

A THOUSAND WAYS TO KISS THE EARTH: ARTISTIC FREEDOM, CULTURAL HERITAGE AND ISLAMIC EXTREMISM

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This paper discusses controversies on freedom of expression and the arts, focusing on Islam and Muslim sensibilities. Drawing from historical examples, the perception of visual arts, and music in the Islamic tradition, it attempts to shed light upon incidents such as the *Charlie Hebdo* attacks and the intentional destruction of cultural heritage by extremists in Mali, Syria and Iraq in the case of global-scale controversies. After examining the concepts of blasphemy (*sabb*), apostasy (*ridda*) and idolatry (*shirk*) in Islamic law, it considers the legitimacy of legal claims related to blasphemous expressions from an international law perspective. The paper distinguishes between violent and non-violent claims, and argues that freedom of expression should prevail in all cases involving blasphemy and offenses to sensibilities. It also takes the view, however, that this solution is not necessarily a sustainable one. Empowering cultural rights as a whole, rather than seeking to resolve a fictitious conflict between rights, seems to be a more effective pathway to address complex issues involving religious extremism and hate speech.

Key words:

Artistic freedom; cultural heritage; iconoclasm; blasphemy; cartoons; Islamic extremism

I. INTRODUCTION

In January 2015, eight gunmen entered the *Charlie Hebdo* satirical magazine office in Paris, and killed twelve well-known French journalists, editors, and political cartoonists. The magazine had been publishing controversial cartoons of Islam and depictions of the Prophet Mohammed for the last few years.¹ The attacks

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¹ See UNDERSTANDING CHARLIE HEBDO CARTOONS, <http://www.understandingcharliehebdo.com/> (last visited Nov. 17, 2015).

created global outrage and sorrow to the world of the press.² World leaders condemned terrorist violence.³ Massive rallies and demonstrations were organized in France and across the world—some in favour of,⁴ and others against,⁵ freedom of speech. At the same time, top newspapers chose not to republish the cartoons,⁶ and university conferences were cancelled for fear of extremist attacks.⁷ The repercussions on Muslim minorities also became visible,⁸ raising a number of questions regarding religious discrimination and racism in the post 9/11 world.

The *Charlie Hebdo* attacks reminded the international community in many respects of the *Danish cartoons* controversy that erupted ten years earlier, resulting in the burning of embassy buildings, death threats against cartoonists, severance of

² See Anoosh Chakelian, *In Cartoons: The Global Response to the Attack on Charlie Hebdo*, NEW STATESMAN (Jan. 8, 2015), <http://www.newstatesman.com/world-affairs/2015/01/cartoons-global-response-attack-charlie-hebdo> (on cartoonists' responses).

³ See Dan Friedman, *Obama Condemns 'Cowardly, Evil' Attack on Charlie Hebdo*, N.Y. DAILY NEWS (Jan. 7, 2015), <http://www.nydailynews.com/news/politics/obama-condemns-cowardly-evil-attack-charlie-hebdo-article-1.2069008>; see also Kim Willsher, *France Has Foiled Five Terror Plots Since Charlie Hebdo Attack, Says French PM*, GUARDIAN (Apr. 23, 2015), <http://www.theguardian.com/world/2015/apr/23/france-foils-five-terror-attacks-says-prime-minister>.

⁴ See Michael Martinez et al., *Marchers Rally in Solidarity in France and Europe After Charlie Hebdo Attack*, CNN (Jan. 8, 2015), <http://edition.cnn.com/2015/01/07/world/france-rally-reaction-charlie-hebdo-attack/>.

⁵ See *Charlie Hebdo Unrest: Muslims Protest Over Magazine's Muhammed Portrayal*, TELEGRAPH (July 11, 2015), <http://www.telegraph.co.uk/news/picturegalleries/worldnews/11356297/In-pictures-Protests-against-Charlie-Hebdo-magazine.html?frame=3170004>; Lizzie Dearden, *Charlie Hebdo Protests: Five Dead as Churches and French Flags Burn in Niger Riots over Prophet Mohamed Cover*, INDEP. (Jan. 17, 2015), <http://www.independent.co.uk/news/world/africa/charlie-hebdo-protests-five-dead-as-churches-and-french-flags-burn-in-niger-riots-over-cover-9985195.html>.

⁶ See Michael Calderone, *New York Times Only Top U.S. Newspaper Not to Publish Charlie Hebdo Cover*, HUFFINGTON POST (Jan. 14, 2015), http://www.huffingtonpost.com/2015/01/14/new-york-times-charlie-hebdo---_n_6470338.html.

⁷ See Henry McDonald, *University Reconsidering Decision to Cancel Charlie Hebdo Conference*, GUARDIAN (Apr. 24, 2015), <http://www.theguardian.com/education/2015/apr/24/queens-university-belfast-charlie-hebdo-conference>.

⁸ See Antonia Blumberg, *Mosques Attacked In Wake Of Charlie Hebdo Shooting*, HUFFINGTON POST (Jan. 8, 2015), http://www.huffingtonpost.com/2015/01/08/mosque-attacks-charlie-hebdo_n_6436224.html.

diplomatic relations, and boycotts against Danish products.⁹ They are also reminiscent of the first time a blasphemy case seized global interest, when, on February 14, 1989—a day coinciding with the end of the Soviet-Afghan war—the Iranian leader Ayatollah Khomeini proclaimed an award for the assassination of the Nobel-award winning writer, Salman Rushdie, for his novel *The Satanic Verses*.¹⁰ From then on, acts of Islamic extremism and claims related to offenses of religious beliefs have been gradually more frequent in both the Muslim world and the West. In the United Kingdom, in particular, controversies over cartoons have been associated with the rise in discrimination policies and identity denial against migrants. They have also been associated with the “war against terror,”¹¹ affecting Muslim populations in one way or another. On a larger scale, they have been echoing identity theories that have held a dominant position in the American political thought of the 1990s, particularly Huntington’s hypothesis of a fictitious “clash of civilizations.” Huntington’s article was published for the first time in the *Foreign Affairs* journal in 1993.¹² Its impact has been nothing less than significant. The article alone has been cited over 10,000 times, and the alleged “cultural clash” is now referred to virtually in all controversies over cultural and religious sensibilities. In the words of the Association for World Education, “[s]ince 1989, a new form of religious-inspired terrorism has developed, leading to the 9 September 2001 climacteric, all of which

⁹ See generally JYTTE KLAUSEN, *THE CARTOONS THAT SHOOK THE WORLD* (2009); David Keane, *Cartoon Violence and Freedom of Expression*, 30 HUM. RTS. Q. 845, 845–46 (2008); Anver Emon, *On the Pope, Cartoons, and Apostates: Shari'a 2006*, 22 J.L. & RELIGION 303, 308–09 (2006); see also Binoy Kampmark, *The Cartoon Riots: A New Cultural Diplomacy*, 7 WHITEHEAD J. DIPL. & INT'L REL. 69, 69 (2006).

¹⁰ See M.M. Slaughter, *Salman Rushdie Affair: Apostasy, Honor, and Freedom of Speech*, 79 VA. L. REV. 153, 154–55 (1993); Pinaki Chakravorty, Note, *The Rushdie Incident as Law-and-Literature Parable*, 104 YALE L.J. 2213, 2216 (1995); Abdullahi A. An-Na'im, *The Contingent Universality of Human Rights: The Case of Freedom of Expression in African and Islamic Contexts*, 11 EMORY INT'L L. REV. 29, 30 (1997). For a timeline of the events, see generally THE RUSHDIE FILE (Lisa Appignanesi & Sara Maitland eds., 1989).

¹¹ In particular, in relation to the UK, see Javaid Rehman, *Islam, "War on Terror" and the Future of Muslim Minorities in the United Kingdom: Dilemmas of Multiculturalism*, 29 HUM. RTS. Q. 831, 848–53 (2007).

¹² See Samuel P. Huntington, *The Clash of Civilizations?*, 72 FOREIGN AFF. 22, 25 (1993). For relevant analysis and criticisms see also Tom Farer, *The Clash of Cultures, the Tension Within Liberalism, and the Proper Limits of Tolerance*, 36 HUM. RTS. Q. 1, 18–19 (2014); Emon, *supra* note 9, at 309–10; Keane, *supra* note 9, at 869–70.

has been characterised by some as a 'clash of civilizations' and differently by others."¹³

This paper aims to clarify the legal interest of the question of offenses to sensibilities, focusing on incidents involving Islam and Muslim beliefs. It argues that empowering cultural rights as a whole could potentially offer a more sustainable solution to the debate over freedom of expression and religious sensibilities and contribute to "cultural peace." In order to substantiate its claims, it adopts an inductive approach. Section II discusses recent incidents involving offensive expression and Islamic beliefs, including international responsibility for acts of religious extremism. Section III dismisses the presumed "aniconic" nature of Islam, yet observes that the offenses of blasphemy, apostasy and idolatry under Sharia law are interrelated and particularly powerful. Section IV examines these offenses in Muslim states and international practice, and finds that their punishment is largely based on abusing the concept of religion at both a domestic level and international level. Section V examines the possible solutions to questions involving religious defamation and other "cultural controversies," suggesting that sensibilities are legitimately excluded from the protective scope of the right to religious freedom. Section VI discusses the shortcomings of this "rights-based" approach and suggests ways to avoid stereotypes about religions and "cultural clashes" in human rights law. In particular, the paper submits that seeking to resolve a fictitious "conflict" between freedom of expression and religious freedom is not an appropriate way to address global scale controversies. Rather, dissociating religions from illegitimate or extremist claims and empowering cultural rights as a whole may contribute to "cultural peace" in a more effective way.

¹³ U.N., Econ. & Sec. Council, The 'Rushdie Affair'/Rushdie Syndrome: The Right To Life And The Human Rights Mechanisms, (Written Statement Submitted by the Ass'n of World Educ., ¶ 28, U.N. Doc. E/CN.4/2004/NGO/252 (Mar. 11, 2004). *But see* Tariq Ramadan, *The Paris Attackers Hijacked Islam but There is No War Between Islam and the West*, GUARDIAN (Jan. 9, 2015), <http://www.theguardian.com/commentisfree/2015/jan/09/paris-hijackers-hijacked-islam-no-war-between-islam-west> (arguing that "this has nothing to do with the message of [the Muslim] religion.").

II. INCIDENTS INVOLVING ARTISTIC EXPRESSION AND ISLAMIC SENSIBILITIES

A. *The Global Impact of Incidents Involving the Arts*

Three preliminary clarifications that shape the context of our discourse seem apposite. First, the question of blasphemy is not confined solely within the Islamic legal tradition, nor are monotheisms alone the source of the problem.¹⁴ Recently, Buddhists complained about the launch of a new Buddha bar in Jakarta,¹⁵ and few years ago, a radical Hindu group issued a 5 million dollar threat for the head of one of India's most acclaimed painters, Maqbool Fida Husain, for portraying Gods naked in his film "*Meenaxi: A Tale of Three Cities*."¹⁶ In addition, it is in the Judeo-Christian and not the Islamic tradition that the offences of blasphemy and idolatry are rooted. The relevant Biblical prohibitions—in particular the myth of the "Golden Calf" that is narrated in the first book of the Bible, the Exodus¹⁷—have served throughout the centuries as an excellent basis to justify prohibitions of both idol-worshipping and art-making. Freedom of expression and artistic creation were restricted virtually in all phases of Christianity. In classical Judaism, painting was seen as a source of impurity and linked to all kinds of sinful behaviour.¹⁸ In

¹⁴ See Heiner Bielefeldt, *Misperceptions of Freedom of Religion or Belief*, 35 HUM. RTS. Q. 33, 36 (2013) (arguing that "[a]nti-universalistic policies in the treatment of religious diversity are not limited to certain Islamic countries" and referring to other countries including China and Eritrea which only recognize certain religions); see also JEAN DELUMEAU, *LE FAIT RELIGIEUX* 735 (1993).

¹⁵ See '*Buddha Bar*' Pressured to Close in Indonesia, ASSOCIATED PRESS, Mar. 12, 2009, <http://www.thejakartapost.com/news/2009/03/12/039buddhabar039-pressured-close-indonesia.html>.

¹⁶ MEENAXI: A TALE OF THREE CITIES (2004). See Shilpa Jamkhandikar, "*Picasso of India*" M.F. Husain Dies in Exile Aged 95, REUTERS, June 9, 2011, <http://in.reuters.com/article/2011/06/09/idINIndia-57595020110609>.

¹⁷ See *Exodus* 20:5; 32:4–28. The Israelites asked Aaron to make for them an idol, so they could worship it as their God. Aaron took the women's golden earrings and made of them a Calf, and they worshipped the Calf and sacrificed on it—something which has been a fatal crime for the new 'Jealous' God. In the continuation of the story, the worship of the Calf made the God angry, since he was the one and only—and consequently also a "jealous" God. He (i.e. God) threatened to "consume [the idolaters] and make of [the Jews] a great nation [instead]." And he would have, had it not been for Moses, who saved his people by killing only three thousand of them to appease the God.

¹⁸ ANTONY JULIUS, *TRANSGRESSIONS OF THE ARTS: ART THAT OFFENDS* 36 (2002) (citing *Exodus* 15:2).

the case of the Catholic Church artists had to conform to strict rules issued by Ecumenical councils—in particular, the Council of Trent, which, convened by Pope Pius in plain Quattrocento, provided thorough guidelines on the making of “sacred images”;¹⁹ the Holy Inquisition has prosecuted not only scientists, but also painters as famous as Veronese,²⁰ and the notorious “Index of Prohibited Books” created in 1559 remained officially in power until 1966.²¹ In addition, the list of censored artworks in many Western states of the Judeo-Christian tradition is sufficiently long not to remain unnoticed.²²

Second, due to its social and symbolic functions,²³ as well as its increased capacity to communicate ideas,²⁴ visual art and other forms of figurative representation constitute extremely fertile ground for the expansion of “cultural conflicts.” Controversies involving religious beliefs have been pivoting around objects of either artistic or sacred significance: the Christian crucifixes in the case of the Italian public schools, minarets in the case of Switzerland, headscarves in France and the denigrated copies of the Qur’an in Germany have all served as symbols in debates over cultural and religious identities.²⁵

Third, the challenges for freedom of expression in the developed and developing world are substantially different. On the

¹⁹ See COUNCIL OF TRENT, THE CANONS AND DECREES OF THE SACRED AND OECUMENICAL COUNCIL OF TRENT 232–89 (James Waterworth ed. & trans., 1848).

²⁰ See JOHN HENRY MERRYMAN ET AL., LAW, ETHICS AND THE VISUAL ARTS 624–25 (5th ed., 2007) (explaining his representation of the Last Supper that he later renamed into “Feast at the House of Levi” to avoid punishment and providing the transcript of the trial); Daniel McClean & Armen Avanesian, *Trials of the Title, in THE TRIALS OF ART* 54–55 (Daniel McClean ed., 2007).

²¹ See Laurent Doussin, *L’Index Librorum Prohibitorum de l’Eglise catholique: Une page d’histoire de la censure [The Index of Prohibited Books of the Catholic Church: A Page from the History of Censorship]*, 22 GAVROCHE: REVUE D’HISTOIRE POPULAIRE 128 (2003).

²² See, e.g., RAPHAEL COHEN-ALMAGOR, THE SCOPE OF TOLERANCE: STUDIES ON THE COSTS OF FREE EXPRESSION AND FREEDOM OF THE PRESS (2006) (focusing on cases from the United States, Israel, Canada and the UK).

²³ See HOWARD S. BECKER, ARTWORLDS (1982) (arguing that an artwork cannot be conceived separately from their social environment); Arthur Danto, *The Artworld*, 5 J. OF PHIL. 571 (1964).

²⁴ ERWIN PANOFSKY, MEANING IN THE VISUAL ARTS (1972).

²⁵ See generally RELIGIOUS PLURALISM AND HUMAN RIGHTS IN EUROPE: WHERE TO DRAW THE LINE? (Titia Loenen & Jenny E. Goldschmidt eds., 2007); George Letsas, *Is There A Right Not to Be Offended in One’s Religious Beliefs?*, in LAW, STATE AND RELIGION IN THE NEW EUROPE: DEBATES AND DILEMMAS 239 (Lorenzo Zucca & Camil Ungureanu eds., 2015).

one hand, freedom has little meaning when poverty impedes knowledge, or when the absence of libraries, cinemas, or museums hinders cultural exchange and the diffusion of artworks.²⁶ The same is true where states refuse to recognize minority identities, or when non-conformist artists and writers impose on themselves self-censorship or exile.²⁷ On the other hand, the governments of many developing countries systematically impose restrictions at a variety of levels. In illiberal states such as China, North Korea or Myanmar—and states with high rates of media control such as Guatemala, Zimbabwe, Ethiopia, Russia or Turkey—censorship is a daily phenomenon that affects not only cultural exchange but first and foremost the internet and the world of the press.²⁸ It goes without saying that the absence of infrastructure and high rates of illiteracy raise questions regarding the links between world poverty, human development and individual freedom. They also challenge the role of freedom of expression proponents, who, as An-Na'im points out, "should strive to show its importance to all citizens and society at large, and not just to a few educated elites."²⁹

In a generalized sense, however, it does appear that the number of prosecutions for blasphemy in the name of Islam has increased since the Islamization of many Muslim governments in the 1980s and 1990s.³⁰ This is particularly true in relation to artistic and literary freedom. The case of Egypt, for example, is one that has acquired publicity after the assassination of eminent

²⁶ See Emmanuel Decaux, *Comment la Prise en Compte des Droits Culturels Interfère sur la Compréhension des Autres Droits de l'homme?*, in 22 LES DROITS CULTURELS: UNE CATEGORIE SOUS-DEVELOPPEE DE DROITS DE L'HOMME 185 (Patrice Meyer-Bisch ed., 1993) (explaining how cultural rights impede the understanding of human rights).

²⁷ See, e.g., *Chinese Cartoonist Rebel Pepper Struggles to Survive in Self-imposed Exile*, IFEX (June 2, 2015), https://www.ifex.org/china/2015/06/02/rebel_pepper_exile/ (commenting that even if someone is not imprisoned, the ruling party can make it impossible for him to live).

²⁸ See generally IFEX, <https://www.ifex.org>, for monthly country reports; INTERNATIONAL PRESS INSTITUTE, <http://www.freemedia.at/country-reports.html> (same); see also Farida Shaheed (*Special Rapporteur in the Field of Cultural Rights*), Report of the Special Rapporteur in the Field of Cultural Rights, Farida Shaheed, ¶ 44, U.N. Doc. A/HRC/23/34 (Mar. 14, 2013).

²⁹ Abdullahi Ahmed An-Na'im, *Human Rights in the Muslim World: Socio-Political Conditions and Scriptural Imperatives—A Preliminary Inquiry*, 3 HARV. HUM. RTS. J. 13, 45–46 (1990).

³⁰ *Id.* at 26–27; see also U.N. Econ. & Sec. Council, Cooperation with Representatives of United Nations Human Rights Bodies, ¶¶ 37–38, E/CN.4/1996/57 (Feb. 22, 1996) (providing information on human rights in Sudan).

intellectual and writer Farag Foda,³¹ and the attempted assassination against Nobelist Naguib Mahfouz, who, despite being hailed “a cultural light who brought Arab literature to the world,”³² was considered an apostate by Islamists.³³

As for the controversies of the new millennium, however, and especially since 9/11, the intriguing feature is arguably their global impact. Once manifested only in extreme theocratic regimes like that of the Taliban—who dashingly filmed the destruction of the two giant Buddha statues of the Bamiyan valley in 2001 following a religious edict “ordering the destruction of all statues and non-Islamic shrines”³⁴—iconoclasm and controversies over blasphemous books, films and cartoons are now becoming casual on social media. Apart from the *Danish cartoons* and *Charlie Hebdo*, one can add to the list numerous smaller-scale incidents that have fuelled extremist reactions not only in the Muslim world, but also, in the West. The most recent ones include protests over a movie trailer mocking the life of the Prophet Mohamed that provoked the attack of the American embassy in Libya in 2012;³⁵ bloodshed following an exhibition with controversial cartoons of the Prophet in Texas in April 2015;³⁶ violent reactions over relatively innocent TV series such as *Southpark*³⁷ and *The Simpsons*;³⁸ and even the

³¹ Declan O'Sullivan, *Egyptian Cases of Blasphemy and Apostasy Against Islam: Takfir al-Muslim*, 7 INT'L. J. HUM. RTS. 97, 105–07 (2003); Chakravorty *supra* note 10, 2222 n. 55.

³² See *President Pays Tribute to Mahfouz*, BBC NEWS (Aug. 30, 2006), http://news.bbc.co.uk/2/hi/middle_east/5297470.stm.

³³ Elham T. Hussein et al., *The Relationship Between Naguib Mahfouz and the Islamists: The Real, the Exaggerated and the Fabricated*, 3 ENG. LANG. & LITERATURE STUD. 28, 32 (2013); Slaughter, *supra* note 10, at 172; O'Sullivan *supra* note 31, at 107–12.

³⁴ See UNESCO, Proceedings of the Doha Conference of 'Ulamâ on Islam and Cultural Heritage, U.N. Doc. CLT/CH/THS/2001/CD/H/1, at 11 (Dec. 30–31, 2001) [hereinafter “DOHA PROCEEDINGS”]; see also Francesco Francioni & Federico Lenzerini, *The Destruction of the Buddhas of Bamiyan and International Law*, 14 EUR. J. INT'L L. 619, 624 (2003).

³⁵ See Barney Henderson & Richard Spencer, *U.S. Ambassador to Libya Killed in Attack on Benghazi*, TELEGRAPH (Sep. 12, 2012), <http://www.telegraph.co.uk/news/worldnews/africaandindianocean/libya/9537366/US-ambassador-to-Libya-killed-in-attack-on-Benghazi-consulate.html>.

³⁶ See Kevin Conlon & Kristina Sgueglia, *Two Shot Dead After They Open Fire at Mohammed Cartoon Event in Texas*, CNN (May 4, 2015), <http://www.cnn.com/2015/05/03/us/mohammed-drawing-contest-shooting/>.

³⁷ See *South Park Creators Warned over Muhammad Depiction*, BBC NEWS (Apr. 22, 2010), <http://news.bbc.co.uk/1/hi/8636455.stm>.

³⁸ *TV Channel Fined over Simpsons 'Blasphemy' in Turkey*, BBC NEWS (Dec. 4, 2012), <http://www.bbc.co.uk/news/entertainment-arts-20598262>.

targeting of monuments and paintings that have been present for years—for instance, the attempts to blow up San Petronio Church in Bologna in 2002, where Giovanni da Modena had centuries ago painted Mohammed in Hell.³⁹ Blasphemy prosecutions and cultural heritage attacks have been also more frequent following the Arab uprisings in Northern Africa,⁴⁰ amounting to significant cultural heritage destructions, such as the bombing of the Egyptian Museum of Islamic Art (and the National Library) in Cairo.⁴¹ Even more alarmingly in the Middle East, especially in Iraq and Syria, “there has been an increasing number of kidnappings and murders of citizen journalists and others publicly broadcasting views that are critical of the Islamic State of Iraq and the Levant (ISIS).”⁴² In 2014, ISIS requested schools in Mosul to stop teaching music and the arts⁴³ and “has attacked social and cultural practices [in Syria]—including weddings, musical events and traditional ceremonies . . . demonstrating their intent to eradicate these aspects of Syrian culture.”⁴⁴ In fact, along with the systematic violence exercised against all segments of civilian population,⁴⁵ and

³⁹ See Philip Willan, *Al-Qaida Plot to Blow Up Bologna Church Fresco*, *GUARDIAN* (June 24, 2002), <http://www.theguardian.com/world/2002/jun/24/arts.artsnews>.

⁴⁰ See, e.g., *Jon Jensen and Tim Hume, Who Will Win Battle for New Tunisia?*, *CNN* (Jan. 11, 2013), <http://www.cnn.com/2013/01/11/world/meast/tunisia-salafists-artists-battle/>; *Tunis: Imam of Tunis Mosque, Blasphemous Artists Must Die*, *ANSAMED* (June 15, 2012), http://www.ansamed.info/ansamed/en/news/nations/tunisia/2012/06/15/Tunis-Imam-Tunis-mosque-Blasphemous-artists-must-die_7044443.html.

⁴¹ See *A UNESCO Emergency Mission to Launch Rehabilitation of the Islamic Arts Museum of Cairo*, *UNESCO* (Feb. 4, 2014), <http://www.unesco.org/new/en/media-services/in-focus-articles/a-unesco-emergency-mission-to-rehabilitate-the-islamic-arts-museum-of-cairo/>.

⁴² *Artist Alert: November 2013*, *ARTICLE 19* (Dec. 5, 2013), <http://www.article19.org/resources.php/resource/37384/en/artist-alert:-november-2013>.

⁴³ Umberto Bacci, *ISIS Medieval School Curriculum: No Music, Art and Literature for Mosul Kids*, *INT’L BUS. TIMES* (Sept. 15, 2014, 6:19 PM), <http://www.ibtimes.co.uk/isis-medieval-school-curriculum-no-music-art-literature-mosul-kids-1465590>.

⁴⁴ U.N., Rep. of the Independent International Commission of Inquiry on the Syrian Arab Republic: Rule of Terror: Living under ISIS in Syria, ¶ 20, U.N. Doc A/HRC/27/CRP.3 (Nov. 19, 2014) [hereinafter “H.R.C.”].

⁴⁵ See *id.* at ¶ 19; see also U.N., Human Rights Council, Rep. of the Office of the United Nations High Commissioner for Human Rights on the Human Rights Situation in Iraq in the Light of Abuses Committed by the So-called Islamic State in Iraq and the Levant and Associated Groups, U.N. Doc A/HRC/28/18 (Mar. 13, 2015); U.N., Human Rights Council, Rep. of the Independent International

especially against minorities and LGBT communities,⁴⁶ ISIS—and at a smaller scale other terrorist organizations—have been implementing iconoclastic cultural policies in the name of Islam. Hence, a number of cultural and historical sites have been under attack in Mali,⁴⁷ while music has been banned in the north of the country since 2012, sending “to exile” a renowned festival, the Festival in the Desert.⁴⁸ In September 2014, Islamists uploaded several videos on YouTube with persons attacking artefacts and other cultural treasures in Timbuktu,⁴⁹ Damascus⁵⁰ and Mosul.⁵¹ In February 2015, ISIS burnt approximately eight thousands books and manuscripts of the Mosul library.⁵² And in June 2015, ISIS

Commission of Inquiry on the Syrian Arab Republic, U.N. Doc. A/HRC/28/69, ¶ 59 (Feb. 5, 2015); U.N., Human Rights Council, Report of the Independent International Commission of Inquiry on the Syrian Arab Republic, ¶¶ 20–84, U.N. Doc. A/HRC/25/65 (Feb. 12, 2014).

⁴⁶ See U.N., Human Rights Council, Rep. of the Office of the United Nations High Commissioner for Human Rights: Discrimination and Violence Against Individuals Based on Their Sexual Orientation and Gender Identity, ¶¶ 29, 31, U.N. Doc. A/HRC/29/23 (May 4, 2015).

⁴⁷ See S.C. Res. 2227, ¶ 14 (June 29, 2015) (urging the UN peace mission in Mali, the MINUSMA, to assist the Malian authorities in their restoration in collaboration with UNESCO).

⁴⁸ See Natasha Schmidt, *The Sound of Silence: Mali’s Musicians*, INDEX ON CENSORSHIP (Oct. 2, 2013), <http://www.indexoncensorship.org/2013/10/sound-silence-malis-musicians/>.

⁴⁹ Ishaan Tharoor, *Timbuktu’s Destruction: Why Islamists are Wrecking Mali’s Cultural Heritage*, TIME July 2, 2012, <http://world.time.com/2012/07/02/timbuktus-destruction-why-islamists-are-wrecking-malis-cultural-heritage/>.

⁵⁰ Rep. of the United Nations Commissioner for Human Rights on the Human Rights Situation in Iraq in Light of Abuses Committed by the So-called Islamic State in Iraq and the Levant and Associated Groups, *supra* note 45, at ¶¶ 120-1; ICOMOS, *Statement on Crac des Chevaliers and the continuing destruction of the cultural heritage of Syria*, Paris, (July 19, 2013), available at <http://www.icomos.org/en/home/177-articles-en-francais/actualites/632-icomos-statement-on-crac-des-chevaliers-and-the-continuing-destruction-of-the-cultural-heritage-of-syria>.

⁵¹ See e.g. Anne Barnard, *ISIS Attacks Nimrud, a Major Archaeological Site in Iraq*, N.Y. TIMES, March 5, 2015, http://www.nytimes.com/2015/03/06/world/middleeast/isis-attacks-iraqi-archaeological-site-at-nimrud.html?_r=0/; *ISIS Destroys Mosul Museum Artifacts*, N.Y. TIMES (Feb. 26, 2015), <http://www.nytimes.com/video/world/middleeast/10000003537753/isis-destroys-mosul-museum-artifacts.html> (featuring a YouTube video uploaded by ISIS).

⁵² Rose Troup Buchanan & Heather Saul, *ISIS Burns Thousands of Books and Rare Manuscripts from Mosul’s Libraries*, INDEPENDENT (Feb. 26, 2015), <http://www.independent.co.uk/news/world/middle-east/isis-burns-thousands-of-rare-books-and-manuscripts-from-mosuls-libraries->

released another video with terrorists reducing the ancient Assyrian Palace in Iraq, a UNESCO heritage site, to ashes.⁵³ This form of extremism has now reached an unprecedented scale, largely justifying the characterization by the Director-General of UNESCO of attacks against cultural heritage as amounting to “cultural cleansing.”⁵⁴

B. Triggering International Responsibility

Violent iconoclastic incidents may take place in the name of religions—yet, should not be mistakenly associated to them. Iconoclasm is an extremely complex phenomenon that has occurred in a variety of contexts—primarily in Europe—and cannot be reduced into a simplistic and stereotypical reading.⁵⁵ Most noteworthy, iconoclasm is associated with the creation of a modern State,⁵⁶ as well as with an imaginary fight against luxury.⁵⁷ As

10068408.html?origin=internalSearch.

⁵³ Kristin Romey, *Why ISIS Hates Archaeology and Blew Up Ancient Iraqi Palace*, NAT'L GEOGRAPHIC (Apr. 14, 2015), <http://news.nationalgeographic.com/2015/04/150414-why-islamic-state-destroyed-assyrian-palace-nimrud-iraq-video-isis-isil-archaeology/>; see also Nour Malas, *Jihadists in Iraq Erase Cultural Heritage*, WALL STREET J. (July 25, 2014), <http://www.wsj.com/articles/jihadists-in-iraq-erase-cultural-heritage-1406313661>; Marcia Biggs & Gwen Ifill, *How War Has Robbed Syria of its History*, PBS NEWSHOUR (May 19, 2015, 6:35 PM), <http://www.pbs.org/newshour/bb/war-robbed-syria-history/>.

⁵⁴ Irina Bokova, Director-General of UNESCO, Address on the Occasion of the Launch of Unite for Heritage Campaign 2 (Mar. 28, 2015), <http://unesdoc.unesco.org/images/0023/002325/232535E.pdf>.

⁵⁵ See David Freedberg, *The Structure of Byzantine and European Iconoclasm*, in MERRYMAN ET AL., *supra* note 20, at 165–67; DARIO GAMBONI, *THE DESTRUCTION OF ART: ICONOCLASM AND VANDALISM SINCE THE FRENCH REVOLUTION 22–24* (1997) (exploring the typologies of vandalism).

⁵⁶ See JAMES NOYES, *THE POLITICS OF ICONOCLASM: RELIGION, VIOLENCE AND THE CULTURE OF IMAGE-BREAKING IN CHRISTIANITY AND ISLAM 1–3* (2013). According to Noyes, the history of iconoclasm is “a formative feature of both Christian and the Islamic history, crossing the boundaries of religion, culture and politics,” and that goes “hand in hand with the political construction of the modern State.” *Id.* at 1; see also Adrian A. Bantjes, *The War Against Idols: The Meanings of Iconoclasm in Revolutionary Mexico, 1910–40*, in NEGATING THE IMAGE: CASE STUDIES ON ICONOCLASM 43 (Anne McClanan & Jeff Johnson eds., 2005) (arguing that organized iconoclasms were primarily related to anti-clericals, with roots in the 20th century struggle between the liberal state and a powerful roman Catholic church).

⁵⁷ GAMBONI, *supra* note 55, at 28 (noting that it has been “object[ing] to the use of images as cult objects as well as to related circumstances, such as the wealth and power that their production and exploitation bestowed on the

David Freedberg explains, it is a phenomenon expressing “the resentment of the populace, especially in times of economic stress, against the expense represented by the images.”⁵⁸ Even in the Byzantine Empire where it served as the Emperors’ official doctrine for more than a century,⁵⁹ iconoclasm was entirely dissociated from religions: while the Emperors and Popes destroyed a huge amount of books and cultural treasures,⁶⁰ a number of clergymen and monks continued practicing iconography.⁶¹ And yet, extremists still maintain the argument that pagan cultural heritage should be destroyed because of its association to either infidelity or idolatry. Hence, while being interviewed about the destruction of the Buddhas of the Bamiyan, the Taliban chief Mufti Abd-ul-‘Alim referring to the Myth of the golden calf opined that “the statues should be destroyed, since there was always a danger of people going back to idol-worship.”⁶² Akin to the Taliban, ISIS also justified its acts by reference to the Prophet’s and his companions’ attitude towards idols.⁶³

In international law it is quite clear that international responsibility should arise in all cases where states either allow or encourage iconoclastic attacks. In fact, these attacks are not only breaching international standards, but, they go against the spirit of the United Nations, and especially UNESCO whose purpose, is, let us not forget, the building of *peace* among nations through cultural

Church”); David Freedberg, “*Iconoclasm and Idolatry*,” in *A COMPANION TO AESTHETICS* 207 (David E. Cooper ed., 1995) (highlighting that in practice “the motives are much less clear and much more difficult to unravel”).

⁵⁸ Freedberg, *supra* note 57, at 620.

⁵⁹ See Anne McClanan & Jeff Johnson, *Introduction: ‘O For a Muse of Fire’* in, *NEGATING THE IMAGE: CASE STUDIES ON ICONOCLASM*, *supra* note 56, at 1 (explaining that iconoclasm expanded throughout the Christendom); GAMBONI, *supra* note 55, 28–29, (giving examples from the New World carried out by the church, especially against the “pagan” indigenous peoples, and that the Pope had asked for forgiveness from the Mayan communities for the Merida’s Cathedral in Yucatan being built upon the ruins of a Mayan temple).

⁶⁰ See CYRIL MANGO, *THE ART OF THE BYZANTINE EMPIRE 312–1453: SOURCES AND DOCUMENTS* (1972).

⁶¹ Carlo Bertelli, *Pour une évaluation Positive de la Crise Iconoclaste Byzantine*, 80 *REVUE DE L’ART* 9, 13 (1988). Ann Epstein however, speculates that after iconoclasm the emphasis was placed on the narrative rather than the figurative, to avoid offensive representations. See ANN WHARTON EPSTEIN, *TOKALI KILISE: TENTH-CENTURY METROPOLITAN ART IN BYZANTINE CAPPADOCIA* 48 (1986).

⁶² See J.M. Butt, *The Buddhas Of Bamiyan: Saving Other Possible Cultural Targets*, in *DOHA PROCEEDINGS*, *supra* note 34, at 53; *supra* note 18 and accompanying text; *infra* notes 77, 158 and accompanying text.

⁶³ See *ISIS Destroys Mosul Museum Artifacts*, *supra* note 51, at 00:06–00:15.

collaboration.⁶⁴ Specifically the element of *intention*, which is one that has been put forward in the UNESCO Declaration Concerning the Intentional Destruction of Cultural Heritage (drafted in the aftermath of the Bamiyan bombing) implies that what is most atrocious is the will to inflict harm on humanity as a whole.⁶⁵ In fact, acts of this nature are antithetical even to the idea of the notion of “heritage,” i.e. the underlying concept of the construction of the whole system of cultural heritage protection. As such, they are at odds with all UNESCO documents and declarations that affirm the significance of cultural heritage and the need to eradicate terrorism—the UNESCO 2001 Universal Declaration on Cultural Diversity for instance, proclaims that “cultural diversity . . . is the common heritage of humanity and should be recognized and affirmed for the benefit of present and future generations,”⁶⁶ and the UNESCO Call for International Cooperation to Prevent and Eradicate Acts of Terrorism states that “acts of terrorism can never be justified whatever the motives.”⁶⁷ These acts of extremism therefore may trigger international responsibility not only under the UNESCO World Heritage Convention,⁶⁸ but also under international humanitarian law. The United Nations Security Council in particular has pointed to this direction, “[c]ondemn[ing] the destruction of cultural heritage in Iraq and Syria particularly by ISIL and ANF, whether such destruction is incidental or deliberate”⁶⁹

The same findings were provided by the Doha Symposium on cultural heritage in 2001, an international conference presided by the Emir of the State of Qatar, aiming at “convey[ing] the

⁶⁴ See United Nations Educ. Scien. & Cultural Org. [UNESCO] Constitution, art. 1 (“The purpose of the Organization is to contribute to peace and security by promoting collaboration among the nations through education, science and culture”).

⁶⁵ See United Nations Educ. Scien. & Cultural Org. [UNESCO] Records of the General Conference: Paris, 29 September to 17 October 2003, § 33 (Oct. 17, 2003).

⁶⁶ United Nations Educ. Scien. & Cultural Org. [UNESCO], Records of the General Conference: Paris, 15 October to 3 November 2001, § 25 (Nov. 2, 2001).

⁶⁷ United Nations Educ. Scien. & Cultural Org. [UNESCO], Records of the General Conference: Paris, 15 September to 17 October 2003, § 39 (Oct. 20, 2001).

⁶⁸ On the discussion on international responsibility for these acts as internationally wrongful acts under the UNESCO mechanisms, see Francioni & Lenzerini, *supra* note 34, at 628–38; see also Raymond Goy, *La Destruction Intentionnelle du Patrimoine Culturel en droit International*, 109 REVUE GÉNÉRALE DE DROIT INTERNATIONAL PUBLIC 273 (2005).

⁶⁹ S.C. Res. 2199, ¶ 15 (Feb. 12, 2015).

viewpoint of Islam regarding the preservation of the cultural heritage” and further, “saving possible cultural targets” from the Taliban.⁷⁰ The Symposium was attended not only by the then Director General of UNESCO Koïchiro Matsuura, but also by representatives of the Islamic Educational, Scientific and Cultural Organization (“ISESCO”) and of the Arab League Educational, Cultural and Scientific Organization (“ALESCO”), as well as by members of the Organization of the Islamic Conference (“OIC”), an organization of fifty-seven member states based in Saudi Arabia.

III. DOES SHARIA PROHIBIT THE ARTS?

This said, in classical Islamic law, there has been a lot of controversy over the meaning and scope of artistic freedom. Muslim leaders have equally condemned terrorist organizations’ iconoclastic policies,⁷¹ while others have pointed to parts of Islamic law that could be read as prohibiting attacks to icons and cultural treasures.⁷² Sharia as a whole, however, is rather hostile towards figurative representations. It seems in fact that artistic freedom in Islam has been oscillating between two fervently opposing situations: stringent religious restrictions on the one hand, and an extremely rich artistic tradition on the other.

A. *Shirk and Prohibitions of Figurative Representations*

The *Qur’an* does not contain any ban of the arts or of figurative representation.⁷³ Yet, a general prohibition of all arts is commonly presumed from the aniconic nature of Islam.⁷⁴ There are

⁷⁰ DOHA PROCEEDINGS, *supra* note 34, at 6.

⁷¹ See *Arab League: ISIS Destruction of Iraqi Heritage ‘Odious Crime’*, AL ARABIYA NEWS (Feb. 27, 2015) <http://english.alarabiya.net/en/News/middle-east/2015/02/27/Arab-League-ISIS-destruction-of-Iraqi-heritage-odious-crime.html>; *OIC Condemns Destruction of Artifacts at Mosul Museum*, ARABSTODAY (Mar. 2, 2015) <http://en.arabstoday.net/culture/also-in-the-news/oic-condemns-destruction-of-artifacts-at-mosul-museum.html>.

⁷² Butt, *supra* note 62, at 54; Pierre La France, *Arguments Proposed To Dissuade The Taliban From The Destruction Of Figurative Historical Remains*, in DOHA PROCEEDINGS *supra* note 34, at 68–70.

⁷³ See generally ISLAMIC ART AND VISUAL CULTURE: AN ANTHOLOGY OF SOURCES 1–6 (D. Fairchild Ruggles ed., 2011) (referring however, to descriptions of paradise as being relevant).

⁷⁴ SILVIA NAEF, L’ISLAM EN DÉBATS: Y A-T-IL UNE « QUESTION D’IMAGE » EN ISLAM?, 15 (2004); see also Rachel Saloom, *You Dropped a Bomb on me, Denmark—A Legal Examination of the Cartoon Controversy and Response as it Relates to the*

two reasons for this. The first is that it fervently prohibits any expressions of polytheism (*shirk*). *Shirk* is deduced from the first pillar of Islam, the *shahada* (and the belief in Oneness, the *tawhid*) as well as from Quranic verses⁷⁵ and the *hadith* tradition (i.e. the Prophet's deeds and sayings).⁷⁶ Indeed, a primary concern of the Prophet and his immediate successors was to spread the word of Allah. This, however, involved fighting against "infidels," the aim of which was to erase all traces of paganism. *Shirk*, from the perspective of idolatry, was considered a serious offence and punished by stoning at least until 400/1000.⁷⁷ The second reason is the virtually sacred meaning that letters hold in Islam. When the Angel Gabriel, the Prophet's messenger, first appeared to the Prophet, he commanded Him to "read." The Qur'an itself stems from the Arabic root "read" and "everything, [it] holds, has been written from all eternity on al-lawh al-mahfuz, the Well-Preserved Table, by means of the pre-existent pen."⁷⁸ Mosques are covered not with drawings, but with meticulous calligraphy and it is even said that the Prophet's son-in-law, Ali, was the first calligrapher.⁷⁹ It is precisely for this reason that literature and poetry (rather than painting and sculpture) have held a predominant role in the Islamic tradition and that well-known Persian poets such as Sanai Ghaznavi (555/1160), Khaqani (595/1199) and Rumi (603/1207) are

Prophet Muhammad and Islamic Law, 8 RUTGERS J.L. & RELIGION 1, 5 (2006).

⁷⁵ See e.g. *Qur'an Sūrah II: Al-Baqarah* 2:51–54 (reiterating the Abrahamic myth of the Golden Calf and prohibit worshipping except Allah); *Qur'an Sūrah IV: Al-Ma'idah*, 5:90 (prohibiting sacrifice on stone alters); see also NOYES, *supra* note 56, at 3 (according to whom 'the greatest threat to *tawhid* is *shirk*').

⁷⁶ See Muhammad Al-Atawneh, *Leisure and Entertainment (malahi) in Contemporary Islamic Legal Thought: Music and the Audio-Visual Media*, 19 ISLAMIC L. & SOC'Y 397, 407 (2012) (discussing visual media as *shirk*); Taha Jaber al-Alwani, *Fatwa Concerning the United States Supreme Courtroom Frieze*, 15 J.L. & RELIGION 1, 4 (2001) (discussing painting as *shirk*); Sheikh Bashir Ghalounji, *Islam and the Preservation of Human Heritage*, in DOHA PROCEEDINGS, *supra* note 34 at 57; Abdul Hamid Al-Ansari, *Islam And The Preservation Of The Human Heritage*, in *id.* at 27.

⁷⁷ See LORENZ LANGER, RELIGIOUS OFFENCE AND HUMAN RIGHTS: THE IMPLICATIONS OF DEFAMATION OF RELIGIONS 325 (2014).

⁷⁸ Annemarie Schimmel, from *Calligraphy and Islamic Culture*, reprinted in RELIGION, ART AND VISUAL CULTURE (S. Brent Plate ed., 2002). See generally SEYED HOSSEIN NASR, ISLAMIC ART AND SPIRITUALITY 17 (1987).

⁷⁹ ANTHONY WELCH & STUART CARY WELCH, ARTS OF THE ISLAMIC BOOK: THE COLLECTION OF PRINCE SADRUDDIN AGA KHAN 19 (1982); Nasr, *supra* note 78, at 17 & n.14; see also Stephen Vernoit, *The Visual Arts in Nineteenth-Century Muslim Thought*, in ISLAMIC ART IN THE 19TH CENTURY: TRADITION, INNOVATION, AND ECLECTICISM 19 (Doris Behrens-Abouseif & Stephen Vernoit eds., 2006).

cherished in the Arab-Islamic world,⁸⁰ up to the present day. Some of the world's most beautiful poems are Rumi's.

The prohibition of visual arts is in addition assumed from the *sunna* and the *hadith* tradition. The *hadith* tradition is of course a debated topic in Islam, as *ahadith* may not always be authentic,⁸¹ and, even when authentic, its interpretations are frequently questioned—primarily within Islam and among Sunni and Shia Muslims.⁸² In a general sense, however, Muslim scholars have held a rigid position not only towards blasphemy and apostasy, but also idolatry and anything that resembles it. Their works have been misused and translated in many instances to justify wholesale bans on the arts.

Hence, some authors argue that the *hadith's* prohibition on images are meant to prohibit all images,⁸³ while others argue that the Prophet appreciates things that are useful rather than those that are merely decorative and might obstruct prayer.⁸⁴ In a very elaborate *fatwa* concerning the legitimacy of the portrayal of the Prophet on the frieze of the U.S. Supreme Court, Jaber-al-Alwani points to at least thirteen narrations of *ahadith* that “regulate” figurative representations.⁸⁵ He classifies them into separate categories, including those that “serve as a warning to the arrogant and vain who try to emulate the creation of God by showing off their own skills”⁸⁶ and those that “warn of the necessity of putting aside all that may distract people from the worship of the Creator.”⁸⁷ In one of the most well known *ahadith*, the Prophet, like

⁸⁰ See generally Hossein Nasr, *supra* note 78, at 114–32; see also REPRESENTATIONS OF THE DIVINE IN ARABIC POETRY (Gert Borg & Ed de Moor eds., 2001).

⁸¹ See IBN AL-SALAH AL-SHAHRAZURI, AN INTRODUCTION TO THE SCIENCE OF THE HADITH 5–23, 25 (2006) (referring to the non-reliable *hadith*, e.g. the weak, interrupted, loose, anomalous, isolated, defective and the misrepresented).

⁸² See MOHAMMAD HASHIM KAMALI, PRINCIPLES OF ISLAMIC JURISPRUDENCE 87 (3rd ed., 2003) (explaining that “[t]here is no dispute about the occurrence of extensive forgery in the *hadith* literature,”); *id.* at 92 (on the classification and value of the *hadith*); see also, al-Shahrazuri, *supra* note 81, at 8 (noting that Bukhari “was the first to compose a collection containing only sound hadiths” and that therefore “[t]he books of Bukhari and Muslim are the soundest”).

⁸³ See Jaber al-Alwani, *supra* note 76, at 19.

⁸⁴ *Id.*; see also, 1 SAHIH AL-BUKHARI, BOOK 8, NO. 371 (narrated by An'as).

⁸⁵ Jaber al-Alwani, *supra* note 76, at 19. On the *hadith* tradition and artistic representations, see generally, JAMAL ELIAS, AISHA'S CUSHION: RELIGIOUS ART, PERCEPTION, AND PRACTICE IN ISLAM 10 (2012).

⁸⁶ Jaber al-Alwani, *supra* note 76, at 21.

⁸⁷ *Id.*

Plato in his *Republic*,⁸⁸ allegedly cursed image-makers in their attempts to imitate God's act of creation, since "it is only God who has the power either to create life, or to take it."⁸⁹ In a second narration, A'ishah tore off cloths that were hanging on the wall and made cushions from it so that Angels may enter her house and the Prophet finds no mistake in it.⁹⁰ And in a third one, the Prophet became angry at his wife, A'ishah, because she was found wearing a piece of cloth with a picture on it. It narrated:

The Prophet entered upon me while there was a curtain having pictures (of animals) in the house. His face got red with anger, and then he got hold of the curtain and tore it into pieces. The Prophet said, "Such people as paint these pictures will receive the severest punishment on the Day of Resurrection."⁹¹

Similarly, it is narrated that when the Prophet was ill, his wives came to see him and told him about paintings they had seen in a church in Abyssinia (present day Ethiopia); when they told the Prophet about it, however, he admonished them rather than sharing their enthusiasm, stating, "if any religious man dies amongst those people they would build a place of worship at his grave and make these pictures in it. They will be the worst creature in the sight of Allah on the Day of Resurrection."⁹² Indeed, it does not appear that the Prophet was particularly enthusiastic about painting. In fact, so strong was his disapproval of anything that

⁸⁸ See PLATO, THE REPUBLIC 596, 597 (Socrates tries to convince Glavkon that God is the only creator; contrary to the "artisans" and others who "make" things, artists are mere "second-hand" imitators of that creation. They would therefore not deserve a position in Plato's fictitious Republic).

⁸⁹ 3 SAHIH AL-BUKHARI, BOOK 34, NO. 299 (narrated by Aun bin Abu Juhaifa); see also, GÖRAN LARSSON, MUSLIMS AND THE NEW MEDIA: HISTORICAL AND CONTEMPORARY DEBATES 52–53 & nn.24–28 (2011) and Al-Atawneh, *supra* note 76, at 407 (referring to the views of Shaykh Ahmad al-Kutty); RICHARD ETTINGHAUSEN, ARAB PAINTING 13 (1977) (suggesting that "the artist, in making something lifelike, is thought to compete blasphemously with God").

⁹⁰ Jaber al-Alwani, *supra* note 76, at 15 n.37, citing 7 SAHIH MUSLIM, BOOK 86 (narrated by Muslim bi Sharh al-Nawawi).

⁹¹ 8 SAHIH AL-BUKHARI, BOOK 73, NO. 130 (narrated by Aysha); and 3 SAHIH AL-BUKHARI, BOOK 43, NO. 659 (narrated by Al-Qasim); see also ELIAS, *supra* note 85, 9–11.

⁹² 1 SAHIH AL-BUKHARI, BOOK 8, NO 419 (narrated by Aysha); 2 SAHIH AL-BUKHARI, BOOK 23, NO 425 (narrated by Aysha); see also Modj-ta-ba Sadria, *Figural Representation in Islamic Art*, 20 MIDDLE EASTERN STUD. 63, 99 (1984).

could be perceived as *shirk*⁹³ that when he conquered Mecca (8/630AD) he smashed not only idols but also icons in the Kaaba, the holy Islamic shrine. Only one image (presumably of the Holy Virgin enlacing Jesus) was spared: it is said that the Prophet “[held] his hands over it for protection while the others were effaced.”⁹⁴

Just like figurative representation, Quranic verses and *ahadith* have been used to justify absolute prohibitions of music other than Quranic recitation.⁹⁵ In fact, the permissibility of music is another “age-old dispute amongst Muslim jurists.”⁹⁶ Many conservative Saudi scholars,⁹⁷ as well as Salafists and adepts of Wahhabism,⁹⁸ have been claiming for a long time that any sort of music (including instrumental) should be prohibited.⁹⁹ Hence, Muslim jurists and *ulemas* at times have deduced that singing and the “beating of Tambur (drum)” are unlawful under Sharia.¹⁰⁰ They

⁹³ See *supra* notes 74–77.

⁹⁴ Sadria, *supra* note 92, at 99; NOYES, *supra* note 56, at 73 (referring however to a picture of Jesus in Kabbala); see also, Anis Ahmad, *Islam and Cultural Heritage*, in DOHA PROCEEDINGS, *supra* note 34; Abd-Ur-Razzak Goussoum, *Islam And World Heritage*, in *id.* at 50, 60.

⁹⁵ See Lois Ibsen al Faruqi, *The Cantillation of the Qu’ran*, 19 ASIAN MUSIC 1 (1987); VOICES OF ISLAM 59–62 (Vincent Cornell ed., 2007); Farid El Asri, *L’expression musicale de musulmans européens. Création de sonorités et normativité religieuse*, 25 REVUE EUROPÉENNE DES MIGRATIONS INTERNATIONALES 35–50 (2009). On the topic of sacred music and *dervish* dancing in Sufism, see SUFISM, MUSIC AND SOCIETY: IN TURKEY AND THE MIDDLE EAST 30–33 (Anders Hammarlund et al. eds., 1997) (pointing also however to the banning of these traditions for a long period of time); see also, Lois Ibsen al Faruqi, *Music, Musicians and Muslim Law*, 17 ASIAN MUSIC 3–36 (1985) (on the imposition of rhythms outside the text that is being recited).

⁹⁶ See Al-Atawneh, *supra* note 76, at 398.

⁹⁷ Jaber al-Alwani, *supra* note 76, at 12–13; see also Al-Atawneh, *supra* note 76, at 407 (referring to the views of Shaykh Ahmad al-Kutty and Shaykh ‘Abd al-‘Aziz Ibn Biz).

⁹⁸ See NOYES, *supra* note 56, at 74, and Al-Atawneh, *supra* note 76, at 404.

⁹⁹ See A. J. WENSINCK, A HANDBOOK OF EARLY MUHAMMADAN TRADITION 173 (1927); SHEILA R. CANBY, ISLAMIC ART IN DETAIL 32 (2005); 2 GROVE ENCYCLOPEDIA OF ISLAMIC ART AND ARCHITECTURE, 182–83 (Jonathan Bloom & Sheila S. Blair eds., 2009)

¹⁰⁰ See *Qur’an Surah Al-Jumu’ah (The Congregation, Friday)* 62:11 (Muhammad Muhsin Khan, trans.) (“they disperse headlong to it, and leave you (Muhammad [SAW]) standing [while delivering Jumu’ah’s religious talk (Khutbah)]. Say “That which Allah has is better than any amusement or merchandise! And Allah is the Best of providers”); *Surat Luqman (Luqman)*, 31:6 (“And of mankind is he who purchases idle talks (i.e. music, singing, etc.) to mislead (men) from the Path of Allah without knowledge, and takes it (the Path of Allah, or the Verses of the Qu’ran) by way of mockery. For such there will be a

have in some instances also deduced that the playing of musical instruments is forbidden. This has been deduced from *ahadith* such as this:

that he heard the Prophet saying: “from among my followers there will be some people who will consider . . . the use of musical instruments, as lawful . . . Allah will destroy them during the night and will let the mountain fall on them, and He will transform the rest of them into monkeys and pigs and they will remain so till the Day of Resurrection.”¹⁰¹

In another *hadith* the drum seems to be allowed during the celebration of Eid:

that during the Mina days, Abu Bakr came to her, while there where two girls with her, beating drums, and the Prophet was (lying) covering himself with his garment. Abu Bakr rebuked the two girls, but the Prophet uncovered his face and said ‘O Abu Bakr! Leave them, for these are the days of *Id* (i.e. festival) . . .’¹⁰²

Of course most of these *ahadith* have been considered by Muslim scholars as non-authentic,¹⁰³ while Al-Ghazali in particular asserts that there are no authentic traditions “specifically banning music,” but rather that “music was practiced during the lifetime of the Prophet.”¹⁰⁴

humiliating torment (in the Hell-fire)).

¹⁰¹ 7 SAHIH AL-BUKHARI, BOOK 69, NO. 494 (narrated by Abu 'Amir or Abu Malik Al-Ash'ari).

¹⁰² 4 SAHIH AL-BUKHARI, BOOK 56, NO. 730 (Narrated by 'Aisha).

¹⁰³ Al-Atawneh, *supra* note 76, at 401–02. On the non-authentic, *see supra* note 60.

¹⁰⁴ Al-Atawneh, *supra* note 76, at 402; *see also* ISLAMIC ART AND VISUAL CULTURE, *supra* note 73, at 34–35 (referring to Ghazali’s writings on the art of the pen and the functions of Secretaries, citing the Arabic version of Ghazali’s *Al-tabr al-masbuk fi nasihat al-muluk wa al-wuzara wa al-wulat* and Ghazali’s *Book of Counsel for Kings*, 1964).

B. Artistic Traditions Flourishing in the Muslim World

Arts flourished astonishingly during the whole expansion period of Islam. This happened largely thanks to the Great Caliphs—the Ummayyad and the Abbasids in the 8th and 9th century, but also the Safavids in Persia (15th century) and the Mughals in India (16th century)—who supported financially culture and writing.¹⁰⁵

i. Painting and Iconography

During the centuries of warfare in the early rise of Islam, “Muslims conquered lands previously unknown to them and Islam was introduced to peoples such as the Persians, Turks, Armenians, Indians, Kurds and Abyssinians.”¹⁰⁶ Literature from antiquity was restored, science expanded, and, new treatises were written, including on the use of papers and colours¹⁰⁷ and on aesthetics.¹⁰⁸ All arts of the Book flourished, not only calligraphy and illumination, but also, illustration and painting. The artistic treasures and knowledge of course in most cases remained the privilege of the royal and sub-royal families.¹⁰⁹ Thus, artists at the time of the Prophet and under these dynasties seem to have enjoyed admirable freedom.¹¹⁰ Iconographers represented visually a variety of topics—not only common ones (such as battles, forests or kings), but also sensitive ones, such as lovers.¹¹¹ Even depictions of sodomy between males are found in manuscripts dating from the

¹⁰⁵ See generally WELCH & WELCH, *supra* note 79, at 139.

¹⁰⁶ Ghalounji, *supra* note 76, at 59.

¹⁰⁷ *Id.* at 38–39, 50–51 (referring to Nishapuri’s (1442/1519) treatise on “Papers, Color and Ink” (1433) and to Sadiqi Beg’s (1533/1609) *Qanun Al-Suvar* treatise on “Painting”).

¹⁰⁸ *Id.* at 74–75 (referring to Ibn Hazm’s (994/1064) and Ibn al-Haytham’s (965/1039) treatise “On Vision”).

¹⁰⁹ One of the most tragic events in Islamic art history is considered to be the destruction of the Fatimid library in the 11th century. Ernst J. Grube, *Fostat Fragments*, in ISLAMIC PAINTING AND THE ARTS OF THE BOOK 25 (B.W. Robinson et al. eds., 1976).

¹¹⁰ See ISLAMIC ART AND VISUAL CULTURE, *supra* note 73, at 11–31; MILSTEIN ET AL., STORIES OF THE PROPHETS: ILLUSTRATED MANUSCRIPTS OF QISAS AL-ANBIYA 27–28 (1999) (discussing artistic freedom in the representation of Prophets in paintings).

¹¹¹ See Robinson, *supra* note 109, at 266 (showing *Lovers in a pavilion*, Mashaad c. 1570).

period of the Abbasids.¹¹² In many instances, religious scenes were illustrated. The most impressive such work is arguably the *the Fal-nama*, the 16th century Persian book on Prophecies (the “Book of Omens”),¹¹³ and also, the so-called *Qisas an anbiya*, whose initial texts date from 732AD.¹¹⁴ The Prophet also appears in these manuscripts;¹¹⁵ and like other prophets that appear in Islamic iconography, he is usually surrounded by a circular flame halo. Contrary to other prophets, however, whose faces are visible in depictions,¹¹⁶ his face is likely to be blurred or covered by a veil.¹¹⁷ In some cases, the Prophet’s entire head, or his body, is covered by a flamed halo,¹¹⁸ while in other manuscripts dating from the 18th and 19th century he is represented by a flame.¹¹⁹

¹¹² See Stephen O. Murray, *The Will Not to Know*, in STEPHEN O. MURRAY & WILL ROSCOE, *ISLAMIC HOMOSEXUALITIES: CULTURE, HISTORY AND LITERATURE* 17–18 (1997); see also Javaid Rehman & Eleni Polymenopoulou, *Is Green a Part of the Rainbow? Sharia, Homosexuality and LGBT Rights in the Muslim World*, 37 *FORDHAM INT’L L.J.* 1, 29 n.107 (2013).

¹¹³ See MILSTEIN ET AL., *supra* note 110, at 66–69; Eva R. Hoffman, *The Beginnings of the Illustrated Arabic Book: An Intersection Between Art and Scholarship*, 17 *MUQARNAS* 37–52 (2000).

¹¹⁴ *Id.* at 1, 7.

¹¹⁵ See Christiane Gruber, *Between Logos (Kalima) And Light (NuR): Representations of the Prophet Muhammad in Islamic Painting*, 26 *MUQARNAS* 229 (2009); Oleg Grabar & Mika Natif, *Histoire des portraits du prophète Muhammad*, in *DE LA FIGURATION HUMAINE AU PORTRAIT DANS L’ART ISLAMIQUE* 89–110 (Houari Touati ed., 2015); see also MILSTEIN ET AL., *supra* note 110, at 160 and relevant illustrations.

¹¹⁶ E.g., Robinson, *supra* note 109, at annex illustration III.72 (*Moses in the Red sea*), illustration III.238 (*Noah’s ark 1570c*).

¹¹⁷ See, e.g., MILSTEIN ET AL., *supra* note 110, at MS T-4 (*Muhammad about to marry Khadija*); see also Gruber *supra* note 76, at 230, 238 (*the Prophet’s Ascension*); Robinson, *supra* note 109, at 216, illustration 27.IV.15 (*The Prophet and his Companions*, Istanbul, early 17th century), annex, illustration IV.16 (*The Prophet in Paradise—Ottoman early 17th century*).

¹¹⁸ MILSTEIN ET AL., *supra* note 110, at XXXII MS T-4 (*Muhammad returning from the Miraj*); *id.* at XXXIII MS T-5 (*Soldiers presenting to Muhammad the severed head of Abu Jahl*); *id.* at 9 MS B (*Muhammad on the Mi ‘raj*); *id.* at XLII (*Muhammad’s prophetic nature recognized by a monk*); *id.* at 12 MS C (*Muhammad praying in the Masjid al-Aqsa*); see also Robinson, *supra* note 109, at 168, illustration 19.III.207 (*the Miraj – Tabriz 1505*), 216, illustration 27.IV.15 (*the Prophet and his Companions*, Istanbul, early 17th century), XVII MS N-2 (*Ali breaking down the doors*).

¹¹⁹ See, e.g. *Muhammad Destroying Idols—L’Histoire Merveilleuse en Vers de Mahomet BNF*, https://commons.wikimedia.org/wiki/File:Muhammad_destroying_idols_L%27Histoire_Merveilleuse_en_Vers_de_Mahomet_BNF.jpg (last visited Nov. 23, 2015) (Persian version where Ali is also represented as a flame); *Illustration*, WIKIPEDIA, https://en.wikipedia.org/wiki/Depictions_of_Muhammad#/media/File:Banu_Qurayza.png (last visited Nov.

Yet, the Islamic tradition of iconography has never been an isolated one. On the contrary, it seems that the artistic exchange between civilizations was quite significant. In fact, during the rule of the Great Caliphs, diplomatic and cultural exchanges with nearby realms such as Palestine and Abyssinia (where Jewish and Christian monks lived and practiced iconography) were frequent,¹²⁰ facilitating artistic exchanges by implication.¹²¹ Archaeological research corroborates these arguments. The mural paintings discovered close to Qurayt Al-Faw in Saudi Arabia in the 1970s demonstrate that larger dimension wall-paintings and sculptures were present at the time of the Prophet, in a style that presents important similarities with the Hellenistic tradition.¹²² Even the mosaics discovered in the Medina mosque “were most likely made by Christian artisans who had gained their skill working on the many mosaic programs adorning Byzantine churches in the eastern Mediterranean.”¹²³ The discovery of the murals in *Qusayr Amrah* in Jordan,¹²⁴ and those in Qasr al-Hayr al-Ghari in Syria,¹²⁵ are in this respect even more significant, given that they were not

23, 2015).

¹²⁰ E.g. Cherif Bassiouni, *Protection of Diplomats Under Islamic Law*, 74 A.J.I.L. 609, 613 (1980) (referring to diplomatic exchanges with Abyssinia).

¹²¹ See ETTINGHAUSEN, *supra* note 89, at 67 (1977) (discussing “Byzantine Art in Islamic Garb”); 1 LUCY-ANNE HUNT, BYZANTIUM, EASTERN CHRISTENDOM AND ISLAM: ART AT THE CROSSROADS OF THE MEDIEVAL MEDITERRANEAN 205 (1998) (essay *Christian Muslim Relations in Painting in Egypt of the Twelfth to Mid-Thirteenth Centuries: Sources of Wallpainting at Deir Es-Suriani and the Illustration of the New Testament Ms Paris, Copte-Arabe 1/Cairo, Bibl. 94* at 205), figures 24–35; Robinson *supra* note 109, at 69, 69 nn.311–14; ISLAMIC ART AND VISUAL CULTURE, *supra* note 73 at 109–12 (on the reception of Byzantine ambassadors in Baghdad, referring to Ghada al-Hijjawi al-Qaddumi’s *Book of Gifts and Rarities* published by CUP 1996 and *Kitab al-hadaya wa al-tuhaf*, published by Kuwait Government Press 1959).

¹²² See ABDUL RAHMAN AL-ANSARY, QARYAT AL-FAW: A PORTRAIT OF PRE-ISLAMIC CIVILISATION IN SAUDI ARABIA (1982), at 128, <https://archive.org/stream/QaryatAl-fawAPortraitOfPre-islamicCivilisationInSaudiArabia1982/QaryatAl-faw#page/n61/mode/2up>; NOYES, *supra* note 56, at 72.

¹²³ ISLAMIC ART AND VISUAL CULTURE, *supra* note 73, at 99.

¹²⁴ *Quseir Amra*, UNESCO, <http://whc.unesco.org/en/list/327/> (last visited Nov. 23, 2015) (listing the cite on the World Heritage List); ETTINGHAUSEN, *supra* note 89, at 29.

¹²⁵ *Un Chateau du désert: Qasr al-Hayr ach-Charqi*, UNESCO (WORLD HERITAGE TENTATIVE LIST –SYRIA) available at <http://whc.unesco.org/en/tentativelists/1298/> (listing the Syrian site on the tentative list); ETTINGHAUSEN, *supra* note 89, at 35–37 (illustration of “Musicians and hunting Cavalier,” Damascus, c 730).

discovered in nomadic areas, but in the palaces of the Ummayyad Caliphs. While UNESCO attributes them to the fact that the “Ummayyad civilization was imbued with a pre-Islamic secular culture,”¹²⁶ they could much more significantly represent a strong argument against the monolithic understanding of the position of Islam vis-à-vis the arts.

ii. Musical Expressions

Musical expressions equally flourished in the early years of Islam—in the cities of Mecca and the Medina as much as in the desert. The tribesmen who lived in the pre-Islamic Arabian Peninsula maintained rich oral and musical traditions that were transmitted to generations much later after the Prophet’s conquests. Some of these musical practices have survived until today: the practice of the *imzad*, for instance, common among Touareg women,¹²⁷ or the Al-Zajal, a form of musical poetry common in the Middle East that has been “passed down from generation to generation through observation, imitation and participation.”¹²⁸ Both of these practices were listed as part of UNESCO’s Intangible Cultural Heritage in 2013 and 2014 respectively: the first on behalf of Lebanon and the second on behalf of Algeria, Mali, and Niger. On the other hand, musical performance was part of life in the city under the rule of the great Caliphs.¹²⁹ This was the case not only when “drummers and trumpeters accompanied armies into battle,”¹³⁰ but also during

¹²⁶ UNESCO, *supra* note 124.

¹²⁷ See United Nations Educ. Scien. & Cultural Org. [UNESCO], Nomination File 00891 for Inscription in 2013 on the Representative List of the Intangible Cultural Heritage of Humanity at 3 (Dec. 2013), www.unesco.org/culture/ich/doc/download.php?versionID=20738.

¹²⁸ See United Nations Educ. Scien. & Cultural Org. [UNESCO], Nomination File 01000 for Inscription in 2013 on the Intangible Cultural Heritage of Humanity in 2014, at 4–5 (Nov. 2014), www.unesco.org/culture/ich/doc/download.php?versionID=30515.

¹²⁹ *Newsletter No. 75*, (OIC Research Centre for Islamic History, Art and Culture), Jan. 2008–April 2008, at 40–41 (), http://www.ircica.org/content_images/NL%2075.pdf (featuring a book review of *Mawsû'at Makkah al-Mukarramah wa'al-Madinah al-Munawwarah*); see also Sadria, *supra* note 92, at 99.

¹³⁰ SPIRIT OF LIFE: MASTERPIECES OF ISLAMIC ART FROM THE AGA KHAN MUSEUM COLLECTION 163 (2007); see also REPRESENTATIONS OF THE DIVINE IN ARABIC POETRY, *supra* note 80, at 1 (noting that the expansion period of Islam equally coincided with a transitional phase from a nomad to an urban lifestyle).

gatherings and other forms of entertainment. In the tenth and eleventh centuries, the lyrics of popular songs were collected in a book called the *Kitab al Aghani* (the *Book of Songs*),¹³¹ while “medieval metalwork from Mosul and Damascus decorated with vignettes from the courtly cycle regularly includes musicians alongside hunters and drinkers.”¹³² Manuscripts also corroborate this evidence. By way of illustration, a manuscript from late sixteenth century Iran depicts a young man playing the tar,¹³³ an illustration from Lahore from 1595 depicts musical entertainment at a scholar’s house,¹³⁴ and a manuscript from Munghal, India depicts a *kemenche* player,¹³⁵ still played in many parts of the Arab world.

IV. LIMITS TO ARTISTIC FREEDOM: THE OFFENCES OF BLASPHEMY AND APOSTASY

Despite the rich artistic tradition of the Muslim world and its openness to cultural exchange, a strict interpretation of Islam only tolerates, rather than encourages, the arts. Even in what is tolerated, however, serious limitations may potentially apply.

A. Blasphemy in Classical Islam

In classical Islam, blasphemy is one of the most important limitations. In classical Islam, there is no agreement as to its exact meaning and punishment. Most authors agree that an equivalent of the word “blasphemy” is not mentioned in the *Qur’an*.¹³⁶ Rabb mentions that Abu Hanafi, i.e. the leader of the most popular School of thought in Sunni Islam, viewed blasphemy as the refutation of the oneness of God,¹³⁷ and by implication also of the

¹³¹ REPRESENTATIONS OF THE DIVINE IN ARABIC POETRY, *supra* note 80, at 86; *see also* ETTINGHAUSEN, *supra* note 89, at 64–65.

¹³² REPRESENTATIONS OF THE DIVINE IN ARABIC POETRY, *supra* note 80, at 86.

¹³³ *See* SPIRIT OF LIFE, *supra* note 130, at 166.

¹³⁴ *See id.* at 167.

¹³⁵ *See id.* at 169.

¹³⁶ Intisar A. Rabb, *Negotiating Speech in Islamic Law and Politics: Flipped Traditions of Expression*, in ISLAMIC LAW AND INTERNATIONAL HUMAN RIGHTS LAW 146 (Anver Emon et al. eds., 2012); KAMRAN HASHEMI, RELIGIOUS LEGAL TRADITIONS, INTERNATIONAL HUMAN RIGHTS LAW AND MUSLIM STATES 31 (2008); *see also* ABDULLAHI AHMED AN-NA’IM, ISLAM AND THE SECULAR STATE: NEGOTIATING THE FUTURE OF SHARI’A 121 (2008); ABDULLAH SAEED & HASSAN SAEED, FREEDOM OF RELIGION, APOSTASY AND ISLAM 37–38 (2004).

¹³⁷ Rabb, *supra* note 136, at 158–59.

first pillar of Islam, the *shahada*. For Saeed and Hashemi, on the other hand, blasphemy seems to be equivalent to an offense called “*sabb*,”¹³⁸ which generally means to express “despicable and irreverent speech”¹³⁹ or more generally, to “insult.”¹⁴⁰ *Sabb* was initially conceived as an offense against God (*sabb-Allah*) or the Prophet (*sabb-al-Rasoul*)—but later on, also against the Messengers of God (i.e. the Angels) and the companions of the Prophet.¹⁴¹ As for the exact legal consequences of *sabb*, views differ. Hashemi suggests that during the lifetime of the Prophet, its punishment was an act of warfare applicable to enemy warriors, and that the Prophet himself and his immediate successors were rather tolerant towards divergent opinions expressed in public—provided only that such speech did not defame the Caliphs.¹⁴² He also asserts that for a long time the Muslim jurists of the leading Sunni schools did not hold anyone criminally accountable for blasphemy, not even those acting intentionally, “unless if they constituted explicit denials of faith,” or if they “acted out of some honest but erroneous interpretation of law of theology.”¹⁴³ Wiederhold, on the contrary, argues that in the early years of Islam, “all canonical *Hadith* collections contain traditions suggesting that the vilification of the Prophet and his Companions was considered intolerable and therefore forbidden by some of the religious scholars.”¹⁴⁴ He also observed, “[t]he assumption that blasphemy against the Prophet was regarded an intolerable act in

¹³⁸ SAEED & SAEED, *supra* note 136, at 37–38; Abdullahi, *Cultural Legitimation: Towards a Cross-cultural Approach to Defining International Standards of Human Rights: The Meaning of Cruel, Inhuman, or Degrading Treatment or Punishment*, in HUMAN RIGHTS: SOUTHERN VOICES 79 (Francis Deng et al. eds., 2009); HASHEMI, *supra* note 136, at 31–33 (citing Saeed); Lutz Wiederhold, *Blasphemy Against the Prophet Muhammad and his Companions (Sabb Al-Rasul, Sabb Al-Sahabah)*, 42 J. SEMITIC STUD. 39, 41 (1997).

¹³⁹ See Report by the Venice Commission: *The Relationship Between Freedom of Expression and Freedom of Religion: The Issue of Regulation and Prosecution of Blasphemy, Insult and Incitement to Religious Hatred*, in BLASPHEMY, INSULT AND HATRED: FINDING ANSWERS IN A DEMOCRATIC SOCIETY ¶¶ 23–24 (2010).

¹⁴⁰ HASHEMI, *supra* note 136, at 31; see also Wiederhold, *supra* note 138, at 40.

¹⁴¹ See HASHEMI, *supra* note 136, at 36 (citing *Qur’an Sūra II: Al-Baqara (the Cow)* 2:256; *Sūra III: ‘Āli ‘Imran (Family of Imran)* 3:72, 3:90; *Sūra II: An-Nisa IV* 4:48, 4:137; *Surat V: Al-Mā'idah (The Table Spread)* 5:54).

¹⁴² HASHEMI, *supra* note 136, at 31–32. According to Hashemi, the most famous case is Ka’b ben al-Ashraf, who composed poetry that insulted the Prophet and his companions and later died in the battlefield. *Id.*

¹⁴³ *Id.* at 31–32.

¹⁴⁴ Wiederhold, *supra* note 138, at 41.

the second/eighth century finds corroboration in a legal source—the *Muwatta'* of 'Abdallah b. Wahb (d. 197/812)."¹⁴⁵ He further notes that “the discussion of the views on blasphemy as developed by scholars who adhere to various *madhhabs* [i.e. schools of thought] suggests that there was no essential *ikhtilaf* [i.e. disagreement] . . . on the issue of *sabb*” and that “[p]rominent jurists of all four major Sunni *madhhabs* [i.e. Shafi'i, Hanafi, Hanbali, Maliki schools of thought] agree that those who abuse the Prophet and his Companions must be considered as sinners or unbelievers respectively.”¹⁴⁶

It appears in fact that soon after the Prophet's death, blasphemy and *sabb* offenses became confused with *irtidad* or *ridda* (i.e. apostasy).¹⁴⁷ Apostasy means to reject Islam and is considered to be one of the most serious crimes in Islamic criminal law. It is considered the first of seven crimes entailing *hadd* punishment,¹⁴⁸ namely, the death penalty.¹⁴⁹ In particular, it seems that when blasphemy was committed by a Muslim, this “was discussed by legal scholars in the context of apostasy [*riddah*] and unbelief [*kufri*].”¹⁵⁰ Hence, although in Islam “insult is a matter of relativism” and the “customs [*urf*] of each society” differed,¹⁵¹ blasphemy in the course of time was gradually considered a *hudud*

¹⁴⁵ *Id.* at 43.

¹⁴⁶ *Id.* at 58.

¹⁴⁷ In some cases, procedural guarantees differ; for instance, the Iranian Criminal Code provides that *hudud* offenses are punished by the death penalty only after the fourth time. See Rabb, *supra* note 136, at 146 (arguing that “over time, jurists drew on the *hadith* in times of war to authorize the Head of State generally to use his discretion to impose the death penalty on one-time Muslims who manifested their disbelief”); Slaughter, *supra* note 10, 177–78. Hashemi on the other hand, does not agree that *sabb* is related to apostasy. See HASHEMI, *supra* note 136, at 37.

¹⁴⁸ See M. CHERIF BASSIOUNI, *THE SHARIA AND ISLAMIC PUBLIC LAW IN TIME OF WAR AND PEACE* 123–47 (2014) (There are three types of crimes: *hudud* (plural of *hadd*), *tazir* and *quisas*); ABDUR RAHMAN DOI, *SHARI'AH: THE ISLAMIC LAW* 341–42 (2nd ed., 2008); KAMALI, *supra* note 82, at 293–94.

¹⁴⁹ See SAEED & SAEED, *supra* note 136, at 139; Rabb, *supra* note 136, 234–38 (discussing pre-modern Islamic legal restrictions on freedom of religion with particular reference to apostasy and its punishment); Elizabeth Peiffer, *The Death Penalty in Traditional Islamic Law and as Interpreted in Saudi Arabia and Nigeria*, 11 WM. & MARY J. WOMEN & L. 507, 511–12 (2005), reprinted in 2 ISLAM AND HUMAN RIGHTS 546–47 (2012); Slaughter, *supra* note 10, 180–81 (referring to several *hadiths* and the practice of the first Caliph.).

¹⁵⁰ HASHEMI, *supra* note 136, at 43.

¹⁵¹ *Id.* at 32.

crime.¹⁵² Such association was clearly not random, but rather a natural consequence of the extremely powerful Islamic condemnation of “disbelief” (*kufr*).¹⁵³ Hence, while “early Islamic scholars distinguished between a *kafir* [i.e. unbeliever, infidel] and *murtadd* [i.e. apostate],” the preeminent Islamic scholars of the main Sunni schools did not discern between the two concepts “since the legal term ‘apostasy’ (*irtidad*) cannot be understood without referring to the theological concept of unbelief.”¹⁵⁴ The reason precisely, as noted by Rabb, “[t]o curse God or to blaspheme Him . . . was implicitly to signal departure from the community of Muslims and the laws governing them.”¹⁵⁵ Indeed, throughout the Qur’an, the word “disbelief” is used numerous times with extremely negative connotation.¹⁵⁶ Non-believers, including those who “believe and then disbelieve,”¹⁵⁷ along with other individuals “who take disbelievers as allies instead of the believers,”¹⁵⁸ are condemned in a number of different verses. Some of these verses also provide for severe punishments,¹⁵⁹ such as “gather[ing] in Hell all together

¹⁵² SAEED & SAEED, *supra* note 136, at 28; HASHEMI, *supra* note 136, at 36–38; Rabb, *supra* note 136.

¹⁵³ “Kufr” stems from the three-letter Arabic root *k-f-r*, and is translated by most authors as “apostasy” and by fewer authors as “blasphemy.”

¹⁵⁴ Shlomo C. Pill, *Law as Faith, Faith as Law: The Legalization of Theology in Islam and Judaism in the Thought of Al-Ghazali and Maimonides*, 6 BERKELEY J. MIDDLE E. & ISLAMIC L. 1, 13 (2014).

¹⁵⁵ Rabb, *supra* note 136, at 158.

¹⁵⁶ See *Qur’an Surat II: Al-Baqarah (the Cow)* 2:88 (starting from the reiteration of the biblical story of the Golden Calf in “And they say, ‘Our hearts are wrapped.’ . . . Nay, Allah has cursed them for their disbelief, so little is it that they believe.”).

¹⁵⁷ See *Qur’an Surat IV: An-Nisā* 4:137-140 (“Indeed, those who have believed then disbelieved, then believed, then disbelieved, and then increased in disbelief—never will Allah forgive them, nor will He guide them to a way. . .”).

¹⁵⁸ *Qur’an Surat IV: An-Nisā* 4:139.

¹⁵⁹ See *Qur’an Sūra III: ‘Alī ‘Imrān (Family of Imran)* 3:4 (“He revealed the *Qur’an*. Indeed, those who disbelieve in the verses of Allah will have a severe punishment, and Allah is exalted in Might, the Owner of Retribution”); *Sūra IV: An-Nisā’ (The Women)* 4:42 (“On that day those who disbelieved and disobeyed the Messenger (Muhammad SAW) will wish that they were buried in the earth, but they will never be able to hide a single fact from Allah”); *id.* 102 (Dr Ghali trans.) (“Indeed, Allah has prepared for the disbelievers a humiliating punishment”); *Sūra VIII: Al-Anfāl (The Spoils of War)* 8:7 (“But Allah intended to establish the truth by His words and to eliminate the disbelievers”); *id.* at 36 (“And those who have disbelieved - unto Hell they will be gathered”); *Sūra XXI: Al-Anbyā’ (The Prophets)* 21:29-30 (“If those who disbelieved but knew the time when they will not avert the Fire from their faces or from their backs and they will not be aided . . . Rather, it will come to them unexpectedly and bewilder them, and they will not be

along with the hypocrites.”¹⁶⁰ The depictions of the Prophet in particular may also give rise to “aggravating circumstances,” as the contempt for any Prophet is an autonomous offense on its own. Accordingly, some authors consider this offense equivalent to *hadd*, while others qualify it as *tazir*, which is a lighter offense.¹⁶¹ Limitations that are recognized in Sharia scholarship should equally apply—for instance, the fact that intentional killings and unnecessary harm to others in times of peace are prohibited.¹⁶²

B. Blasphemy and “Religious Defamation” in Muslim States Practice

There is a general religious obligation in Muslim states to not contradict Sharia law. Hence in domestic practice, blasphemy offenses may be prosecuted and punished before domestic jurisdictions, as long as a state contains a relevant crime in its criminal code. In this way, its punishment applies equally to non-Muslims.¹⁶³ In the extreme case of Islamic republics, punishments may be imposed under Sharia law. This situation has been of course serving as tool for extreme political oppression against dissident opinions.¹⁶⁴ Moreover, in many of these republics, *a priori* censorship may be exercised. In Saudi Arabia, blasphemy is a criminal offense punishable by death. The 2000 Press and Publication Act establishes fines for any media criticizing the Council of Senior Religious Scholars.¹⁶⁵ According to Amnesty

able to repel it, nor will they be reprieved.”)

¹⁶⁰ *Qur’an Sūra IV: An-Nisā’ (The Women)* 9:140.

¹⁶¹ *Id.* at 211.

¹⁶² See BASSIOUNI, *supra* note 148, at 285; FARHAD MALEKIAN, *PRINCIPLES OF ISLAMIC INTERNATIONAL CRIMINAL LAW: A COMPARATIVE SEARCH* 117–99 (2d ed. 2011).

¹⁶³ See MALEKIAN, *supra* note 162, at 51.

¹⁶⁴ An-Na’im, *supra* note 29, 23–24; HASHEMI, *supra* note 136, at 34; Rabb, *supra* note 136, 158–59; Javid Rehman, *The Sharia, Islamic Family Laws and International Human Rights Law: Examining the Theory and Practice of Polygamy and Talaq*, 21 INT’L J.L. POL’Y & FAM. 108 (2007); see also Farer, *supra* note 12, 19–20; ANN ELIZABETH MAYER, *ISLAM AND HUMAN RIGHTS: TRADITION AND POLITICS* (4th ed., 2012); Jytte Klausen, *The Danish Cartoons and Modern Iconoclasm in the Cosmopolitan Muslim Diaspora*, 8 HARV. MIDDLE EASTERN & ISLAMIC REV. 86 (2009); see also KLAUSEN, *supra* note 9, 19–20 (arguing that “cultural differences can be easily manipulated to advance political interests.”).

¹⁶⁵ U.N., Human Rights Council, Compilation Prepared by the Office of the High Commissioner for Human Rights in Accordance with Paragraph 15 (b) of the annex to Human Rights Council Resolution 5/1 and Paragraph 5 of the Annex to Council Resolution 16/21: Saudi Arabia, ¶ 6, U.N. Doc. A/HRC/WG.6/17/SAU/2

International, in 2014, “the government severely restricted freedoms of expression, association and assembly, and cracked down on dissent, arresting and imprisoning critics, including human rights defenders.”¹⁶⁶ Likewise in the United Arab Emirates, at least since the early 1990s, the “Censorship Department of the Ministry of Information and Culture reviews all imported newspapers, periodicals, books, films, and videos, and bans items considered [*inter alia*] pornographic, violent or derogatory to Islam.”¹⁶⁷ Also in Pakistan, the criminal code punishes blasphemy by the death penalty and insults to the *Qur’an* by life imprisonment. The law is being regularly abused against religious minorities,¹⁶⁸ while a number of executions have sadly taken place for both apostasy and blasphemy.¹⁶⁹ In post-revolutionary Iran, all laws and regulations regarding political offenses and offenses of the press must be based on “Islamic criteria.”¹⁷⁰ The Iranian criminal code in addition provides that “whoever insults Islam and its holy attributes and his offence amounts to the apostasy should be punished as an apostate;”¹⁷¹ a clause that results to artists, musicians, and filmmakers such as Jafar Panahi being imprisoned, and others, like Sherin Neshat being in exile. Other Sharia-compliant states such as Yemen,¹⁷² Oman,¹⁷³ Afghanistan¹⁷⁴ equally

(Aug. 6, 2013).

¹⁶⁶ Amnesty Int’l, *Rep. 2014/15: Saudi Arabia*, <http://www.amnesty.org/en/countries/middle-east-and-north-africa/saudi-arabia/report-saudi-arabia/>.

¹⁶⁷ U.S. Dep’t of State, Bureau of Democracy, H.R. and Lab., United Arab Emirates 2014 Human Rights Report 9 (2014).

¹⁶⁸ See Stephanie E. Berry & Javaid Rehman, *Is “Defamation of Religions” Passé? The United Nations, Organisation of Islamic Cooperation, and Islamic State Practices: Lessons from Pakistan*, 44 GEO. WASH. INT’L L. REV. 431, 453–67 (2012); Osama Siddique & Zahra Hayat, *Unholy Speech and Holy Laws; Blasphemy Laws in Pakistan—Controversial Origins, Design Defects, and Free Speech Implications*, 17 MINN. J. INT’L L. 303, 324 (2008).

¹⁶⁹ See Ujala Akram, *Freedom of Speech, Freedom of Religion and Islam*, 16 EUR. J.L. REFORM 353, 364, nn.71–73, nn.82–84 (2014); see also Zahra Hayat, *Apostasy and Blasphemy in Pakistan*, 10 CONN. J. INT’L L. 27 (1994–1995); see also U.N., Human Rights Council, Communications Report of Special Procedures, A/HRC/27/72, at 69 (Aug. 20, 2014) (highlighting the death of lawyer in Pakistan who worked on blasphemy cases).

¹⁷⁰ ISLAHAT VA TAQYYRATI VA TATMIMAH QANUNI ASSASSI [AMENDMENT TO THE CONSTITUTION] 1368 [1989] art. 168 (Iran).

¹⁷¹ See HASHEMI, *supra* note 136, at 58.

¹⁷² See *Prohibitions on Publication Law No. 25*, art. 103 (1990) (Yemen).

¹⁷³ See Omani Penal Code, art. 29 (1974).

¹⁷⁴ See Official Publication of the Government of the Republic of Afghanistan. Penal Code, arts. 77 & 144 (1976); see also U.N. H.R.C., *Reports of the Human Rights Council on its twelfth session*, A/HRC/12/50 (Feb. 25, 2010) ¶ 388 (regarding

provide for extremely detailed punishments of all types of insults against Islam. Even in Sudan apostasy is still a crime entailing the death penalty and a number of human rights activists and journalists are reported to be detained *incommunicado*.¹⁷⁵

This obligation has passed also in supranational declarations of rights. It is stated, for instance, in the Universal Islamic Declaration, fruit of the Organization of the Islamic Conference, prepared in Dhaka in 1981 and circulated to UNESCO in 1984 that “[e]very person has the right to express his thoughts and beliefs so long as he remains within the limits prescribed by the Law,”¹⁷⁶ i.e. including therefore Sharia law. Similarly, according to the so-called “Cairo Declaration” adopted by the OIC in 1993, “every man has a right to freely express his opinion, provided it does not conflict with the principles of Sharia.”¹⁷⁷ Most alarmingly, the Muslim States, through the OIC, have been pressuring the international community to legitimize these controversial obligations at an international level for more than ten years.¹⁷⁸ The pressure had amounted to the widely discussed “defamation of religions” campaign, the series of resolutions that were voted alternatively before the General Assembly and the Human Rights Council of the United Nations since 1999.¹⁷⁹ In 2010, presumably due to the presence of the United States within the Human Rights Council, no such resolution was voted on, and another was passed

the concern of International Pen “about the existence of ‘blasphemy’ laws, under which a number of writers and publishers had been charged and imprisoned and sentenced to death.”).

¹⁷⁵ U.N., Human Rights Council, *Compilation prepared by the Office of the High Commissioner for Human Rights in accordance with paragraph 15 (b) of the annex to Human Rights Council resolution 5/1: Sudan* (Feb. 24, 2011) 39–44, U.N. Doc. A/HRC/WG.6/11/SDN/2; see also An-Na’im, *supra*, note 29.

¹⁷⁶ Universal Islamic Declaration of Human Rights, art. 12. For an extensive discussion, see Nicholas Kourides, *The Influence of Islamic Law on Contemporary Middle Eastern Legal Systems*, 9 COLUM. J. TRANSNAT’L L. 384–435 (1970); see also MOHAMMED AMIN AL-MIDANI, *LES DROITS DE L’HOMME EN ISLAM* (2003).

¹⁷⁷ U.N., World Conference on Human Rights: The Cairo Declaration on Human Rights in Islam, U.N. Doc. A/CONF.157/PC/62/Add.18 (June 9, 1993).

¹⁷⁸ See Christian Green, *Between Blasphemy And Critique: Freedom of Religion and Freedom of Speech*, 29 J.L. & RELIGION 176, 176–79 (2014); Bielefeldt, *supra* note 14, 45–47; Allison G. Belnap, *Defamation of Religions: A Vague and Overbroad Theory that Threatens Basic Human Rights*, BYU L. REV. 635–86 (2010); see Sejal Parmar, *The Challenge of “Defamation of Religions” to Freedom of Expression and the International Human Rights System*, 3 EUR. HUM. RTS. L. REV. 353 (2009); Berry & Rehman, *supra* note 168, at 432.

¹⁷⁹ U.N., Econ. & Soc. Council, Commission on Human Rts., Report on the Fifty-Fifth Session, U.N. Doc. E/CN.4/RES/1999/82 (Mar. 22–Apr. 30, 1999).

instead, fully in line with the international standards.¹⁸⁰ Indeed, the issue seemed buried at least for a while—for instance, in a panel on “religious intolerance and discrimination” held in Geneva during the twentieth Session of the Human Rights Council in July 2012, the issue of defamation of religions was not even brought up.¹⁸¹

V. LEGAL CLAIMS RELATED TO OFFENCES TO SENSIBILITIES

A. *Difficulties in Striking the Right Balance*

In spite of these clear political indications, at a legal level there is still debate about the legitimacy of limits on free speech when it comes to freedom of expression and religious sensibilities. The debate is fuelled by two shortcomings of the human rights system.

The first is that the human rights instruments provide no clear indication as to where exactly “draw the line;” it ultimately falls upon courts to decide. Most likely this is done *ad hoc* in each and every specific case. This is however an extremely challenging task,¹⁸² particularly when minority beliefs are at stake. The European Court for instance, which is the body that could give guiding lines to other regional bodies as well as to domestic courts, has not developed a consistent approach on the specific matter of sensibilities.¹⁸³ Hence, while the Inter-American Court of Human Rights has had no hesitation to condemn Chile for censoring Scorsese’s “Last Temptation of Christ” on national television (the film has been also banned repeatedly in other countries, including France, Greece, South Africa, Israel, and the Philippines),¹⁸⁴ the

¹⁸⁰ See Human Rights Council Res. 16/18, U.N. Doc. A/HRC/RES/16/18 (Apr. 12, 2011) (combating intolerance, negative stereotyping and stigmatization of, and discrimination, incitement to violence and violence against, persons based on religion or belief); see also Rabb, *supra* note 136, at 178–79 (calling this a “seismic shift” (at 179)).

¹⁸¹ See U.N., Human Rights Council, Rep. of the Human Rights Council on its eighteenth session, U.N. Doc. A/HRC/RES/18/2 (Oct. 14, 2011).

¹⁸² See also Bielefeldt, *supra* note 14, at 40.

¹⁸³ Ian Leigh, *Damned if They Do, Damned if They Don't: the European Court of Human Rights and the Protection of Religion from Attack*, 2 RES PUBLICA 55, 67–70 (2011); Ilias Trispiotis, *The Duty to Respect Religious Feelings: Insights from European Human Rights Law*, 19 COLUM. J. EUR. L. 499, 529 (2013); Paul Kearns, *The Judicial Nemesis: Artistic Freedom and the European Court of Human Rights*, 1 IRISH L.J. 56, 70–71 (2012).

¹⁸⁴ See *Olmedo-Bustos et al. v. Chile, Merits, Reparations, and Costs*,

European Court, has still been hesitant in other relevant cases.¹⁸⁵ There have been indeed indications that offenses to sensibilities are now excluded from the protective scope of Article 10 of the European Convention in freedom of expression cases,¹⁸⁶ yet, in more controversial cases, the Court still appears to be largely relying on its margin of appreciation doctrine.¹⁸⁷ The sole indication consistently present in the jurisprudence of the Court, as well as in that of the Human Rights Committee and other human rights bodies,¹⁸⁸ is that restrictions to freedom of expression should be interpreted *narrowly*.¹⁸⁹ The approach of the UN Human Rights Committee is also illustrative of the strains that the human rights bodies have to face while explicitly condemning blasphemy laws. During the adoption of the final general comment 34 on Article 19 of the I.C.C.P.R. in late 2010 and mid-2011, the Committee has not

Judgment, Inter-Am. Ct. H.R., (ser. C), No.73, (Feb. 5, 2001).

¹⁸⁵ See *Wingrove v. United Kingdom* App. No. 17419/90, Eur. Ct. H.R. (1996); *Otto-Preminger-Institut v. Austria*, App. No. 13470/87, Eur. Ct. H.R. (1994). (older case concerning State religion); see also *Vereinigung Bildender Künstler v. Austria*, App. No. 68354/01, Eur. Ct. H.R. (2007) (the last relevant judgment in which the Court decided on religious sensibilities, in favor of freedom of expression, yet dividing the Court by four votes to three). Two relevant cases against Russia are still pending: *Samodurov & Vasilovskaya v. Russia*, App. No. 3007/06 (2009) (admissibility decision regarding the vandalism of artworks in the Sakharov Museum), and *Alekhina and Others v. Russia*, App. No. 38004/12 (2012) (regarding the imprisonment of the Punk rock group Pussy Riot).

¹⁸⁶ See e.g. Jeroen Temperman, *Blasphemy, Defamation of Religions and Human Rights Law*, 26 NETH. Q. HUM. RTS. 517, at 543–45 (2008); Trispiotis, *supra* note 183, at 550–51; see also Eleni Polymenopoulou, *Does one Swallow Make a Spring? Artistic and Literary Freedom at the European Court of Human Rights*, 16 HUM. RTS. L. REV. (forthcoming 2016) (manuscript at 14 n.73 and 76–78 and accompanying text (referring to *Tatlav v. Turkey* (2006), *Giniewski v. France* (2006) and *Klein v. Slovakia* (2006)) (on file with author).

¹⁸⁷ See Polymenopoulou, *supra* note 186, at 18–20 nn.97–104 and accompanying text.

¹⁸⁸ See Conference Room Paper #3, 49–62, in OFFICE OF THE UNITED NATIONS HIGH COMMISSIONER FOR HUMAN RIGHTS (“OHCHR”) (expert meeting on the Links Between Articles 19 and 20 of the ICCPR: Freedom of Expression and Advocacy of Religious Hatred that Constitutes Incitement to Discrimination, Hostility or Violence (Oct. 2–3, 2008) (providing an overview of these bodies jurisprudence and the clarification between the limits in particular the Nazila Ghanea), <http://www.ohchr.org/EN/Issues/Freedom>

Opinion/Articles19-20/2008Seminar/Pages/ExpertPapers.aspx; Parmar, *supra* note 178, at 364–73.

¹⁸⁹ See *Lingens v. Austria*, App. No. 9815/82, Eur. Ct. H.R., at ¶¶ 39–40 (1986); *Thorgeirson v. Iceland*, App. No. 13778/88, Eur. Ct. H.R., at ¶ 63 (1992); see also Parliamentary Assembly of the Council of Europe, *Recommendation on Hate Speech* (Oct. 8, 1997).

been as straightforward as it could be. Comparing the draft¹⁹⁰ and the text that was finally adopted,¹⁹¹ the Committee did not observe a *per se* incompatibility of criminal blasphemy laws with international standards. Namely, contrary to the first draft, the Committee noted in the final text that “[p]rohibitions of displays of lack of respect for a religion or other belief system, including blasphemy laws, are incompatible with the Covenant.”¹⁹² Yet, it added explicitly, “except in the specific circumstances envisaged in article 20, paragraph 2, of the Covenant.”¹⁹³ This addition, however, implies that blasphemy laws, in the view of the Committee, may still be compatible with the Covenant while their purpose is to prohibit hate speech (e.g. article 20 paragraph 2). Such conclusion however, adds to the confusion between blasphemy and hate speech.

The second shortcoming is that the international community is not an ideal one where all states agree to assign the same importance and the same meaning to religious freedom. At present, a mutual agreement is far from reality. As domestic practice is in fact dependent on the states’ various legal and religious traditions, the weight assigned to religion varies substantially from one context to another. The difference is particularly striking between religious¹⁹⁴ and secular states. Yet, the large majority of the so-called western member states also maintain criminal blasphemy laws. Although inactive in many cases, these laws do remain in the criminal codes of states such as Canada, Australia, New Zealand, and Singapore, while Ireland has only recently reintroduced them.¹⁹⁵ States with an official religion or in which religion holds a powerful status in the public sphere such as Austria, Denmark, Finland, or Greece,¹⁹⁶ provide for more stringent punishments, with punishments ranging from six months to three years of

¹⁹⁰ U.N., Human Rts. Committee, Draft general comment No. 34 (Upon completion of the first reading by the Human Rights Committee), ¶ 50, U.N. Doc. CCPR/C/GC/34/CRP.5 (Jan. 25 2010) (“States parties should repeal criminal law provisions on blasphemy,” adding again however, that this prohibition, “. . . should not be understood in a manner inconsistent with paragraph 3 of Article 19 or other provisions of the Covenant.”).

¹⁹¹ U.N., Human Rts. Committee, General comment No. 34, Article 19: Freedoms of Opinion and Expression, U.N. Doc CCPR/C/GC/34 (Sept. 12, 2011).

¹⁹² *Id.* ¶ 48.

¹⁹³ *Id.*

¹⁹⁴ *See supra* section III(b).

¹⁹⁵ *See also* Temperman, *supra* note 186, at 519–20.

¹⁹⁶ *Report by the Venice Commission, supra* note 139.

imprisonment.¹⁹⁷ To my knowledge, there is only one jurisdiction that has explicitly rejected the balancing approach in matters related to freedom of speech—namely, the United States Supreme Court. This Court applies the First Amendment as the rule and a variety of tests,¹⁹⁸ without needing to balance competing interests—in fact, being quite explicit in rejecting balancing in matters related to freedom of expression.¹⁹⁹ In addition, it is only this court that has been consistently following a unique practice of dissociation between law and religions, clarifying since the 1960s (in a case concerning Rossellini’s film *The Miracle*) that “it is not the business of government in [the American] nation to suppress real or imagined attacks upon a particular religious doctrine, whether they appear in publications, speeches, or motion pictures.”²⁰⁰

With such extreme varieties in domestic practice, the lack of consensus becomes a rather problematic aspect of freedom of expression controversies. Cartoons such as those published in *Charlie Hebdo* or in *Jyllands Postern* could undoubtedly be perceived as offensive for Muslims; in fact, under an extremist perspective of Sharia law they could be easily considered as either *sabb* or *irtidad*,²⁰¹ even *shirk*²⁰² under Sharia law. In international human rights law, however, rights such as freedom of expression

¹⁹⁷ See e.g. POINKOS KODIKAS [P.K.] [CRIMINAL CODE] 7:198–99 (Greece) (providing for punishments of 3 years of imprisonment in Greek Criminal Code).

¹⁹⁸ See John Bellinger III & Murad Hussain, *The Great Divide and the Common Ground Between the United States and the Rest of the World*, in ISLAMIC LAW AND INTERNATIONAL HUMAN RIGHTS LAW 172–73 (Envor, Ellis & Glahn eds., 2012); IAN CRAM, *CONTESTED WORDS: LEGAL RESTRICTIONS ON FREEDOM OF SPEECH IN LIBERAL DEMOCRACIES* (2006).

¹⁹⁹ *New York Times Co. v. United States*, 403 U.S. 713, 717 (1971); *Barenblatt v. United States*, 360 U.S. 109, 134 (1959).

²⁰⁰ *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 505 (1952). The U.S. Supreme Court ruled on this case in 1952, following a controversy on Rossellini’s film, which recites the story of a shepherdess who gets pregnant by a vagabond, taking him by mistake for Jesus. *Id.* The Court has not changed its position of offenses to sensibilities since then. In 1998, it created public outrage by affirming the right of a yellow-press magazine to parody in an extreme way a popular Christian Minister, and in 2011, it upheld the right of a church congregation proclaiming slogans such as “Pope in Hell” and “Priests Rape Boys” in the public sidewalk next to the funeral of a former U.S. marine soldier sent to Iraq. See *Snyder v. Phelps*, 580 F.3d 206, 461 (4th Cir. 2011); *Hustler v. Falwell*, 485 U.S. 46 (1988).

²⁰¹ HASHEMI, *supra* note 136, at 25; see also Wiederhold, *supra* note 138, at 39.

²⁰² See *supra*, notes 54–74 and accompanying text.

and religious freedom are *a priori* equal.²⁰³ Hence, a “negative” protection in the sense of “not being offended” is rightly not included in the scope of the right to religious freedom. Such extension would be incompatible with the interpretation of the scope of the *forum externum* of religious freedom.²⁰⁴ There is therefore no need to balance freedom of expression against beliefs; freedom of expression prevails in any way.²⁰⁵ As per the current human rights standards, only prohibitions of hate speech, advocacy or incitement to hatred are lawful,²⁰⁶ as well as prohibitions to prevent discrimination against a specific religious group that can identify as a racial minority according to the current interpretation of the notions “race” and “ethnicity” by the CERD Committee.²⁰⁷

B. Defending Minority Claims?

And yet, the assertion that freedom of expression should always prevail seems to be somewhat rigid. There is no doubt that controversies such as the *Danish cartoons* or *Charlie Hebdo* are ultimately very little, if at all, associated to the substance of religions. They might not even be associated with the offense of blasphemy as such. In the multi-cultural western European cities in particular, a backlash on religious Muslim minorities has been

²⁰³ The only exception from this *a priori* equality is the prohibition of derogation from religious freedom in a state of emergency—see art. 4 of the International Covenant on Civil and Political Rights (“ICCPR”); see also Peter Danchin, *Of prophets and Proselytes: Freedom of Religion and the Conflict of Rights in International Law*, 49 HARV. INT’L L.J. 249, 258–59 (2008) (making a parallel with the ‘over-stretched’ protection of religious freedom in the case of proselytism).

²⁰⁴ See Kearns, *supra* note 183; George Letsas, *supra* note 25, at 239.

²⁰⁵ See Trispiotis, *supra* note 183, at 507 (arguing that the balancing exercise has significant weaknesses); Temperman, *supra* note 186, at 517 (arguing that “the two rights do as a rule not need to be balanced—for it is precisely when the two rights are balanced without a legal necessity to do so that human rights law is undermined”).

²⁰⁶ See International Convention on the Elimination of All Forms of Racial Discrimination Dec. 21, 1965, art. 4(a), International Covenant on Civil and Political Rights, Dec. 16, 1966, art. 20. On the links between the two provisions, see OHCHR *supra* note 188.

²⁰⁷ See *The Jewish community of Oslo et al. v. Norway*, CERD/C/67/D/30/2003, ¶¶ 8–10 (U.N. Committee on the Elimination of Racial Discrimination Aug. 22, 2005); *Kamal Quereshi v. Denmark*, CERD/C/66/D/33/2003, §7.3 (Mar. 4, 2004); U.N., Rep. of the Committee on the Elimination of Racial Discrimination, ¶ 3, U.N. Doc. A/48/18 (Sep. 15, 1993).

visible following each incident of Islamic extremism,²⁰⁸ raising questions of tolerance in multicultural societies. Quite clearly, equality issues for religious minorities are also at stake. In fact, unless one is able to prove either incitement to hatred or intent of discrimination against a specific religious group that can also identify as either an ethnic or racial group, in which cases the ICERD would be applicable,²⁰⁹ religious minorities—as well as migrants of minority faiths—are not collectively protected from “offenses to sensibilities” that amount to hurt their sensibilities. The argument that those feelings offended could have avoided being exposed to the cartoons²¹⁰ seems also irrelevant in the context of a globalized world, where the mass media and internet communications allow extremely rapid exchanges of information. Several authors seem to have already implied this danger: Keane, for instance, who makes the point of a clash between freedom of expression and “religious tolerance” rather than freedom while discussing the Danish controversy,²¹¹ and Nathwani who takes the view that religious feelings do deserve protection when minority religions are at play.²¹²

In spite of the noble reasoning, arguments in favour of minority rights should not be maintained in controversies involving sensibilities. Discrimination and hatred against Muslim minorities have also served as formal justifications of all the “defamation of religions” debate. Indeed, the content of the resolutions was never meant to initiate blasphemy prosecutions, but rather “to take all appropriate measures to combat hatred, discrimination, intolerance and acts of violence, intimidation and coercion motivated by religious intolerance . . . and to encourage understanding, tolerance and respect in matters relating to freedom of religion or belief.”²¹³

²⁰⁸ See Blumberg, *supra* note 8.

²⁰⁹ See *supra* notes 206–07.

²¹⁰ As the dissenting European Court of Human Rights judges pointed in a case concerning a novel considered blasphemous in Turkey, “nobody is ever obliged to buy or read a novel, and those who do so are entitled to seek redress in the courts for anything they consider blasphemous and repugnant to their faith.” See, I.A. v Turkey, App. No. 42571/98, Eur. Ct. H.R., dissenting opinions, ¶ 5 (2005).

²¹¹ Keane, *supra* note 9, at 845.

²¹² Niraj Nathwani, *Religious Cartoons and Human Rights*, 13 EUR. HUM. RTS. L. REV. 488, 506 (2008) (“in my opinion, a minority religion connected to ethnic identity deserves more protection than a majority religion, because a minority religion often serves simply as a proxy of ethnic identity. However, who is the majority and who the minority might be difficult to establish in a global affair like the Danish cartoon affair.”).

²¹³ See *supra* notes 180–82.

Furthermore, an interpretation of the human rights standards on either religious freedom or intolerance as including offences to sensibilities would create immense confusion between victimless religious offences and personal offenses²¹⁴ and would allow excessive leeway to states to advance their public interests largely facilitated blasphemy persecutions,²¹⁵ perpetuating a model of virtual “clash” between cultural systems and systems of beliefs. It is quite illustrative that, despite the alleged end of the “defamations of religions debate,” the notions of religion, culture and tradition are still utilized not only at a domestic level, but also at the level of the United Nations political bodies. For example, in June 2011, i.e. three months after the issue of blasphemy was allegedly “buried,” the row sparked again, this time by the voting of the Council in favor of Sexual Orientation and Gender Identity (SOGI) rights.²¹⁶ OIC member states, along with African states, voted against that first SOGI Resolution, pressuring the international community not to recognize non-discrimination and equality claims for LGBT communities.²¹⁷ The SOGI resolution was followed by other similar, somewhat more generic debates, this time on the notion of the notion,” which appears to be the new battleground in the United Nations. Hence, the OIC and African states have joined Russia in a new controversial resolution on the ing the international community no.”²¹⁸ This use of the notion of tradition, however, which is one that omits the dynamic concept of culture, has already had a visible impact in the area of equality in

²¹⁴ See Trispiotis *supra* note 183, at 529; Letsas, *supra* note 25, at 239 (arguing that ‘free speech prevails without any competition with other values’).

²¹⁵ See Green *supra* note 178, at 180–81 (2014); Parmar *supra* note 178, at 358 (2009); Bielefeldt *supra* note 14, at 36; Berry & Rehman *supra* note 168 451–54 (referring to Pakistan –see especially also references to the OIC Astana Declaration 2011).

²¹⁶ Human Rights Council Res. 17/19, U.N. Doc. A/HRC/RES/17/19 (July 14, 2011). See generally, Rehman & Polymenopoulou *supra* note 112, at 39.

²¹⁷ Nineteen states voted against this resolution. See Rehman & Polymenopoulou *supra* note 112, at 42 n.187.

²¹⁸ U.N. Human Rts. Council, Promoting Human Rights and Fundamental Freedoms Through a Better Understanding of Traditional Values of Humankind: Best Practices, U.N. Doc. A/HRC/ /21/L.2 (Sept. 21, 2012) (draft, sponsored by Pakistan (on behalf of the OIC) and other member States); Human Rights Council Res. 21/3, U.N. Doc. A/HRC/RES/21/3 (Oct. 9, 2012) (adopted by 25 votes in favor, 15 against and 7 abstentions, in view of “promoting a better understanding of traditional values”).

family rights,²¹⁹ and may, in the future, have an impact also on the enjoyment of other universal rights and equality claims.

One should not forget, in addition, that the aim and punishment of blasphemy laws is heavily contested among Muslims. In fact, various scholars have been calling for Islamic law reform in the modern era, including by a contextual interpretation of controversial verses—what An-Na'im has identified as a "constructivist approach to human rights, through a reinterpretation of the Sharia."²²⁰ Such claims have been particularly evident in various areas of human rights, from slavery²²¹ to gender equality,²²² and from religious minorities debates²²³ to children rights.²²⁴ Undoubtedly, they could also be put forward in the case of religious freedom and blasphemy claims. The reason is precisely, as Niaz Shah puts it, that "they could also be put forward in the case of religious freedom and blasphemy claims. The reason is precisely, as Niaz Shah puts it, "we do not have Islamic States as were conceived by the Koran and practiced by the Prophet Mohammed and it is only in such as state where Islamic laws could be enforced"²²⁵ Further, not allowing a contemporary interpretation of Islam seems to be undermining the value specifically attributed to Islam as an autonomous legal tradition that maintains an extremely well-developed literature and

²¹⁹ See, e.g., U.N. Human Rts. Council, Protection of the family, U.N. Doc. A/HRC/26/L.37 (June 24, 2014) (draft) (sponsored by the U.S., the E.U. and western member states); U.N. Human Rts. Council, Protection of the family, U.N. Doc. A/HRC/26/L.20/Rev.1 (June 25, 2014), (draft) (sponsored by OIC and African states).

²²⁰ An-Na'im *supra* note 29, at 17; M.K. Nawaz, *The concept of Human Rights in Islamic Law*, 11 HOWARD L.J. 325 (1965); see also AN-NA'IM *supra* note 138, at 80 (arguing that "it is possible to develop [universal cultural legitimacy] retrospectively through enlightened interpretation of human rights norms").

²²¹ An-Na'im, *supra* note 29, at 22–23.

²²² As an indication only, see Niaz Shah, *Women's Human Rights in the Koran*, 28 HUM. RTS. Q. 868 (2006), reprinted in 2 ISLAM AND HUMAN RIGHTS, *supra* note 149, at 18–19; Alex B. Leeman, *Interfaith Marriage in Islam*, 84 INDIANA L.J. 743, 762–63 (2009), reprinted in *id.* at 148–49; Rehman *supra* note 165, at 164–67.

²²³ Peiffer, *supra* note 149, at 546–47; Berry & Rehman *supra* note 168, at 453–67.

²²⁴ O'Sullivan, *supra* note 31, at 187; Kamran Hashemi, *Religious Legal Traditions, Muslim States and the Convention on the Rights of the Child: An Essay on the Relevant UN Documentation*, 29 HUM. RTS. Q. 194, 194 (2007); Javaid Rehman, *Religion, Human Rights Law and the Rights of the Child: Complexities in Applying the Sharia in Modern State Practices*, 62(2) N. IRL. LEG. Q. 153, 154 (2011).

²²⁵ Shah, *supra* note 222, at 394.

jurisprudence also on legal matters. Interpretation is an extensive chapter in Islamic law and encompasses a number of interpretative rules and principles—including extremely flexible tools, such as the *ijtihad* (individual reasoning), which, contrary to the divine revelation and prophetic legislation which ended the death of the Prophet, *ijtihad* “connotes a continuous process of development.”²²⁶

VI. TOWARDS A MEANINGFUL UNDERSTANDING OF CULTURAL RIGHTS

Rather than seeking to resolve an extremely complicated dilemma as a legal issue, a more fruitful pathway would be perhaps to adopt a holistic approach to culture and religion—primarily by empowering cultural rights. Since blasphemy controversies are fuelled by legitimate religious minorities’ claims, it seems quite clear that the pathway to follow would be to enforce religious minority cultural rights more effectively—especially in states where religious minorities suffer the most. In fact, still today unfortunately, a number of UN member states avoid international human rights mechanisms’ scrutiny by the UN expert bodies in cultural and religious matters. States of the Gulf such as Saudi Arabia, United Arab Emirates or Oman, along with the United States, have never even signed the ICESCR; others like Pakistan (since 2008) and Bahrain (since 2007) have only become parties very recently; states such as Kuwait, Yemen, Sudan, Syria, Iraq are parties for years now, yet have never, or almost never, sent to the Committee periodic reports for examination.²²⁷ Others have been neglecting entirely their cultural and cultural minority heritage. For instance, Pakistan where “hundreds of Hindu temples and other heritage sites across the country including the national heritage of Buddha statues” have not been restored since their destruction in the 1990s²²⁸ or Syria that has been using the Aleppo

²²⁶ VOICES OF ISLAM, *supra* note 95, at 156. The *ijtihad* is not accepted however by all sects, e.g. it is by the Akhbaris, but not by the *Usulis*. See Bassiouni, *supra* note 120, at 618.

²²⁷ E.g. the only concluding observations of the HR Comm. for Iraq, E/C.12/1/Add.17, 12/12/1997; report for Egypt due in 20 Jun 2003, submitted on May 11, 2010, and subsequent concluding observations on 13 December 2013, E/C.12/EGY/CO/2–4.

²²⁸ U.N., Committee on the Elimination of Racial Discrimination, Consideration Of Reports Submitted By States Parties Under Article 9 of The Convention, U.N. Doc. CERD/C/PAK/CO/20 (Mar. 4, 2009) (no mention in the final

Citadel²²⁹ as a military base, entirely disregarding 2014 Security Council resolution that orders it to refrain “from attacking cultural objects and sites and to not use them for military purposes.”²³⁰ As for the UNESCO instruments, they are the ones that enjoy truly universal acceptance, and also the highest numbers of ratifications²³¹—a rather uncommon situation in multilateral treaties. Yet, these mechanisms do not allow for close scrutiny, if only by the UNESCO intergovernmental committees. It is therefore not surprising that Muslim states that typically oppose human rights instruments such as the ICESCR,²³² CEDAW,²³³ and the CRC,²³⁴ have posed virtually no reservations in the cultural heritage and cultural diversity instruments.

On the other hand, the international bodies should continue reminding states that culture should not be associated necessarily with religion, or tradition—and especially not with traditions that question or endanger the underlying values of human rights.²³⁵ At

CERD Concluding observations).

²²⁹ See ISLAMIC ART AND VISUAL CULTURE, *supra* note 73 (providing the importance and description of the Aleppo citadel).

²³⁰ S.C. Res. 2139 (Feb. 22, 2014). The resolution also “calls on all parties to act immediately to save [its] rich societal mosaic and cultural heritage, and take appropriate steps to ensure the protection of Syria’s World Heritage Sites.” *Id.*

²³¹ As of June 2015, the 1972 Convention enjoys 192 ratifications (including Palestine), with the only exception of newly formed States such as Tuvalu, Timor-Leste and South Sudan. Likewise, the 2005 Convention on the Protection and Promotion of the Diversity of Cultural Expressions 190 (only the US and Israel refused to ratify); the 2003 UNESCO Convention for the Safeguarding of the Intangible Cultural Heritage 161 ratifications and even the Convention on ‘Illicit Trafficking of Cultural Property’ is ratified by 127 Member States. Only the, more challenging, 2001 Convention on the Protection of the Underwater Cultural Heritage that acknowledges underwater cultural heritage as ‘an integral part of the cultural heritage of humanity’ has less (50) ratifications; it is however, ratified by Palestine, as well as by Iran and Libya.

²³² See Manisuli Ssenyonjo, *State Reservations to the ICESCR: A critique of Selected Reservations*, 26 NETH. Q. HUM. RTS. 340 (2008) (discussing the example of Pakistan).

²³³ See *e.g.*, Rebecca Cook, *Reservations to the Convention on the Elimination of All Forms of Discrimination against Women*, 30 VA. J. INT’L L. 643 (1989–1990).

²³⁴ See Kamran Hashemi, *supra* note 224, at 196.

²³⁵ See Michael Addo, *Practice of United Nations Human Rights Treaty Bodies in the Reconciliation of Cultural Diversity with Universal Respect for Human Rights* 32 HUM. RTS. Q. 601, 608 (2010) (describing the different scholarly approaches to the reconciliation of cultures with human rights); MYLÈNE BIDAULT, LA PROTECTION INTERNATIONALE DES DROITS CULTURELS 519 (2009); ELSA STAMATOPOULOU, CULTURAL RIGHTS IN INTERNATIONAL LAW: ARTICLE 27 OF THE UDHR AND BEYOND 18–28 (2007).

present, all instruments that protect cultural diversity include clauses that indicate their compatibility with present human rights standards—abuse clauses, limitations clauses, or clauses of compatibility with other international instruments. The fact that the meaning and scope of “the right to culture” is not clearly defined in international instruments should no longer provide a good excuse for relativist claims, as both the UNESCO and the ESCR Committee have given adequate clarifications with respect to the meaning of “culture”²³⁶—especially in relation to its dynamic character and its association with a culture of *humanity*.²³⁷ Consequently, religious reasons cannot possibly be brought forward as an objection to human rights law. As noted repeatedly by international human rights bodies, human rights are not subject to divergent interpretations under the pretext of religion, tradition, or culture.²³⁸ The Committee of Economic, Social and Cultural Rights (“ESCR Committee”) in particular has clarified, first, that the International Covenant on Economic, Social and Cultural Rights (“ICESCR”) is not dependent upon any particular political, economic, or other system;²³⁹ and, second, that domestic law should be interpreted as far as possible in a way that conforms to a state's international legal obligations.²⁴⁰ In the case of the practice of

²³⁶ U.N., Committee on Econ., Soc. & Cultural Rts., General comment No. 21: Right of Everyone to Take Part in Cultural Life –art. 15, ¶ 1 (a) of the International Covenant on Economic, Social and Cultural Rights, ¶¶ 8–16, U.N. Doc. E/C.12/GC/21 (Dec. 21, 2009); *see also* Janusz Symonides, 158 INT’L SOC. SCIEN. J. 559 (1998) (arguing, in 1998, that “there is no need for new rights, but for their elucidation, clarification, and the elaboration of a full list with the elaboration of already existing rights . . .”). On the contribution of the Committee, *see* Athanasios Yupsanis, *The Meaning of ‘Culture’ in Article 15 (1)(a) of the ICESCR – Positive Aspects of CESCR’s General Comment No. 21 for the Safeguarding of Minority Cultures*, 55 GERMAN YEARBOOK OF INT’L L. 356 n.61 (2012).

²³⁷ *See* U.N. Doc. E/C.12/GC/21 *supra* note 236, at ¶ 12. In the wording of the Committee, culture “must be seen not as a series of isolated manifestations or hermetic compartments, but as an interactive process whereby individuals and communities, while preserving their specificities and purposes, give expression to the culture of humanity.” *Id.*; *see also*, Ann-Belinda Preis, *Human Rights as Cultural Practice*, 18 HUM. RTS. Q. 286 (1996).

²³⁸ *See* World Conference on Human Rights, Vienna Declaration and Programme of Action, ¶ 5, A/CONF.157/2 (June 25, 1993).

²³⁹ *Compare* U.N. Doc. E/C.12/GC/21 *supra* note 236, at ¶ 18, *with* U.N., International Covenant on Economic, Social and Cultural Rights, art. 2 ¶ 1. In particular, the nature of States parties’ obligations (Dec.14, 1990) §8, U.N. Doc. E/1991/23 (in relation to the ‘neutrality’ of the Covenant).

²⁴⁰ U.N. ESCR Committee, General Comment No.9 (1998), in relation to the domestic application of the Covenant (Dec. 3 1998) §15, U.N. Doc. E/C.12/1998/24

condemnation for apostasy through *fatwas* for instance, the Human Rights Committee has been quite clear in observing that “[s]tates parties also violate the right to security of person if they purport to exercise jurisdiction over a person outside their territory by issuing a *fatwa* or similar death sentence authorizing the killing of the victim.”²⁴¹

That being said, a meaningful implementation of cultural rights, should not be confined to United Nations mechanisms. Attention should be paid to the local implementation of human rights standards, including by domestic legislation implementing obligations stemming from cultural rights. Such implementation cannot be done without the active participation of civil societies. Artists, comic cartoonists, illustrators and literature writers—especially those writing in the mass media or publishing or performing widely—play a central role in this. Those in mass media are not random individuals—they are actors of the civil society and important members of political life, if not also mechanisms of social transformation. Their freedom of expression is not gratuitous, neither endless; it is precisely for this reason that freedom of expression is the only human right to be accompanied by duties and responsibilities.²⁴² It also falls upon them therefore to develop their own criteria, deontology rules and codes of practice²⁴³ rather than acting under the covering of the “I have a right to” approach. Rights are not a panacea; they have limits, and most importantly, are co-related to duties. Accordingly, it equally falls upon the leaders of spiritual and cultural traditions to give direction to those who wish to oppose offenses to sensibilities and peacefully manifest their claims, as well as to fight against extremist interpretations of religions. In this, Islamic law can make an important contribution.²⁴⁴ Perhaps in the future, new types of bodies and *fora*

(1998).

²⁴¹ U.N., Human Rts. Comm., General comment No. 35: Article 9 (Liberty and security of the person), n. 15, U.N. Doc., CCPR/C/GC/35 (Dec. 16, 2014); *see also, e.g.* Concluding observations: Islamic Republic of Iran, §9, CCPR/C/79/Add.25 (1993).

²⁴² International Covenant on Civil and Political Rights, Dec. 16, 1966, art. 19 (“this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions . . .”); European Convention on Human Rights, art. 10, Nov. 4, 1950 (reminding us that “the exercise of these freedoms . . . carries with it duties and responsibilities.”).

²⁴³ *See e.g.*, Boualem Bessaih, *An ethics of responsibility for artists*, in VENICE COMMISSION, BLASPHEMY, INSULT AND HATRED: FINDING ANSWERS IN A DEMOCRATIC SOCIETY 79–80 (2010).

²⁴⁴ Jason Morgan-Foster, *Third Generation Rights: What Islamic Law Can*

will be created that will be better placed than courts to decide where exactly to “draw the line”; and this, in the interest of respect for cultural diversity of humankind, as well as its maintenance for both present and future generations.

VII. CONCLUSION

This paper looked into controversies over religious sensibilities. It found that the international bodies have clarified in many instances that cultural and religious reasons cannot provide a valid justification for human rights violations. Killings and death threats in particular, including by *fatwas*, are situations that are condemned by international bodies. They are also widely contested within the Islamic tradition, and particularly with modern interpretations of Sharia law.

Further, artistic traditions of the Muslim world, especially those during the life of the Prophet and the early rise of Islam, prove that there has never been a sole monolithic understanding of the position of Islam vis-à-vis the arts, and further, that Islam, despite the stringent religious prohibitions, has been at the crossroad of cultural and artistic exchanges. Consequently claims of absolute bans on music and iconography should be dissociated from religious justifications. Iconoclastic policies, intentional destruction of heritage and other similar acts in particular, should trigger international responsibility as acts of terrorism, and therefore also violate humanitarian law.

As for domestic laws restricting freedom of expression on the grounds of protecting religious beliefs, the answer is less straightforward. Since the “defamation of religions” campaign ended in 2010, the international community has been clearer in rejecting blasphemy laws. The absence of consensus among states however, and the persistent politicization of the concepts of “religion” and “tradition” within the United Nations, makes enforcement of human rights standards an extremely challenging task. For this reason, human rights bodies, including regional courts and universal bodies, appear to be rather inadequate mechanisms—if not entirely inappropriate ones.

From there, two pathways seem possible: either to declare the inability of the human rights system to address global scale

Teach the International Human Rights Movement, YALE HUM. R. & DEV. L.J. 67, 74–75 (2005); MASHOOD BADERIN, INTERNATIONAL HUMAN RIGHTS AND ISLAMIC LAW 40–41 (2003).

controversies involving religious sensibilities, or to re-approach them from a holistic perspective, empowering cultural rights as a whole and posing the emphasis not only on the rights as such, but also, on the duties accompanying them. Which of the two solutions is the adequate one? The first undermines the credibility of the human rights system and should therefore not be preferred. The second, on the contrary, would have a dual benefit. First, it would allow addressing a specific point of the Islamic legal tradition, which is not compatible with the human rights system, through the lens of a modern interpretation of Sharia scholarship. Second, it would enable dialogue and understanding between different religions and different traditions. For this approach, however, courts seem to be the least adequate forum.