

Durban Review Conference: A New Defeat for the Concept of Defamation of Religion?

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1. The Concept of Defamation of Religion

1.1. The Origin of the Concept

The concept of «defamation of religion» finds its origin in the traditional offence of defamation, which is defined as the «act of harming the reputation of another by making a false statement to a third person»¹. Defamation is traditionally prohibited in most states and is accepted as a legitimate limitation to freedom of expression. With time, the concept has developed to also encompass another form: group defamation, meaning to hurt the reputation of a group. This new notion is however more problematic as it can «furnish undeserved protection to the decadent customs and practices» of this group and therefore allow too wide limitations to freedom of expression².

But defamation of religion goes even beyond the concept of group defamation, «since it may even prohibit the defamation of religious ideas and doctrine»³, meaning protecting a theoretical concept, and not a person or a group of persons anymore. In this sense, defamation of religion is closely associated with the offence of blasphemy, which is described as the «irreverence toward God, religion, a religious icon, or something else considered sacred»⁴ and which is still recognised as a legitimate limitation to freedom of expression in some countries.

1.2. The United Nations Resolutions on «Defamation of Religion»

On the international scene, the use of the concept of defamation of religion is quite recent. Moreover, it is not

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¹ *Black's Law Dictionary Pocket Edition*, Westgroup, St. Paul (Minnesota), 2001 (2nd edition), p. 183.

² A. Khan, *Combating Defamation of Religions*, in «American Muslim», January 2007, p. 4, available at SSRN:<http://ssrn.com/abstract=954403>.

³ *Ibidem*.

⁴ *Black's Law Dictionary Pocket Edition*, cit., p. 70.

defined in any international instrument. Today, in this context, the term is understood as having a wide definition encompassing any criticism of a religion which should not be protected under freedom of expression. In the last decade, several resolutions and reports have been passed and presented on this issue at the United Nations level. Since 2005, resolutions on «combating defamation of religion» have been adopted every year in the General Assembly⁵. These new resolutions have been adopted even though another resolution, initiated by the EU countries, is also adopted every year by the same UN organ on «elimination of all forms of intolerance and of discrimination based on religion or belief»⁶.

The resolutions on «defamation of religion» don't define the notion. They however use alternatively the term «negative stereotyping of religion», which demonstrates that «defamation of religion» is a broad and vague concept, not technically construed. This last expression of «negative stereotyping of religion», which is perceived as less dangerous, for reasons that will be examined below, has been used at the Durban Conferences, in order to avoid the use of the more problematic one of «defamation of religion».

The General Assembly resolutions stress that defamation of religion is a threat to the protection of human rights because it causes illicit restriction to the freedom of religion of its adherents as well as incitement to religious hatred and violence. They however single out one religion harmed by this phenomenon: Islam, which is said to be wrongly associated with terrorism and human rights violations since 11 September, especially in the media. This is however not a surprise given that these texts have always been introduced by the group of countries of the Organisation of the Islamic Conference (OIC).

Similar resolutions have also been adopted by the Human Rights Council and by the ex-Human Rights Commission every year since 1999⁷. These texts don't define clearly the term «defamation of religion» either and also single out Islam. They have been traditionally introduced by Pakistan on the behalf of the states of the OIC. In 1999, Pakistan first introduced a draft resolution entitled *Defamation of Islam* in the Commission on Human Rights. In response to this, the EU proposed the use of a different title, the *Stereotyping of Religion*, which was refused

⁵ E.g.: United Nations, General Assembly, *Combating Defamation of Religions*, A/RES/60/150, 20 January 2006, and A/RES/61/164, 21 February 2007.

⁶ E.g.: United Nations, General Assembly, *Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief*, A/RES/61/161, 21 February 2007, and A/RES/59/199, 22 March 2005.

⁷ E.g.: United Nations, Human Rights Council, *Combating Defamation of Religion*, A/HRC/RES/4/9, 30 April 2007, available at http://ap.ohchr.org/documents/sdpage_e.aspx?b=10&se=67&t=11, and *Defamation of Religion*, E/CN.4/RES/1999/82, 30 April 1999, available at http://ap.ohchr.org/documents/sdpage_e.aspx?b=1&se=9&t=11.

by the OIC. We will see below how the same confrontation between the EU and the OIC countries concerning the language on this issue reappeared in the context of the Durban Review Conference. It is also worth noting that this first 1999 resolution was adopted before the occurring of the events of 11 September 2001, and long before the Danish cartoons episode of 2006. These events have however intensified the popularity of those resolutions, as well as helped strengthen their language.

The EU countries have systematically voted against the resolutions on «Combating defamation of religion» in all forums. According to them, these texts fail to protect the right to freedom of expression and the freedom of religion which encompasses the right to choose or change religion. Moreover, they also single out Islam without deploring or sanctioning the defamation of other religions. European countries might also vote against these texts because since their adoption, some countries have used them to pass national anti-religious defamation legislation that has been used in some cases to sanction and silence political dissidents⁸. Moreover, the fact that the concept of «defamation of religion» isn't properly defined in the resolutions or in any other text is also alarming for Western states. It could be said that the absence of clear definition might actually be done on purpose by the authors of the resolution who want to keep the concept as wide and vague as possible, rather than delimitating its content, so as to have a higher number of countries supporting it.

The last resolution passed under this title in the Human Rights Council, at its 11th session in March 2009, one month exactly before the end of the Durban Review Conference. Here again the opposition between Western and OIC countries as well as non-aligned states is evident in the voting⁹. Many Western NGOs criticised the adoption of this last resolution, especially as in the parallel negotiations on this issue in the Durban Review Conference, «a trend to move away from the concept [of defamation of religion] had been witnessed, and the notion had disappeared from a draft outcome document which received large support». The Fédération Internationale des Droits de l'Homme (FIDH) also regretted that this resolution was promoting a «politically motivated notion, instead of fighting effectively against the incitement to religious hatred

⁸ P. Kapai, A. Sy Cheung, *Hanging in a Balance: Freedom of Expression and Religion*, 2008, p. 10, available at http://works.bepress.com/puja_kapai/1.

⁹ United Nations, Human Rights Council, *Combating Defamation of Religions*, A/HRC/10/L.11, 26 March 2009, available at http://www2.ohchr.org/english/bodies/hrcouncil/docs/10session/edited_versionL.11Revised.pdf.

through a resolution promoting the legal obligations of the states»¹⁰. In the last section we will come back to this argument according to which the debate on this topic is motivated by political reasons and not for the sake of a real solution to the legal problematic.

1.3. The United Nations Reports on «Defamation of Religion»

In addition to the resolutions mentioned above, some of the UN Special Rapporteurs, as well as the High Commissioner for Human Rights have recently produced reports on «defamation of religion». In 2005, prior to the Danish cartoons incident, the Special Rapporteur on Contemporary Forms of Racism, Doudou Diène, presented a report to the Commission of Human Rights on *Defamation of Religions and Global Efforts to Combat Racism: Anti-Semitism, Christianophobia and Islamophobia*¹¹. The report was actually required by the resolutions on defamation of religion, which asked him to regularly report on the cases of defamation of religion as well as on the legislations adopted around the world to prohibit it. In 2006, Doudou Diène produced another report on the situation of Arab and Muslim people in various parts of the world, concluding that defamation of religion had become trivialised. His attacks on the Danish cartoons publishers were severe as he held that «these newspapers' intransigent defense of unlimited freedom of expression is out of step with international norms that seek an appropriate balance between freedom of expression and religious freedom, specifically the prohibition of incitement to religious and racial hatred»¹². In his recommendations he urged states to demonstrate political commitment to combating all forms of defamation of religions, as well as to take action against acts of Islamophobia.

The High Commissioner for Human Rights also presented a report on *Combating Defamation of Religions* to the Commission on Human Rights in 2006. In her conclusions she held that the Commission was «rightly alarmed by increasingly serious instances of intolerance and discrimination on the grounds of religion or belief», defamation of religions being one of its most aggressive manifestations¹³. The Special Rapporteur on Freedom of Religion or Belief, Asma Jahangir, also submitted her point of view on this question in a 2006

¹⁰ FIDH, UN Human Rights Council, *Resolution on Defamation of Religion: Moving Away from the Human Rights Mandate*, 27 March 2009, available at <http://www.fidh.org/UN-Human-Rights-Council-resolution>.

¹¹ United Nations, Commission on Human Rights, *Report by the Special Rapporteur on Contemporary Forms of Racism, Racial Discrimination, Xenophobia and Related Intolerance: Addendum 4, Defamation of Religions and Global Efforts to Combat Racism: Anti-semitism, Christianophobia and Islamophobia*, 13 December 2004.

¹² United Nations, Commission on Human Rights, *Report by the Special Rapporteur on Contemporary Forms of Racism, Racial Discrimination, Xenophobia and Related Intolerance on the Situation of Muslim and Arab Peoples in Various Parts of the World*, 13 February 2006.

¹³ United Nations, Commission on Human Rights, *Report by the High Commissioner for Human Rights on Combating Defamation of Religion*, 6 February 2006.

joint report with Doudou Diène to the Human Rights Council on *Incitement to Racial and Religious Hatred and the Promotion of Tolerance*. Her opinion on defamation of religion was however far more moderate as she seemed to accept far less limitations to freedom of expression. During the 2nd session of the Human Rights Council, where those reports were presented, the OIC group called for setting-up consultations to examine the possibility of drafting a Convention to combat defamation of religions and to promote religious tolerance¹⁴.

From this analysis of the different circumstances where the concept of defamation of religion has been handled, it can be said that this term is relatively new but also relatively vague as it is not clearly defined in any document. Moreover, this notion is quite contentious as it is only supported by a certain group of countries and human rights experts, but also criticised by many of them as well as NGOs. Finally the concept is mainly associated with one particular religion, Islam, and tends to ignore the insulting of other religions, and mostly, minority ones. All these features will reappear in the study of the Durban Review Conference. But before going into the study of this Conference, we will first examine the reasons of the debate around this concept and more explicitly, the specific threats that it poses to freedom of expression and human rights in general.

2. The Threats Posed by the Concept of «Defamation of Religion» to Freedom of Expression

The prohibition of defamation, understood in its original sense, has always been seen as a legitimate limitation to freedom of expression because it was seen as necessary to protect the reputation of a person, which is essential to its human dignity. Moreover, this restriction to freedom of speech is also limited in its spectrum, as it only concerns the reputation of an individual, which is a narrow topic of discussion. The prohibition of defamation of religion however limits freedom of speech only *in abstracto*, as it affects the religion itself, which cannot be said to have a «human dignity». Some however argue that speech insulting religion hurts the human dignity of its believers and violates their religious

¹⁴ K. Lindahl, *Racism in the Second Session of the Human Rights Council*, Islamic Human Rights Commission, 2007, p. 7, available at <http://www.ihrc.org.uk/file/RacismHRC.pdf>.

sensibility and right to freedom of religion and that it should therefore be prohibited. We will analyse the different arguments concerning this conflict between the concept of defamation of religion and the right to freedom of expression, in a theoretical and legal approach.

2.1. The International Legal Standards

Article 18 of the International Covenant on Civil and Political Rights states that «everyone shall have the right to freedom of thought, conscience and religion» and that this right includes «freedom to have or to adopt a religion or belief of his choice, and freedom, either individually or in community with others and in public or private, to manifest his religion or belief in worship, observance, practice and teaching». As with most articles, it is however stated thereafter that this right can be subject to limitations which «are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others».

Article 19 of the Covenant holds that «everyone shall have the right to hold opinions without interference and shall have the right to freedom of expression». The article provides that the exercise of this right «carries with it special duties and responsibilities» and therefore might be subject to certain restrictions but only when «necessary for the respect of the rights or reputation of others or for the protection of national security or of public order or of public health or morals». The resolutions on «Combating defamation of religions» analysed above always included this principle and lately even added the «respect for religions and beliefs» as a ground allowing for limitations¹⁵ which is however not recognised in the Covenant. This last section of Article 19 however proves that the protection of the reputation of others is recognised as a legitimate ground for limiting freedom of expression. Moreover, it has been recognised that this ground could be extended to the protection of the interests of a community as a whole. This could therefore make some think that the prohibition of defamation of religion is a legitimate limitation, because it would protect the reputation of a religious community¹⁶.

Article 20 of the Covenant tries to offer a solution to the

¹⁵ United Nations, General Assembly, *Combating Defamation of Religion*, A/RES/62/154, 18 December 2007.

¹⁶ United Nations, General Comment no. 10 (19), A/38/40 (1983), Annex VI, p. 109.

situation where those two rights enter into conflict. It holds that «any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law». If Article 19 stresses that states *may* limit freedom of expression for the reasons it lists, Article 20 holds that states *must* ensure protection against such incitements on these grounds¹⁷. States *may* therefore prohibit some group defamation under Article 19(3) that does not qualify under Article 20¹⁸. The prohibition of defamation of religion could therefore be seen as something which can be adopted by a state, without being mandatory. We therefore see that there is already a provision in international human rights instruments to fight the phenomenon of «defamation of religion» when it incites to hatred or violence. However, some countries want to push for even stronger protection against it. This idea might be inspired by the more important guarantees that exist in the field of the protection against racism. Article 4 of the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD) goes further than Article 20 of the Covenant as it requires states to forbid not only the advocacy or incitement to hatred or violence, but also «all dissemination of ideas based on racial superiority or hatred». This provision, contrary to Article 20 of the Covenant, doesn't require an element of incitement to violence to prohibit the speech. This provision grants better protection against the phenomenon of racism, but less for the right to freedom of expression and this is why some European countries actually made reservations to it as their conception of freedom of expression is wider. But however far this Article 4 goes concerning the restrictions imposed on freedom of expression, it does so only for the issue of racism and not for discrimination on the basis of religion. This is why the countries who are pushing for the prohibition of defamation of religion actually want to adopt the same standards for religion. Despite the definition of freedom of speech in the Covenant, countries around the world have different conceptions of this principle. Western states have a very wide conception of freedom of expression and accept very few exceptions to it, the USA having in this respect the most extreme vision. This conception is however not shared by the majority of countries around the world, who accept larger limitations to freedom of

¹⁷ P. Kapai, A. Sy Cheung, *Hanging in a Balance...*, cit., p. 6.

¹⁸ L. Henkin, *Group Defamation and International Law*, in M.H. Freedman, E.M. Freedman (eds.), *Group Defamation and Freedom of Speech. The Relationship Between Language and Violence*, Greenwood Press, Santa Barbara (CA), 1995, p. 129.

expression, because they don't see it as more important than other human rights. This division on the «extent» of the right to freedom of expression can explain why countries disagree on the question whether the prohibition of defamation of religion violates this principle.

2.2. The Contradiction with the «Philosophy» of Human Rights

There are two sets of arguments against the prohibition of defamation of religion. The first one is that this concept violates the implicit logic behind the system of human rights, which is, the protection of human dignity. According to some, defamation of religion doesn't attack persons, but rather abstract concepts, which are not protected by human rights instruments. This idea is supported by Freedom House, according to which the concept of defamation of religion is not only incoherent with the principle of freedom of expression, but more generally with the whole philosophy behind the body of human rights. This body, as its name itself underlines, provides the most basic rights for the protection of every human being, and not for the protection of abstract or theoretical ideas, beliefs or philosophies¹⁹.

In December 2008, the Special Rapporteurs on Freedom of Expression of the UN, the Organisation of American States and the African Commission's, as well as the OSCE's Representative on Freedom of the Media, made a Declaration for the 60th anniversary of the Universal Declaration of Human Rights, for which the NGO Article 19, which is promoting the respect of freedom of expression, organised a global campaign for free expression. This Declaration focused on the main current threats to this right, among which it included the prohibition of defamation of religions. It denounced the potential threat posed by this concept to freedom of expression, the restrictions to which «should be limited in scope to the protection of overriding individual rights and social interests, and should never be used to protect particular institutions, or abstract notions, concepts or beliefs, including religious ones»²⁰. Others also held that for the sake of democratic principles, it is crucial that abstract concepts such as religion remain open to public debate²¹.

¹⁹ Freedom House, *Fact Sheet on Defamation of Religions*, March 2009, available at <http://www.freedomhouse.org/uploads/032009/CampaignAgainstDefamationOfRel.pdf>.

²⁰ Article 19, *Joint Declaration on Defamation of Religions and Anti-terrorism and Anti-extremism Legislation*, 10 December 2008, available at <http://www.article19.org/pdfs/other/joint-declaration-on-defamation-of-religions-and-anti-terrorism-and-anti-ext.pdf>.

²¹ M. Grinberg, *Defamation of Religion v Freedom of Expression: Finding the Balance in a Democratic Society*, in «Sri Lanka Journal of International Law», July 2006, p. 1.

2.3. The Contradiction with International Legal Standards

The second kind of arguments against the prohibition of defamation of religion, is based on legal considerations. These refer to the traditionally accepted prohibition of defamation, as well as to the international provisions on the limits to freedom of expression, such as found in Articles 19 and 20 of the Covenant.

2.3.1. The Contradiction with the Traditional Prohibition of Defamation

Concerning the first legal argument, the Declaration drafted by the group of Special Rapporteurs on Freedom of Expression underlines that the concept of defamation of religion doesn't accord with the traditional concept of defamation «which refers to the protection of reputation of individuals, while religions, like all beliefs, cannot be said to have a reputation of their own»²². This idea is also shared by the Freedom House, according to which the concept is also vague and therefore open to abuse because even a speech questioning some principles of a religion could fall into this category, and on an arbitrary base²³.

2.3.2. The Contradiction with the Right to Freedom of Expression

Moreover, the prohibition of defamation of religion is according to some, also inconsistent with the international provisions protecting freedom of expression. As set in Articles 19 and 20 of the Covenant, restrictions to this right have to respect some conditions, which might not be present in the case of defamation of religion. We have seen above that the protection of the reputation of others, including a community, is a legitimate ground for allowing limitations to freedom of speech. However, it is argued that the purpose of prohibiting defamation of religion is not to protect the believers themselves, but rather to protect the religion from any kind of insult or criticism.

2.3.3. The Existing Prohibition of Incitement to Racial and Religious Hatred

Many argue that defamation of religion could in fact already

²² Article 19, Joint Declaration on Defamation..., cit.

²³ Freedom House, *Fact Sheet on Defamation of Religions*, cit.

be combated through the existing and more balanced conventional prohibition of incitement to racial or religious hatred and discrimination, as set in Article 20 of the Covenant²⁴. However, this article requires a certain level of incitement to violence that might not be found in all cases of defamation of religion. The prohibition of defamation of religion is not based on a risk of violence, but rather on the violation of a person's sensibility or feelings. Nevertheless, it is not sure that freedom of religion protects religious feelings, because freedom of expression should include the right to express views critical of religious opinions of others²⁵. This view is also shared by the Venice Commission of the Council of Europe which states that there is a difference between blasphemy and insults based on a person's religion. According to it, blasphemy is the insult to religious feelings and it should not be prohibited. Incitement to religious hatred should however be criminalised, as it is already in most European countries²⁶. Accordingly, the Special Rapporteur on Freedom of Religion or Belief, Asma Jahangir, held that «defamation of religions may offend people and hurt their religious feelings but it does not necessarily or at least directly result in a violation of their rights, including their right to freedom of religion» because «freedom of religion [...] does not bestow a right for believers to have their religion itself protected from all adverse comment»²⁷.

Speech, under Article 20, should be prohibited when it «raises or strengthens hostile feelings vis-à-vis adherents of a certain religion, in order to uphold the latter's right to be protected from religious hatred»²⁸. The Special Rapporteur on Freedom of Religion or Belief, Asma Jahangir, goes even further by saying that the speech should incite to «imminent acts of violence or discrimination against a specific individual or a group»²⁹. Therefore, if a criticism, even outrageous, doesn't contain this risk, then it should be tolerated. Deciding otherwise would destroy the delicate balance between the principle of freedom of expression and the right to be free from discrimination³⁰. It is however debatable how imminent should this threat of violence be. In a more nuanced way, some have argued that «the law should only intervene if speech is so hostile that it would inhibit those who hold such beliefs from exercising or manifesting their religion openly and freely»,

²⁴ A. Khan, *Combating Defamation of Religions*, cit., p. 5, and Article 19, Joint Declaration on Defamation..., cit.

²⁵ M. Grinberg, *Defamation of Religion v Freedom of Expression...*, cit., p. 21.

²⁶ European Commission for Democracy Through Law, *Report on the Relation Between Freedom of Expression and Freedom of Religion*, 23 October 2008, available at [http://www.venice.coe.int/docs/2008/CDL-AD\(2008\)026-e.pdf](http://www.venice.coe.int/docs/2008/CDL-AD(2008)026-e.pdf).

²⁷ United Nations, Human Rights Council, *Report of the Special Rapporteur on Freedom of Religion or Belief, Asma Jahangir, and the Special Rapporteur on Contemporary Forms of Racism, Racial Discrimination, Xenophobia and Related Intolerance, Doudou Diène, A/HRC/2/3*, 20 September 2006.

²⁸ J. Temperman, *Blasphemy, Defamation of Religions & Human Rights Law*, in «Netherlands Quarterly of Human Rights», vol. 26, no. 4, 2008, p. 529.

²⁹ *Ibidem*.

³⁰ Freedom House, *Fact Sheet on Defamation of Religions*, cit.

which is really what freedom of religion is meant to protect³¹. In addition to the latter argument, Freedom House holds that «the concept of “defamation of religions” falsely equates religious belief with race» which cannot be treated similarly because a religion, contrarily to someone’s race is not predetermined or immutable. This doesn’t mean that the religion of a person isn’t to be taken into account when applying the principle of non-discrimination, but that any criticism of it does not automatically leads to discrimination or incitement to hatred³². Asma Jahangir, underlined that «the elements that constitute a racist statement are not the same as those that constitute a statement defaming a religion» and that the legal measures adopted to fight racism may therefore not necessarily be applicable to defamation of religion. According to her, as the 1981 UN Declaration on the Elimination of All Forms of Intolerance and of Discrimination based on religion or belief contains no provision similar to that in ICERD Article 4, defamation of religion shouldn’t be considered the same way as a racist statement. Therefore also, Article 20 of the Covenant cannot be raised to prohibit defamation of religion, if there is no concurrent incitement to violence. No international provision similar to Article 4 of ICERD exists for the protection of religion, as it does there with the prohibition of racist speech. Only incitement to religious hatred exists in this field, but the threshold for this offence is more difficult to reach.

2.3.4. *The Contradiction with the Right to Freedom of Religion*

Finally, it is argued that the prohibition of defamation of religion is contrary to the right to freedom of religion itself because «the very exercise of one’s religion in a certain fashion might be considered heretical in the eyes of another person»³³. Such prohibition would limit the debate on specific ideas both for believers and believers of other religions as well as for non-believers. Furthermore, if everybody recognises that combating religious intolerance is definitely a good idea, some argue that prohibiting criticism and defamation of religion could just have the opposite effect of stirring it up even more³⁴. This counter-productive effect has also been found in a recent study of the European Center for Law and Justice according to which «laws based on the concept of defamation of religion

³¹ P. Kapai, A. Sy Cheung, *Hanging in a Balance...*, cit., p. 26.

³² Freedom House, *Fact Sheet on Defamation of Religions*, cit.

³³ J. Temperman, *Blasphemy...*, cit., p. 544.

³⁴ Freedom House, *Fact Sheet on Defamation of Religions*, cit.

actually help to create a climate of violence»³⁵. Asma Jahangir, also held that as freedom of expression is an essential part of the right to freedom of religion «any attempt to lower the threshold of Article 20 of the Covenant would not only shrink the frontiers of free expression, but also limit freedom of religion or belief itself»³⁶.

From the presented analysis we can conclude that there are many arguments against the legitimacy of the concept of defamation of religion as an acceptable limit to freedom of expression or as a human rights concept. This is why it was difficult for the OIC countries to impose it in the context of the 2001 Durban Conference and of the 2009 Review Conference. The compromise that was finally reached in those contexts however, reveals that the arguments described in this section were taken into due consideration by the Western states, who eventually managed to pass their ideas.

3. The Context of the «Durban Conferences» on Racism

The prohibition of discrimination is one of the core principles of human rights. However, at the beginning of the 21st century, discriminations, and mostly racism, are still a universal problem. This unacceptable reality has been acknowledged by many actors including the United Nations. To combat this evil, the UN organised, in the beginning of September 2001, a World Conference against Racism, Racial Discrimination, Xenophobia and Related Intolerance in the city of Durban in South Africa. It was described as «a landmark event in the struggle to improve the lives of millions of human beings around the world who are victims of racial discrimination and intolerance»³⁷.

After intensive debates, the Conference adopted the Durban Declaration and Program of Action (DDPA) by consensus. This text provided a comprehensive new framework to guide the actions of the different actors to address the problematic of racism around the world. The DDPA addresses many different aspects of the problematic of racism, such as the fight against poverty, the strengthening of education or of the respect for the rule of law. The negotiations around that document were quite tense, with the USA and Israel leaving the Conference

³⁵ European Center for Law and Justice, *Combating Defamation of Religions, Submission to the UN Office of the High Commissioner for Human Rights*, June 2008, available at http://www.eclj.org/PDF/080626_ECLJ_submission_to_OHC_HR_on_Combating_Defamation_of_Religions_June2008.pdf.

³⁶ United Nations, *Human Rights Council, Report of the Special Rapporteur on Freedom of Religion or Belief, Asma Jahangir...*, cit.

³⁷ United Nations website on the Durban Review Conference, <http://www.un.org/durbanreview2009/background.shtml>.

before the end. This event is also remembered by many for the anti-Semitic statements made by the NGO Forum organised in parallel to the Conference, which was the main reason for the Israeli and the US walkout. The DDPA however, was an acceptable document in human rights terms, which also contained a paragraph on the negative stereotyping of persons or communities based on their religion.

In the following section, we will analyse how the specific issue of «defamation of religion» was dealt with by the different actors during the Durban Review Conference as well as the solution that was finally reached on this point.

In 2006, it was decided to organise a Durban Review Conference in 2009 to assess the progress that had been made on the implementation of the DDPA but explicitly not to «re-open discussion on issues or introduce new issues»³⁸. During both Durban Conferences, the issue of «defamation of religion» caught much of the attention and caused many debates and disagreements between the different geographical groups. To prevent any dangerous consequences in this second Conference, the EU member states adopted in the end of 2008 specific «red lines» to show publicly what they were not prepared to accept in the Outcome Document of the Conference. One of these red lines was the «reopening the 2001 Durban declaration by inserting a prohibition against “defamation of religion”, designed to restrict free speech and impose the censorship inherent in Islamic anti-blasphemy laws»³⁹.

4. The Compromise Reached at the Durban Review Conference on the Conflict Between «Defamation of Religion» and Freedom of Expression

The issue of «defamation of religion» was one of the controversial topics of the 2001 and 2009 Durban Conferences. In 2001, the debate was concluded by the adoption of paragraph 60 of the DDPA which recognised the «increased negative stereotyping, hostile acts and violence against communities because of their religious beliefs». The document doesn't mention the concept of «defamation of religion» even though some had argued in favour of it during

³⁸ United Nations website on the Durban Review Conference, cit.

³⁹ European Parliament, Recommendation to the Council on the EU Priorities for the 64th Session of the UN General Assembly, 24 March 2009, available at <http://www.europarl.europa.eu/sides/getDoc.do?type=TA&reference=P6-TA-2009-0150&language=EN&ring=A6-2009-0132>.

the negotiations. Moreover, the text holds that the fight against this negative stereotyping should be made in accordance with the principle of freedom of expression.

The Review Conference was always meant to only assess the progress made on the implementation of the DDPA and not to introduce new issues. However, the issue of «defamation of religion» came back to the negotiations in 2009, pushed by the OIC countries. The reason for this can be found in some events that took place between 7 September 2001 and 2009, such as the attacks of 11 September or the Danish cartoons, which caused an uprising in the «negative stereotyping of persons based on their religion». This attitude could have also been foreseen given the numerous resolutions passed in the UN organs on «combating defamation of religion» since 2001.

4.1. The State of the Text in January 2009

To prepare this Review Conference, countries and regional groups were invited to submit contributions on their assessment of the progresses made on the implementation of the DDPA, which were then compiled to provide a text on which the negotiations could start. In January 2009, the text was still a lengthy patchwork of more than 200 paragraphs with many incoherencies. It contained some references to the concept of defamation of religion, as well as other terms and principles dangerous for the principle of freedom of expression. At that time, paragraph 26 of the draft text affirmed that the Conference noted «with concern the instances of defamation of religions, which manifests itself in generalized and stereotypical association of religions, in particular Islam, with violence and terrorism, thus impacting negatively on the rights of individuals belonging to these religions, including Muslim minorities, and exposing them to hatred and discrimination»⁴⁰. Paragraph 53 also mentioned that Islamophobia was a very disturbing phenomenon, including when it was «expressed in the form of defamation of religions» where «it takes cover behind the freedom of expression»⁴¹.

In the same way, paragraph 159 urged states «to take firm action against negative stereotyping of religions and defamation of religious personalities, holy books, scriptures

⁴⁰ United Nations, *Revised Version of the Technically Reviewed Text Submitted by the Chairperson-Rapporteur of the Intersessional Open-ended Working Group Mandated to Continue and Finalize the Process of Negotiations on and Drafting of the Outcome Document of the Durban Review Conference*, 23 January 2009, available at http://www.un.org/durbanreview2009/pdf/intersession_open_ended19109.pdf.

⁴¹ *Ibidem*.

and symbols»⁴². Paragraph 160 went even further by calling on states «to develop, and where appropriate to incorporate, permissible limitations on the exercise of the right to freedom of expression into national legislation»⁴³. Finally, paragraph 216 stated that «national laws alone cannot deal with the issue of defamation or negative stereotyping of religions» and that «a framework is needed to provide guidelines for States – aimed at countering defamation of religions»⁴⁴. This last paragraph refers to the adoption of additional norms on the issue of racism and discrimination, and to the mandate of the Ad Hoc Committee established after the first Durban Conference to work on this issue. The EU was since the beginning against the setting up of this Committee, as it was pushed by the OIC and African group to develop norms on for example on the discrimination on the basis of religion and on other even more dangerous topics. All these paragraphs were criticised at the time by Human Rights Watch (HRW) who saw them as violating international human rights standards⁴⁵.

But in parallel, other paragraphs such as the no. 28 underlined that the Conference reaffirmed «the indivisibility of all human rights, and stresses that the fight against racial and religious hatred should not serve as a pretext to legitimize impermissible limitations to freedom of expression»⁴⁶.

In the first months of 2009, the issue of «defamation of religion» and other concepts such as the incitement to religious hatred and violence were felt by the EU as being the most difficult points to negotiate. The OIC countries were pushing so much for strong language on this issue and with the support of other countries that many politicians and academics in Europe started to doubt about the positive outcome of this Conference as well as of the participation of their countries to it⁴⁷.

However, without first managing to suppress the problematic references to «defamation of religion», the EU member states started to insist on the mentioning of the importance of the right to freedom of expression and the press in other paragraphs, so as to make the text more balanced. European states also managed to add some references to Article 20 of the Covenant, so as to propose the conventional concept of the prohibition of incitement to racist and religious hatred, as an alternative. It was also essential for the EU to have an explicit reference to Article 19 of the Covenant, but this was opposed

⁴² *Ibidem*.

⁴³ *Ibidem*.

⁴⁴ *Ibidem*.

⁴⁵ Human Rights Watch, *Position Paper on the Current Status of the Durban Review Process*, 13 January 2009, available at <http://www.hrw.org/en/news/2009/01/13/position-paper-current-status-durban-review-process>.

⁴⁶ United Nations, *Revised Version of the Technically Reviewed Text Submitted by the Chairperson-Rapporteur of the Intersessional Open-ended Working Group...*, cit.

⁴⁷ E.g.: B.-H. Lévy, *Refusons la mascarade de Durban II*, in «Le point», 5 March 2009, available at <http://www.lepoint.fr/actualites-chroniques/2009-03-05/le-bloc-notes-de-bernard-henri-levy-refusons-la-mascarade-de-durban-ii/989/0/323102>.

by the OIC countries group. To guarantee a reference to this article, the EU proposed the idea of expert workshops organised by the OHCHR as a follow-up of the expert seminar organised by the organisation in 2008 on the links between Articles 19 and 20 of the ICCPR. It was also crucial for the EU to avoid any reference in that paragraph to the «gaps» in international human rights instruments on the issue of religious hatred, so as to avoid the debates on the potential complementary standards on this issue, which would have put even more pressure on the principle of freedom of expression.

It was clear from the discussions in the 1st Durban Conference, as well as from its opposition to the resolutions on «Combating defamation of religion» passed in the UN as well as from their red lines adopted in late 2008, that the EU couldn't agree to this concept. EU countries were only prepared to accept the language of the DDPA on this issue; the «negative stereotyping of persons or communities on the basis of religion or belief». European countries favoured this formula because they wanted to underline the importance of focusing on the protection of persons and not of abstract concepts such as religions. The OIC however favoured the notion of «defamation or negative stereotyping of religions» which doesn't incorporate this dimension. The EU also used another tactic to avoid references to the concept of defamation of religion, by trying to replace it with the concept of incitement to religious hatred, as set in Article 20 of the Covenant.

4.2. The State of the Text in the Beginning of April 2009

Given this difficult situation, it was very surprising that in the beginning of April, the rolling text prepared by the Chairman-Rapporteur of the Working Group didn't include anymore references to the concept of defamation of religion. The term was replaced by some expressions like «the negative stereotyping of religions», «the prohibition of incitement to racial or religious hatred» and «the incidents of racial or religious intolerance and violence». In addition, two paragraphs underlined the positive role that the right to freedom of opinion, expression and information could play in combating racism and intolerance. The paragraphs on the seminars organised by the OHCHR on the prohibition of incitement to

racial or religious hatred however didn't contain any more reference to Article 19 of the Covenant, but only to its Article 20⁴⁸. In contrast with the first drafts of the text, these last developments were seen as a first step in the good direction by the European countries. For them, the concept of «negative stereotyping of religions» was seen as acceptable because it didn't contain the term «defamation» anymore, which was more dangerous as it was clearly associated with a traditionally accepted limitation to freedom of expression. It was however not ideal as it still meant the protection of an abstract concept and not of human beings. Furthermore, the use of this wording meant going a step backwards from the DDPA which only recognised the «negative stereotyping against persons or communities because of their religious beliefs».

In the draft Outcome Document as amended by the Chair on 15 April, another line was however added to paragraph 11 on the negative stereotyping of religion, which said that this phenomenon resulted «in the denial or undermining the rights of persons associated with them»⁴⁹, which assured a reference to the protection of persons, as meant in all human rights instruments.

4.3. The Final Outcome Document

The Final Outcome Document finally adopted at the Review Conference provided better guarantees to the protection of freedom of expression than any other draft version of the text. Paragraph 12 (previously paragraph 11) was changed into the «derogatory stereotyping and stigmatization of persons based on their religion or belief»⁵⁰, which is far from the concept of «defamation of religion», or even from the «negative stereotyping of religion». The focus was now put on the consequences of these incidents on the individuals' victims of it and not on the religion itself. It should also be underlined that, in contrast with the first draft texts, this is the only paragraph of the document mentioning Islamophobia. Moreover, also in contrast with the first drafts, this paragraph doesn't single out Islam as being the only religion whose believers are victims of negative stereotyping, it also mentions anti-Semitism, Christianophobia and even anti-Arabism, even though Arabism is not based on a religion.

⁴⁸ United Nations, *Rolling Text Prepared by the Chairperson-Rapporteur of the Intersessional Open-ended Working Group for the Durban Review Conference*, 3 April 2009, available at [http://www.un.org/durbanreview2009/pdf/Rolling_text_in_English_\(edited_version\).pdf](http://www.un.org/durbanreview2009/pdf/Rolling_text_in_English_(edited_version).pdf).

⁴⁹ United Nations, *Draft Outcome Document as Amended by the Chair of the Intersessional Open-ended Working Group for the Durban Review Conference*, 15 April 2009, available at <http://www.un.org/durbanreview2009/pdf/DOD%20Rev.1%2015-4-2009.pdf>.

⁵⁰ United Nations, *Outcome Document of the Durban Review Conference*, 20 April 2009, available at http://www.un.org/durbanreview2009/pdf/Durban_Review_outcome_document_En.pdf.

Paragraph 13 underlines the importance of prohibiting «advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence» but «in accordance with the international obligations of States and that these prohibitions are consistent with freedom of opinion and expression»⁵¹. Paragraphs 68 and 69 of the Outcome Document repeat this concern, underlining that the prohibition «of acts of incitement to hatred, which have targeted and severely affected racial and religious communities», must be made as stipulated in Article 20 of the Covenant. The positive role of freedom of expression in the fight against racism is maintained in paragraphs 54 and 58, which emphasize that this role should be «in line with relevant provisions of international human rights law, instruments, norms and standards»⁵². In this final version of the text, the reference to the «gaps» in international instruments on the prohibition of incitement to religious hatred were also deleted from paragraph 134 describing the seminars organised on this issue. The reference to Article 19 of the Covenant was however finally kept in that paragraph through the mentioning of the previous seminars organised by the OHCHR in September 2008 on the topic of the links between this article and Article 20 of the Covenant.

A couple of days before the end of the Conference, Human Rights Watch and other NGOs called on all states, and especially the Western and the European ones, not to boycott it. They stressed that the document was now acceptable because, among other things, «it fully protected the right to freedom of expression as defined under international law» as it «rejected the dangerous concept that religions, as opposed to individuals, could be defamed or have their rights violated»⁵³. According to HRW, the text of the Final Outcome Document proved that the international community rejected the idea of prohibiting «defamation of religion» and that the Conference therefore stands as an important defeat for the proponents of this idea. The Final Document was nearly seen as a victory that erased all the resolutions passed on this issue in the last decade. Given this important achievement, HRW held that it would be incoherent for Western states to leave the Conference⁵⁴. This call was however not heard by some European countries who decided to abandon it, even though the most problematic

⁵¹ *Ibidem*.

⁵² *Ibidem*.

⁵³ Human Rights Watch, *UN Race Conference Undermined by Western Withdrawals*, 19 April 2009, available at <http://www.hrw.org/en/news/2009/04/19/un-race-conference-undermined-western-withdrawals>.

⁵⁴ *Ibidem*.

points of the document, and namely the issue of defamation of religion, were settled according to their views.

It can be seen from the description of the evolution of the text at its last stages that the European countries managed to put forward their vision on the issue of defamation of religion even if this seemed very improbable at first. This result was achieved step by step and mostly in the last days before the Conference. It is finally the OIC countries who made most of the concessions on this issue, without even gaining much more in exchange on the other topics dealt with in the Outcome Document. But as we will see in the next section, this achievement didn't benefit greatly to the image of the European Union, which ended quite affected by the breakdown of its unity in the last days and weeks before the Conference.

5. The Political Aspects of the Controversy on «Defamation of Religion»

As described in the above section, the concept of «defamation of religion» was an important source of division between Western and OIC countries in the preparatory process of the Durban Review Conference. In addition to the legal controversy, some important political motives were also hidden behind this opposition, which can also explain why it was so difficult to find a compromise on this issue. The efforts put by each group to promote its vision, illustrates the larger conflict between liberal states supporting freedom of expression and Islamic states supporting the respect for religion.

In its contribution to the Conference, the OIC insisted on the inclusion of a prohibition of defamation of religion and even for the adoption of «internationally binding normative standards that can provide adequate guarantees against defamation of religions and religious intolerance»⁵⁵. The EU countries on the other side totally refused the inclusion of this prohibition, as set in one of their red lines. Considering the existence of this red line and the state of the text in the beginning of 2009, it can be said that the participation of the European countries to the Conference was at that time, more than uncertain.

⁵⁵ United Nations, Preparatory Committee of the Durban Review Conference, *Reports of Preparatory Meetings and Activities at the International, Regional and National Levels, Contribution by Pakistan in the Name of the OIC*, 3 October 2008, available at http://www.un.org/durbanreview2009/pdf/Contribution_by_the_OI_C.pdf.

5.1. The Boycott of the Conference by Some Western States and Its Reasons

During the last months before the Conference, the prospects for the Western states weren't looking so positive. The pressure for limitations to freedom of expression was strong and they had little «room for manoeuvre» to propose compromises with other issues. This state of play was one of the reasons why Canada, the USA and Israel decided to stay out of the Conference. Those two last states didn't participate to the 1st Durban Conference in 2001 and there was therefore little chance that they would come back to the Review Conference, even if in the case of the USA, the election of President Obama made some think that this could change the situation. If President Obama's external human right policy might stand in strong contrast to the one of his predecessor, this doesn't change the fact that Americans, more than any other nation in the world, regard freedom of speech as a nearly absolute right. The threats posed to this principle were thus one of the main reasons of their refusal to take part in the Conference. They declared with regret that they wouldn't join it because of the «relatively new additions to the text regarding “incitement”, that run counter to the U.S. commitment to unfettered free speech»⁵⁶. This confirms that the American conception of freedom of expression is much stricter than the European one. In addition to these countries, some European states also decided to boycott the Conference for similar reasons. Italy was the first to leave it in early March and to the complete surprise of the other member states. The Italian Minister for Foreign Affairs, Franco Frattini, explained that this decision was made «in defense of freedom of expression», because it seemed that the draft document was going to sanction the end of the right to freedom of expression, which in his view couldn't be negotiated with the respect for religious tolerance⁵⁷. On 19 April, The Netherlands also took the decision to boycott the Conference because it was «misused for political purposes and attacks against the West» by states who want to «elevate religion above human rights and to place unnecessary restrictions on freedom of expression»⁵⁸. Germany and Poland also decided to leave the Conference a couple of days before it started and the Czech Republic, having the Presidency of the

⁵⁶ US Department of State, Durban Review Conference, Robert Wood, Acting Department Spokesman, 18 April 2009, available at <http://www.state.gov/r/pa/prs/ps/2009/04/121876.htm>.

⁵⁷ Letter from Minister Frattini, *Italy's Decision to Leave Durban II*, in «Corriere della Sera», 8 March 2009, available at http://www.humanrights.ch/home/upload/pdf/090327_Italien_Durban.pdf.

⁵⁸ Netherlands Government Press Release, *Not Attending Durban Review Conference*, 19 April 2009, available at <http://www.durbanreview.org/reporting/?p=92>.

European Union at the time, decided to quit the Conference after Iranian President Ahmadinejad's speech on the first day of the Conference. It should be noted that all these countries decided to leave the Conference when its text was in fact becoming more and more acceptable on all the points of the red lines, including on the respect for freedom of expression.

It can be argued that this common argument of the «threats to freedom of expression» was a perfect pretext to withdraw from the Conference without having to give other political reasons. The content of the Outcome Document was however totally acceptable on this issue. This gave the OIC countries the impression that the concessions they had made, especially on freedom of expression, had not been appropriately appreciated by some European countries. It seems that this attitude will not encourage the OIC states to agree on making concessions again in the future.

During the Conference, the High Commissioner for Human Rights, Navanethem Pillay thanked all regional groups and countries for the compromise reached and the concessions made, to have a text acceptable for all. On this last aspect she especially thanked «the delegation of the Organisation of the Islamic Conference for the flexibility they have displayed on issues of such crucial importance to them»⁵⁹. It is more than probable that reference was here made to the issues of defamation of religion and freedom of expression.

5.2. President Ahmadinejad's Speech

In addition to the boycott of some countries, the Durban Review Conference was also remembered for the provocative speech of Iranian President Ahmadinejad on its first day. In contrast with the positions taken by the OIC negotiators during the preparatory phase of the Conference, President Ahmadinejad didn't defend the concept of defamation of religion. He in fact, made some anti-Semitic remarks himself during his speech, such as «World Zionism personifies racism that falsely resorts to religions and abuses religious sentiments to hide its hatred and ugly face»⁶⁰. Outraged by these remarks, the European Union delegations decided to leave the room and the Czech Republic then even decided to leave the Conference. The Secretary General, as well as the High Commissioner for

⁵⁹ United Nations website on the Durban Review Conference, *Opening Statement of Ms. Navanethem Pillay, United Nations High Commissioner for Human Rights*, 20 April 2009, available at http://www.un.org/durbanreview2009/stmt20-04-09_pillay.shtml.

⁶⁰ President Ahmadinejad's Speech at the Durban Review Conference on Racism, 20 April 2009, available at <http://www.presstv.ir/detail.aspx?id=92046>.

Human Rights later condemned this speech, as well as the boycott of the Conference by some European states, especially because the final text should have been acceptable to them.

5.3. The Position of the Other Western States

The European states who decided to stay involved in the Conference criticised the member states that abandoned it because it exposed the breakdown of the EU unity. The Belgian Minister for Foreign Affairs Karel De Gucht, declared at the Conference that the negotiations had been difficult because of the division on the idea of prohibiting defamation of religion and that it would have been unconceivable to include this concept in the Final Outcome Document as it was not respectful of human rights or of the principle of freedom of expression⁶¹. The Norwegian Minister for Foreign Affairs, Jonas Gahr Støre, had exactly the same discourse on the unacceptability of the concept of defamation of religion in regard with «the hard-won gains made in the field of universal human rights», such as freedom of expression. He also underlined that it was also important to acknowledge the responsibility of the media concerning the incitement to hatred and violence⁶².

5.4. Defamation of Religion: A Political Concept?

In its speech at the Conference, the FIDH stated that the outcome of this Conference was positive as the Final Document «deplores the derogatory stereotyping and stigmatization of persons based on their religion» while moving away «from a politically defined notion of defamation of religion»⁶³. It is interesting to underline that this NGO characterised the concept of defamation of religion as «politically defined». Indeed, it can be said that by pushing this concept, the OIC was knowingly pushing for this theme to be placed on the international agenda and to gain attention from the general public. It could be said that if the OIC really wanted to find legal solutions to fight the increasing stigmatisation of Muslims, they could have used the existing tools such as the prohibition of incitement to religious hatred. However, they refused to engage in this legal path by trying to

⁶¹ Address of Belgian Minister De Gucht at the Durban Review Conference in Geneva, 23 April 2009, available at http://www.diplomatie.be/fr/press/speech_details.asp?TEXTID=96538.

⁶² Norwegian Statement at Durban Review Conference, 20 April 2009, available at http://www.regjeringen.no/en/dep/ud/about_mfa/minister-of-foreign-affairs-jonas-gahr-s/Speeches-and-articles/2009/durban_ii.html?id=555874.

⁶³ FIDH, *Durban Review Conference: Oral Intervention*, 23 April 2009, available at <http://www.fidh.org/Durban-Review-Conference-Oral>.

find a new compromise on the interpretation of this conventional prohibition. Rather, they choose to come up with the concept of defamation of religion, which they knew from the beginning it would have no chance of being accepted by the Western states. We can suppose that this attitude was adopted so as to push more generally for a renewed attention for the right to freedom of religion and the respect owed to religious beliefs, which should in the view of the OIC, have at least as much importance as freedom of expression.

Conclusion

The debate around the concept of «defamation of religion» is a recent but intense one. The absence of clear legal solution concerning the legitimacy of the prohibition of this concept with regard to right to freedom of expression caused an important confrontation between the Western and OIC countries. The Durban Review Conference was an important occasion to settle this controversy and to agree on a language acceptable to all. The compromise that was finally reached reveals the strength of the European states during the negotiations, as they managed to transform a dangerous first draft into an acceptable Outcome Document. The boycott of the Conference by some European countries however, countered this success as it made them look as not appreciating the concessions made in their favor. The result of the Conference on this issue was an important drawback for the OIC countries, especially considering the trend in favor of the recognition of the concept of «defamation of religion» these last years. The conflict on this issue is by no means overcome, as there is now an important contradiction between the Outcome Documents of the two Durban Conferences on one hand, and the UN resolutions on «combating defamation of religion» on the other. It depends upon the will and the understanding of the international community to reach a consensus acceptable and, above all, compatible with the human rights standards.