments, however, justify the existence of blasphemy laws because the offended are provoked to violence. Protecting against provocation is quite different than protecting against incitement. Imagine a law that justified restricting Jews or Roms from speaking out against the atrocities inflicted under the Nazi regime based out of fear that the Nazis would be provoked to act more violently. This flips articles 19(3) and 20 on their head, which were passed in light of the Nazis creating a violent uprising against the Jewish people. The modern day example is restricting the religious speech of the minority on the justification that the majority believers will react in violence, all the while, freely allowing religious leaders and scholars of the majority faith to encourage the adherents to kill or harm those who have expressed dissent against the faith. In this modern day example, articles 19(3) and 20 were intended to restrict the latter expression that outwardly encouraged violence, not the former minorities’ expression.

In reality, often times the subject group of the expression has dubiously asserted that its right to religious freedom and expression was violated by the expression, not because the expression incited violence *towards* a subject group, but because violence has resulted *from* the subject group. This proposition, that “insults or criticism aimed at a religion or religious doctrine somehow restrict adherents’ ability to freely practice their religion[,] has been rejected by renowned experts and human rights activists.”³⁴ The limitations in articles 19 and 20 were never

³³ Tenth Anniversary Joint Declaration: Ten Key Challenges to Freedom of Expression in the Next Decade (Feb. 3, 2010), <http://www.article19.org/pdfs/standards/tenth-anniversary-joint-declaration-ten-key-challenges-to-freedom-of-express.pdf>.

³⁴ Freedom House, *supra* note 25, at 2.

intended to protect violent actors; rather they were intended to protect the subject group *from* imminent violence. And as explained below, instead of creating order, blasphemy laws generally result in additional violence. Furthermore, violence from *any* group, whether or not they are the subject of offensive speech or art, is never justified and is in grave contradiction to the guiding principles of the U.N. Charter, the Declaration, and the Covenant. Criminal blasphemy laws lower the thresholds intended by articles 19(3) and 20, and as the Special Rapporteur has noted, “any attempt to lower the threshold of article 20 . . . would not only shrink the frontiers of free expression, but also limit freedom of religion or belief itself. Such an attempt could be counterproductive and may promote an atmosphere of religious intolerance.”³⁵

C. In Reality Blasphemy Prohibitions and Defamation Laws Related to Religious Expression Increase Violence and Stifle Free Expression.

In reality, blasphemy prohibitions and defamation of religion laws are frequently abused to stifle dissent, to harass minorities, and to legitimize violence. A recent study by Freedom House, which assessed various blasphemy and religious insult laws, found that these laws “give rise to the violation, not the protection, of fundamental human rights.”³⁶ The disturbing incidents described below provide a window into the violence that blasphemy or rumors of blasphemy can spawn.

Afghanistan

- **November 2007** – Ahmed Ghous Zalmai, a veteran journalist, was “arrested for publishing an unofficial translation of the Qur’an in Dari. Religious scholars alleged the translation was un-Islamic for misinterpreting verses about alcohol, begging, homosexuality, and adultery, as well as for not providing a parallel text in Arabic for comparison.” Protest demonstrations called for the death penalty for Zalmai.³⁷

Egypt

- **2007 to 2010** – Christian convert Mohamed Hegazy petitioned the courts to change his religion on his state-issued identification card from Muslim to Christian. During the three years of his legal battle, Hegazy was subjected to death threats and discrimination because of his conversion. Furthermore, Hegazy went through several attorneys after they were repeatedly threatened and physically attacked for representing him. He remains in hiding “after extremists surrounded his former house for several days and set fire to his neighbour’s residence, killing the female occupant (who was his wife’s best friend).”³⁸ In a public statement, two religious scholars from Al-Azhar University declared it legal in Islamic law for Hegazy to be killed because of his conversion.

Pakistan

³⁵ 2006 Statement of Special Rapporteur, *supra* note 32, ¶ 50.

³⁶ Freedom House, *supra* note 25, at 1.

³⁷ U.S. Dep’t of State, Bureau of Democracy, Human Rights and Labor, *Int’l Religious Freedom Report 2008 Afghanistan*, available at <http://www.state.gov/g/drl/rls/irf/2008/108497.htm>.

³⁸ Press Release, ECLJ to the UN: Egypt Must Legalize Conversion from Islam to Christianity (Jan. 25, 2010), <http://www.eclj.org/Releases/Read.aspx?GUID=31e5640b-ef9c-466b-92a8-639fd03b63e9>.

- **January 4, 2011** – Governor of the Punjab province, Salman Taseer, was assassinated. His murderer, a member of his security force, admitted to killing him because the governor termed Pakistan’s blasphemy laws as “black laws.” Doctors at the hospital where the governor was taken accounted for 26 bullets in his body.³⁹ Since the assassination, many Muslims have celebrated the murder, marching in the streets in support of the murder.⁴⁰ Asia Noreen Bibi, a mother of five children who was recently sentenced to death on an alleged blasphemy charge, lives in fear after the governor’s assassination as she awaits the appeal of her conviction. ““She knows the Muslims have announced a prize on her head and would go to any lengths to kill her.””⁴¹

- **July 2010** – After handwriting experts notified police that signatures on papers demeaning Muhammad did not match those of the accused, an armed gunman shot the accused (two Christian brothers, Rev. Rashid Emmanuel and Sajid Emmanuel). The two men were being led in handcuffs back to jail when they were shot. “Advocacy group representatives said the two bodies bore cuts and other signs of having been tortured while the brothers were in police custody. Muslims had staged large demonstrations calling for the death penalty for the brothers.” The murderers have not been brought to justice.⁴²

- **July 30, 2009** – Responding to a blasphemy rumor, an angry mob of hundreds descended upon a small village in Punjab, looting and burning over 47 homes. On August 1st, the local *Ulema* (legal scholar) lead thousands, some armed and others masked, to another village.⁴³ The violence left 20 people injured, 7 dead (which included two children ages 6 and 13), two churches burned to the ground, and more than 100 homes torched and looted.⁴⁴ The police did little to deter the mob, though criminal charges were filed by the authorities to apprehend the attackers.

Indonesia

- **June 9, 2008** – Just before government officials signed a joint decree that imposed criminal sanctions to prevent “the Ahmadiyah sect from spreading their religious practices and interpretations on the pretext that they deviate from the principal teachings of Islam,”⁴⁵ 500 Islamists militants attacked a peaceful gathering of

³⁹ *Governor of Pakistan’s Punjab Province Assassinated*, CNN, Jan. 5, 2011, <http://www.cnn.com/2011/WORLD/asiapcf/01/04/pakistan.governor.killed/?hpt=T2>.

⁴⁰ Rob Crilly, *Daughter of Murdered Politician Warned About Blasphemy Campaign*, TELEGRAPH, Jan. 12, 2011, <http://www.telegraph.co.uk/news/worldnews/asia/pakistan/8254699/Daughter-of-murdered-politician-warned-about-blasphemy-campaign.html>.

⁴¹ *Jailed Pakistani Mother Living in Constant Fear, Husband Says*, COMPASS DIRECT NEWS, Jan. 19, 2011, <http://www.compassdirect.org/english/country/pakistan/31607>.

⁴² *Compass Direct News’ Top 10 Stories of 2010*, COMPASS DIRECT NEWS, Jan. 7, 2011, <http://www.compassdirect.org/english/country/pakistan/31102>.

⁴³ Sabrina Tavernise, *Hate Engulfs Christians in Pakistan*, N.Y. TIMES, Aug. 2, 2009, <http://www.nytimes.com/2009/08/03/world/asia/03pstan.html>.

⁴⁴ *Islamists Attack Pakistani Christian Village to Avenge “Blasphemy,”* CHRISTIAN TELEGRAPH, May 3, 2009, <http://www.christiantelegraph.com/issue5701.html>.

⁴⁵ Press release, Asian Human Rights Commission, (Indonesia): Decree banning religious group must be revoked (June 12, 2008), <http://www.ahrchk.net/ua/mainfile.php/2008/2902>.

opponents to the decree, injuring more than 60 people.⁴⁶ More violence erupted after officials signed the decree when those in favor of the decree burnt several Ahmadiyah mosques and blockaded Ahmadis from entering any place of worship.

- **October 2009** – When the Advocacy Alliance for Freedom of Religion requested that the Constitutional Court review Indonesia’s blasphemy law, alleging that the law was discriminatory, abusive, and violated freedom of religion and expression, Islamic organizations, such as Islamic Defenders Front (which has been involved in numerous incidents of violence), staged “vociferous demonstrations” outside the hearings. These demonstrators threatened the petitioners and those in support of the constitutional review. Inside the courtroom, extremists attempted to intimidate witnesses who argued in favor of repeal by heckling them with various religious slogans and shouting that they were “infidel[s]” and should “repent.”⁴⁷
- **December 2009** – An angry mob attacked a group of Ahmadis leaving a house where they had been worshipping. Police reportedly arrived when the situation escalated, but many Ahmadis already fled, six were taken to the local police station, and none of the perpetrators were arrested.⁴⁸
- **October 2009** – Bakri Abdullah, a 70-year-old man, was arrested in eastern Lombok on blasphemy charges. Bakri was charged with blasphemy after he asserted he was a prophet. After local villagers attacked Bakri, security guards intervened and handed him over to the police. In May 2010, Bakri was sentenced to one year in jail for blaspheming Islam, the court reportedly showing lenience because of his older age.⁴⁹

Nigeria

- **February 2008** – A mob stormed a police station holding a woman accused of blasphemy against Islam. After police refused to hand over the woman, the mob attacked the police officers and torched the police station. The violence left one person dead and five seriously injured. The youth mob then continued to torch and loot nearby Christian homes.⁵⁰

Although many of these violent acts are committed by private persons, the Draft Comment correctly recognizes that the States Parties have a positive obligation to ensure

⁴⁶ International Crisis Group, *Indonesia: Implications of the Ahmadiyah Decree*, Asia Briefing N°78, July 7, 2008,

⁴⁷ Editorial, *Holier Than Thou*, JAKARTA POST, Feb. 4, 2010, <http://www.thejakartapost.com/news/2010/02/04/editorial-holier-than-thou.html>; Carmelia Pasandaran, *Constitutional Court Keeps Faith with Indonesia’s Controversial Blasphemy Law*, JAKARTA GLOBE, Apr.20, 2010, <http://www.thejakartaglobe.com/home/constitutional-court-keeps-faith-with-indonesias-controversial-blasphemy-law/370423>.

⁴⁸ Indah Setiawati and Hasyim Widhiarto, *Ahmadis Terrorized by FPI, Detained*, JAKARTA POST, Dec.12, 2009, <http://www.thejakartapost.com/news/2009/12/12/ahmadis-terrorized-fpi-detained.html>.

⁴⁹ *Indonesian “Prophet” Jailed for Blasphemy*, AGENCE FRANCE-PRESSE, May 7, 2010; *In Brief*, CANBERRA TIMES, May 8, 2010; Made Arya Kencana, *“Certified” Prophet Gets One Year in Jail*, JAKARTA GLOBE, May 7, 2010, <http://www.thejakartaglobe.com/home/certified-prophetgets-one-year-in-jail/373707>.

⁵⁰ *Nigeria: Deadly Sectarian Riot over Alleged Blasphemy*, IRIN, Feb. 4, 2008, <http://www.irinnews.org/Report.aspx?ReportId=76570>.

Covenant rights are protected even from private persons. “[T]he positive obligations on States Parties to ensure Covenant rights will only be fully discharged if individuals are protected by the State, not just against violations of Covenant rights by its agents, but also against acts committed by private persons or entities that would impair the enjoyment of Covenant rights.”⁵¹ In the cases described above, States Parties have largely failed in their obligations to protect people and their Covenant rights from mob violence. And in some instances the authorities have been complicit. Of equal importance is that in most cases the perpetrators of these violent acts are never brought to justice.

D. In Reality Blasphemy Prohibitions and Defamation Laws Related to Religious Expression Elevate One Religion Over Another.

Blasphemy prohibitions and defamation laws go far beyond the existing domestic legal concept of defamation, which protects *individuals* against verifiable false statements of fact that damage their reputation and livelihood. On the contrary, by definition, a blasphemous statement is defined with reference to a religious dogma or rule. Its definition and assessment will thus vary according to the religion of the legislator and judge, which is likely to be detrimental to minority believers.

Freedom of religion, as General Comment No. 22 states, encompasses both the believer and the nonbeliever.⁵² Thus, if a theist proclaims the existence of God in his or her faith, this expression is of course false and potentially offensive to the non-theist and atheist. The same would be true in the reverse. Many statements that fall under blasphemy prohibitions are simply opinions which depend on the beliefs. Even within one religion, believers sometimes question the dogma and even split into various groups. Take for instance the Ahmadiyya, a sect whose members consider themselves Muslims but do not believe Mohammad was the final prophet. Many other Muslim sects and governments do not recognize the legitimacy of Ahmadis’ beliefs and would consider a statement that Mohammad was not the final prophet blasphemous. The debate on religious beliefs remains a large part of religious discourse. It is this discourse and the diversity of religious beliefs that article 18 intended to protect.

Even a law that is neutrally cast “for the respect of the right or reputations of others” can be highly problematic in suppressing beliefs not favoured. These laws, although neutral on their face, typically place the state in a role of adjudicating which religious viewpoints may be expressed and “the business of judging the truth claims of religions.”⁵³ Having the state judge whether a truth claim is in fact true would surely infringe on the person’s right to freedom of religion. This practice would also entangle the government’s role with religion and result in protecting one religious belief, typically the interpretation of the majority, over other minority beliefs. The result is elevating one religious belief over another. As the Special Rapporteur on

⁵¹ U.N. Human Rights Committee, The Nature of the General Legal Obligation on States Parties to the Covenant, General Comment No. 31, ¶ 8, U.N. Doc. CCPR/C/21/Rev.1/Add.13 (Mar. 29, 2004).

⁵² U.N. Human Rights Committee, The right to freedom of thought, conscience and religion (Art. 18), General Comment No. 22, ¶ 2, U.N. Doc. CCPR/C/21/Rev.1/Add.4 (“Article 18 protects theistic, non-theistic and atheistic beliefs, as well as the right not to profess any religion or belief.”).

⁵³ Freedom House, *supra* note 36, at 7.

freedom of religion or belief has noted, numerous examples exist where religious minorities are persecuted even under neutrally cast laws as a result of overzealous application.⁵⁴

Furthermore, because blasphemy prohibitions and defamation of religion laws deviate sharply from universal human rights standards, they cannot be saved by including in the Draft Comment that such laws must comply with “other provisions of the Covenant” and not be applied discriminately to favor one religion over another. Without objectively verifiable truths within religion, even the hypothetical non-discriminating blasphemy law would only work to stifle religious expression. Imagine a law that forbids criticizing any religious belief or making any statement that although true in one faith is false in another. The result would be the complete lack of any religious discussion or debate. As one NGO reports, blasphemy and defamation laws related to religious expression “turn[] human rights upside down, restricting the speech and actions of men and women for the sake of disembodied ideas as such, and replacing equality and the rule of law with deference to religious orthodoxy and subjective feelings of outrage.”⁵⁵ Instead of legitimizing oppressive laws that stifle a person’s right to freedom of expression, the Draft Comment should condemn all blasphemy prohibitions and defamation of religion laws.

E. Criminal Blasphemy and Defamation Laws are Incompatible with the Covenant and Other International Human Rights Laws.

Paragraph 49 of the Comment provides, “States parties *should* consider the decriminalisation of defamation and, in any case, *the application of the criminal law should only be countenanced in the most serious of cases.*”⁵⁶ This provision does not go far enough to protect the fundamental right of expression. First, criminal defamation laws that relate to religious expression, in any case, are inconsistent with the aims of the Covenant and the Universal Declaration of Human Rights. As explained above, these laws protect the favoured ideology over the individual liberties human rights laws were designed to protect. Moreover, criminal sanctions for statements that offend or criticize an ideology will always fail the proportionality requirement. Second, even if criminal defamation laws were somehow compatible with the Covenant or other human rights laws, this provision provides no guidance on what constitutes the “most serious of cases.” Such a vague statement can only lead to additional confusion and misguidance. The Committee should expressly state that criminal blasphemy and defamation of religion laws are incompatible with the Covenant.

IV. The Relationship of Articles 19 and 20.

Recently, the ECLJ filed a report with the Office of the High Commissioner for Human Rights, Civil Society Section, at their request, in preparation for the 2011 Expert workshops on the Prohibition of Incitement to National, Racial, or Religious Hatred. In an effort not to be redundant in our submissions, we summarize our analysis here and recommend how the Draft Comment should be amended.

⁵⁴ Interim Report of the Special Rapporteur on freedom of religion or belief, ¶ 29, U.N. Doc. A/62/280 (Aug. 20, 2007).

⁵⁵ Freedom House, *supra* note 25, at 12.

⁵⁶ Draft Comment, ¶ 49 (emphasis added).

The Draft Comment does not go far enough to clarify how article 19 and 20 interrelate. If the Draft Comment is going to comment on article 20, it must clearly explain what “extreme” cases fall under article 20. To preserve freedom of expression, “extreme” cases must be narrowly defined to include both a subjective and an objective incitement component. Article 20’s limitation on the freedom of expression must be limited to instances when the speaker maliciously intends to incite severe and imminent violence. And whether the expression incites imminent violence must be adjudged from an objective standard and not from the perspective of the individual or group claiming offence. Only when the term “incitement” is analyzed from both the subjective intent of the speaker and an objective view, does article 20 truly ensure that the freedom of expression enshrined in article 19 will be respected. Anything less and societies will be held hostage to the excessive sensitivities of certain individuals and the groups in the majority.

To preserve the right to freedom of expression under article 19, all individuals and groups, including those holding sincere religious beliefs, must tolerate critical public statements and debate about their activities, teachings, and beliefs. Those individuals or groups with sincerely held religious beliefs must be free to criticize or comment on behaviours that the tenets of their faith consider immoral. These public expressions of faith or religious morality should not be liable to prosecution simply because the tenets of the faith oppose certain ideas or practices; such expressions are fundamentally protected by article 19 and expressed peacefully. Society must not fear debate, for it is through open discussion that ideas should be countered and respect given to a diversity of views. In the balance between article 19’s freedom of expression and article 20’s prohibition of “incitement,” the balance must protect statements of disagreement with or criticism of a particular ideology. If “incitement” is analyzed from the perspective of the offended or lacks the requirement that the speaker intend to incite imminent violence, article 20 will effectively chill expression and encourage the majority to squelch any controversial expression by the minority. Instead, article 20 of the Covenant should target only malicious expressions and expressions that objectively incite imminent violence. This balance forbids intentional and grave offences while preserving a forum for the free debate of ideas.

CONCLUSION

These recommendations help ensure that States Parties are clear on both their positive and negative obligations under article 19. They ensure the free exchange of ideas, whether in peaceful debate or criticism, that preserves a free and democratic society. We respectfully request that the Committee revise the Draft Comment accordingly. The Draft Comment should clearly state that religious laws, or official ideologies, are not “laws” under the meaning of article 19(3). It should explain the term “others” in article 19(3)(a) does not permit restrictions of expression to protect the integrity of a religious ideology. It should clearly state that no right exists to protect the reputation of an ideology, and although the term “others” may relate to members of a community defined by its religious faith, it refers to the rights of the *individual* members to freely exercise their freedom of religion as expressed in article 18 and freedom of expression as expressed in article 19. The Draft Comment should expressly state that criminal defamation of religion laws are incompatible with the Covenant. The Draft Comment should affirm that blasphemy and defamation laws regarding religious expressions are incompatible

with the Covenant. Finally, for clarity, the Draft Comment should articulate that article 20, as it relates to article 19, targets only malicious expressions and expressions that objectively incite imminent violence.