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Taking "Great Care": Defining Victims of Hate Speech Targeting Religious Minorities

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Taking “Great Care”: Defining Victims of Hate Speech Targeting Religious Minorities

Whittney Barth*

Abstract

This Comment explores the intersection of race and religion in cases brought before the Human Rights Committee alleging violations of Article 20(2) of the International Covenant on Civil and Political Rights. This article proposes a positive requirement for states parties to prohibit hate speech. Specifically, the following analysis considers Committee determinations of standing in cases brought by Muslims living in Europe who sought to challenge a state party’s response to discriminatory remarks made by public figures. This Comment argues that these determinations, which appear to implicitly endorse a lower threshold for group standing when both race and religion are under attack (rather than religion alone) lead to three undesirable outcomes: 1) they weaken promised protections for minorities; 2) they fail to acknowledge the internal racial diversity of religious communities and the growing salience of religious identity; and 3) they do not account for the range of ways in which religion, race, and ethnicity are coded in the content and interpretation of the hate speech. In light of this analysis, this Comment argues for a more consistent application of the Human Rights Committee’s own broad standard of admissibility.

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I. INTRODUCTION

Protecting individuals from discrimination on the basis of their race and religion has had a place on the U.N.'s agenda since its inception. Often this principle collides with concerns over the appropriate limits of freedom of expression.¹ There are clear limits when criminal activity is involved—vandalism of a temple or mosque cannot be adequately defended as expressive.² Yet debate continues as to how far protection against animus should extend when it comes to verbal attacks. In some countries, like the U.S., hate speech is not criminal unless and until it is paired with criminal conduct.³ In others, only hate speech that rises to the level of incitement is unlawful.⁴ The U.N., while recognizing the importance of freedom of expression, supports the latter approach.

This Comment focuses specifically on hate speech by public figures that targets people based on protected statuses, namely religion and race. While the statuses of race and religion are intertwined, their evolution and trajectory within the U.N. have been distinct. This Comment explores the manner in which each status has developed through cases brought before two human rights adjudicatory bodies and highlights a troubling result: in some instances, Muslims have been denied standing to challenge state responses to discriminatory remarks on the grounds that their claims amount to *actio popularis*, or claims brought solely in the interest of the public, as opposed to personal, welfare.⁵ However, their coreligionists challenging both religious *and* racial or ethnic discrimination have been granted standing. These different outcomes track the findings of scholars

¹ The International Convention on the Elimination of All Forms of Racial Discrimination, the International Covenant on Civil and Political Rights, and the European Convention on Human Rights require a prohibition on advocacy of national, racial, or religious hatred from its members. See generally Elizabeth F. Defeis, *Freedom of Speech and International Norms: A Response to Hate Speech*, 29 STAN. J. INT'L. L. 57 (1992). Professor Defeis points out that, “[i]n contrast to the United States Constitution, international conventions specifically recognize that protected rights can be abused, often with the effect of denying others different rights.” *Id.* at 58. Prior to the founding of the U.N., the rights of minorities not to be discriminated against was also recognized through a series of post-World War I treaties promulgated by the League of Nations, although these protections were limited to minorities residing in specific states. DANIEL MOECKLI, HUMAN RIGHTS AND NON-DISCRIMINATION IN THE ‘WAR ON TERROR’ 61 (2009).

² Some scholars argue that hate crimes should not be separate or enhanced crimes. For a window into this debate within the United States, see generally Jeff Jacoby, *Punish Crime, Not Thought Crime*, in THE HATE DEBATE: SHOULD HATE BE PUNISHED AS A CRIME? 114–22 (Paul Iqanski ed., 2002).

³ See *Comparing Hate Speech Laws in the U.S. and Abroad*, NAT’L PUB. RADIO (Mar. 3, 2011), <https://perma.cc/54LX-PXPH>.

⁴ *Id.*

⁵ See *Actio Popularis*, BLACK’S LAW DICTIONARY (10th ed., 2014).

who argue religious affiliation as a protected status is currently more tenuous in international law than other minority statuses.⁶

This Comment argues that international adjudicatory bodies should apply the same amount of deference to group standing when petitioners claim inciteful hate speech has targeted them because they are a religious minority as when petitioners claim that hate speech has targeted them because they are both a religious and racial minority. The need for this is illustrated by the odd results of several U.N. Human Rights Committee decisions involving Muslims living in European countries.⁷ On at least two occasions, petitioners who brought a claim involving hate speech directed at Muslims were not granted an opportunity for their case to be heard on the merits. However, on another occasion, different petitioners who brought a claim involving hate speech that attacked them as members of a religious and racial minority were allowed to proceed with their case. The latter result aligns more closely with the outcome of similar cases heard by the Committee on the Elimination of Racial Discrimination, whose broad standard for determining victim standing was actually borrowed from the Human Rights Committee.

These discrepancies are problematic for at least three reasons: 1) the determinations appear to curtail the comprehensiveness of promised protections against inciteful hate speech by public figures; 2) they seem to elide racial diversity within a religious community, potentially resulting in uneven protection within the same community even if hate speech is targeted broadly; and 3) they do not engage with the many ways race and religion may be intertwined in the speech of perpetrators and the perceptions of the broader public hearing the speech. The following analysis zeroes in on cases involving hate speech by a politician or other public figure, because hate speech by politicians is likely to pose a special threat to vulnerable groups as compared to private actors who engage in similar speech.

Section II gives a brief history of the U.N.'s current instruments addressing racial discrimination, religious discrimination, and freedom of expression. The Section considers the historical relationship between race and religion at the U.N. and then explains how they have remained separate but intertwined. The Section

⁶ See Nazila Ghanea, *Are Religious Minorities Really Minorities?*, 1 OXFORD J. L. & RELIGION 57, 59–60 (2012) (“Religious minorities have always been assumed to be part and parcel of the minorities’ regime normatively, but have, in fact, rarely been protected through it.”); see also generally David Keane, *Addressing the Aggravated Meeting Points of Race and Religion*, 6 U. MD. L.J. RACE, RELIGION, GENDER & CLASS 367 (2006).

⁷ Compare *A.W.P. v. Denmark*, Communication No. 1879/2009, Hum. Rts. Comm., U.N. Doc. CCPR/C/109/D/1879/2009, ¶ 6.4 (Nov. 25, 2013), and *Andersen v. Denmark*, Communication No. 1868/2009, Hum. Rts. Comm., U.N. Doc. CCPR/C/99/D/1868/2009 (Sept. 14, 2010) with *Mohamed Rabbae et al. v. Netherlands*, Communication No. 2124/2011, Hum. Rts. Comm., U.N. Doc. CCPR/C/117/D/2124/2011, ¶ 9.5 (Nov. 18, 2016).

introduces two key documents—the International Covenant on Civil and Political Rights (ICCPR)⁸ and the International Convention for the Elimination of All Forms of Racial Discrimination (ICERD)⁹—and briefly explores the tension between the right to freedom of speech and expression and the rights of individuals to be protected by the state from discriminatory speech.

Section III outlines the legal mechanisms for challenging states parties' responses to hate speech under the ICCPR and ICERD. The U.N. Human Rights Committee and the U.N. Committee for the Elimination of Racial Discrimination, the judicial bodies that administer ICCPR and ICERD respectively, have extended standing to members of groups targeted by the state party or not adequately protected by it.¹⁰ Three cases brought by Muslims living in Europe challenging state responses to discriminatory and hateful remarks made by public figures are examined in this section.

Section IV examines, in light of these decisions, the relationship between hate speech claims brought on the basis of race and religion and those brought on the basis of religion alone. It further examines how determinations of who counts as a victim of hate speech may be similar to attempts to define religion for the purposes of international law.

II. RACE, RELIGION, AND HATE SPEECH AT THE U.N.

The U.N. has grappled with the intersection of racial discrimination, religious discrimination, and the right to free expression since its founding.¹¹ Article 2 of the Universal Declaration of Human Rights affirms the equal protection of rights “without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.”¹² Article 7 entitles every person to protection from discrimination.¹³ Article 18 ensures the right to freedom of thought, conscience and religion, which includes the right to manifest religion or belief in “teaching, practice, worship and observance.”¹⁴

⁸ International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 U.N.T.S. 171 [hereinafter ICCPR].

⁹ International Convention for the Elimination of All Forms of Racial Discrimination, Mar. 7, 1966, 660 U.N.T.S. 195 [hereinafter ICERD].

¹⁰ See *Toonen v. Australia*, Communication No. 488/1992, Hum. Rts. Comm., U.N. Doc. CCPR/C/50/D/488/1992 (Dec. 25, 1991); see also discussion in Section III.A, *infra*.

¹¹ See Keane, *supra* note 6, at 367–70.

¹² G.A. Res. 217 (III) A, U.N. Universal Declaration of Human Rights, art. 2, Dec. 10, 1948 [hereinafter UDHR].

¹³ *Id.* at art. 7.

¹⁴ *Id.* at art. 18.

At the same time, the right to freedom of opinion and expression is enshrined in Article 19.¹⁵ There has long been a debate about the appropriate limits of this freedom. Concerns over how to protect communities from hate speech that might incite violence while also protecting against fascism initially informed both sides of this debate in the aftermath of World War II.¹⁶ As discussed below,¹⁷ later iterations of the right to freedom of expression, at least in the legal instruments of the U.N., settled on coupling it with “special responsibilities.”¹⁸ A number of states party have made reservations to these particular portions of the instruments, however, which indicates that the matter is far from settled.¹⁹

Race and religion are both enumerated as protected classes in the Universal Declaration of Human Rights (UDHR). However, status-based legal protections for race and for religion have not developed at the same pace or to the same extent. One scholar described international efforts to eliminate discrimination based on race and religion as “parallel, unequal regimes.”²⁰ The development of a legal infrastructure to combat racial discrimination has proceeded in a way that is “clear-sighted and tenacious,” but similar efforts aimed at combating religious discrimination have proceeded in fits and starts.²¹ Before considering how race and religion play out in contemporary decisions of the Human Rights Committee, it is important to understand the different legal landscapes affecting race and religion.

¹⁵ *Id.* at art. 19.

¹⁶ *See* Defeis, *supra* note 1, at 97.

¹⁷ *See* discussion in Sections II.A–II.C, *infra*.

¹⁸ *See* ICCPR, *supra* note 8, at Article 19.3. Articles 18 and 19 of the U.N. Universal Declaration of Human Rights provided the template for the same articles within the International Covenant on Civil and Political Rights, but the UDHR lacks both the ICCPR’s “special duties and responsibilities” (Article 19.3) as well as its prohibition on incitement (Article 20) provisions. *Compare* UDHR, *supra* note 12, *with* ICCPR, *supra* note 8.

¹⁹ At the time of this writing, 169 states parties have ratified the ICCPR; an additional 6 are signatories, and 22 have taken no action. At the time of this writing, 179 states parties have ratified ICERD, 4 are signatories, and 14 have taken no action. For an interactive map of the status of the ICCPR, the ICERD, and related optional protocols, see Status of Ratification at U.N. Hum. Rts., Office of the High Commissioner, Ratification of 18 International Human Rights Treaties, <https://perma.cc/8BBH-JMSP>.

²⁰ *See* Keane, *supra* note 6, at 367.

²¹ *Id.* Note that Professor Keane does not claim—nor does this author—that the problem of racial discrimination has somehow been solved because of a stronger legal infrastructure; this is merely a commentary on the development of each as a regime within international law. The question of effectiveness is left for another day.

A. U.N. Protections against Racial Discrimination

The U.N. Declaration on Human Rights entitles every person to protection from discrimination, including on the basis of race.²² The U.N. General Assembly continued its effort to end racial discrimination with the adoption of the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD) in 1965.²³ Article 1 of ICERD offers a broad definition of racial discrimination, including

any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life.²⁴

Article 8 of ICERD established an adjudicatory body, the Committee for the Elimination of Racial Discrimination, to hear complaints brought by individuals against member states alleged to be in noncompliance with the Convention. Today, the Committee on the Elimination of Racial Discrimination continues to play a central role in international legal efforts to counter racial discrimination.²⁵

In addition to hearing claims from individuals, the Committee continues to publish extensive country-specific findings that are presented during its regular session meetings. These files include state party reports, input from civil society organizations, national human rights institutions, information from other stakeholders, and concluding observations.²⁶

Another landmark effort to combat discrimination on the basis of race was the 2001 World Conference against Racism, Racial Discrimination, Xenophobia, and Related Intolerance in Durban, South Africa.²⁷ Agenda items were grouped into five themes: 1) sources and contemporary manifestations of racism and racial discrimination and related intolerance; 2) victims; 3) measures of prevention,

²² See UDHR, *supra* note 12, at Articles 2 and 7. For a brief adoption history, see <https://perma.cc/86YC-DFYU>.

²³ See generally ICERD, *supra* note 9.

²⁴ *Id.* at art 1.1.

²⁵ See José A. Lindgren Alves, *Race and Religion in the U.N. Committee on the Elimination of Racial Discrimination*, 42 U.S.F. L. REV. 941, 947–52 (2008). For an in-depth look at the interworking of the Committee on the Elimination of Racial Discrimination, see *id.*, at 947 et seq.

²⁶ See, for example, U.N. Hum. Rts., Office of the High Commissioner, CERD—International Convention on the Elimination of All Forms of Racial Discrimination (Nov. 20, 2017–Dec. 8, 2017), <https://perma.cc/B33F-7E2P>.

²⁷ U.N. Comm'n on Hum. Rts., *The World Conference Against Racism, Racial Discrimination, Xenophobia, and Related Intolerance* (Aug. 31–Sept. 8, 2001), <https://perma.cc/H7VF-D67U> [hereinafter *World Conference Against Racism*]. The U.N. Commission on Human Rights was replaced by the Human Rights Council in 2006 by action of the U.N. General Assembly.

education, and protection aimed at eradication; 4) provision of effective remedies, recourses, and redress; and 5) strategies to achieve “full and effective equality.”²⁸

B. U.N. Protections against Religious Discrimination

When the U.N. General Assembly convened for a third time, a convention on the elimination of racial discrimination was proposed and included support for addressing “manifestations of racial prejudice and religious intolerance.”²⁹ This was in 1962 and came as a response to a growing number of anti-Semitic incidents in several countries during the winter of 1959–1960.³⁰ The General Assembly ultimately decided to split the issues of racial prejudice and religious intolerance and address them separately, resulting in two resolutions.³¹ Both called for draft declarations and conventions to be submitted to the General Assembly.³²

A Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion and Belief (DEAFIDBRB) was eventually adopted by the General Assembly in 1981 and offers the most in-depth discussion of religious discrimination of any U.N. document.³³ However, it is not legally binding.³⁴ Claims of religious discrimination may also be brought under Article 18 of the International Covenant on Civil and Political Rights (ICCPR), a multinational treaty enforced by the Human Rights Committee and discussed at length in Section II.

The U.N. established a Special Rapporteur on Religious Intolerance in 1986, a position renamed the Special Rapporteur on Freedom of Religion or Belief (SRFRB) in 2000.³⁵ The SRFRB is primarily responsible for conducting fact-

²⁸ *Id.*

²⁹ Keane, *supra* note 6, at 372.

³⁰ *Id.*

³¹ *Id.* at 373.

³² *Id.*

³³ G.A. Res. A/RES/36/55, Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion and Belief (Nov. 25, 1981) [hereinafter DEAFIDBRB]; *see also* Hum. Rts. Council Res. A/HRC/RES/22/20, Freedom of Religion or Belief (Apr. 12, 2013); Hum. Rts. Council Res. A/HRC/RES/6/37, Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief (Dec. 14, 2007). For enactment and endorsement history of DEAFIDBRB, *see* U.N. Office of the High Commissioner for Hum. Rts., Human Rights Documents, <https://perma.cc/TX52-HH3Y> (last visited May 20, 2018).

³⁴ *See* Lindgren Alves, *supra* note 25, at 945 (describing the DEAFIDBRB as having no more than “recommendatory” force).

³⁵ The name change was endorsed by the U.N. Economic and Security Council in 2000 and by the General Assembly, G.A. Res. A/RES/55/97 (Dec. 4, 2000). *See* U.N. Hum. Rts., Office of the High Commissioner, Special Rapporteur on Freedom of Religion or Belief, <https://perma.cc/GBZ9-SLVC> (last visited May 20, 2018).

finding missions to “identify existing and emerging obstacles to the enjoyment of the right to freedom of religion or belief;” for promoting the adoption of measures at national, regional and international levels; and for examining governmental actions that are incompatible with DEAFIDBRB.

In March 2016, for instance, then-SRFRB Heiner Bielefeldt visited Denmark on a three-day fact-finding mission. This visit was a first by a SRFRB to a Scandinavian country.³⁶ The SRFRB chose Denmark in part because of the country’s high-profile attempt to grapple with the perceived tension between the right to freedom of religion and the right to freedom of expression in the context of an increased presence of visible religious minorities due to immigration.³⁷ While in Denmark, the SRFRB met with government authorities, civil society organizations, academics, and representatives of religious communities.³⁸ Upon his return to Geneva, he issued a press release urging *inter alia* the Danish government to develop a more inclusive “Danishness.”³⁹

³⁶ U.N. Hum. Rts., Office of the High Commissioner, Preliminary Findings of Country Visit to Denmark by Heiner Bielefeldt Special Rapporteur on Freedom of Religion or Belief (Mar. 22, 2016), <https://perma.cc/LPL4-GLKR>.

³⁷ *Id.* The SRFRB noted in particular the 2006 “cartoon crisis,” the role of the established Church of Denmark in an increasingly diverse society, and the 2015 decision of the government (surprisingly at the request of left-leaning political parties) to keep the blasphemy provision as part of the country’s penal code. *Id.* Related issues are taken up in some of the Human Rights Committee cases, *see* Section III, *infra*. This Comment is limited in scope to cases involving hate speech toward religious minorities and therefore does not explore cases involving, for instance, blasphemy. For a critical look at all state practices of limiting insulting speech, *see* Amal Clooney & Philippa Webb, *The Right to Insult in International Law*, 48 COLUM. HUM. RTS. L. REV. 1, 3–13 (2017).

³⁸ The role of the Special Rapporteur is similar to that of the Committee on the Elimination of Racial Discrimination and the Human Rights Committee insofar as it involves the examination of state infringements on a fundamental right. However, the SRFRB’s work is both limited in its enforcement power, since the role does not carry a binding judicial capacity, and more expansive in its constructive aims, insofar as DEAFIDBRB conceptualizes religion as not just as a fundamental right to be protected but a means to an end of fulfilling the goals of the U.N. Charter. *See, for example*, DEAFIDBRB, *supra* note 33 (“Considering that it is essential to promote understanding, tolerance and respect in matters relating to freedom of religion and belief and to ensure that the use of religion or belief for ends inconsistent with the Charter of the U.N., other relevant instruments of the U.N. and the purposes and principles of the present Declaration is inadmissible . . . [c]onvinced that freedom of religion and belief should also contribute to the attainment of the goals of world peace, social justice and friendship among peoples and to the elimination of ideologies or practices of colonialism and racial discrimination”). Further exploration of this aim is outside the scope of this Comment. It is worth noting, however, that the use of religion in this constructive way is a potentially problematic undertaking for an inter-governmental organization even as such an aim may, independently be embraced by individuals and like-minded civil society organizations.

³⁹ U.N. Hum. Rts. Office of the High Commissioner, *Freedom of Religion: UN Expert Urges Denmark to Move Toward a More Inclusive ‘Danishness’* (Mar. 22, 2016), <https://perma.cc/XM4M-5BJN>.

C. Grappling with Freedom of Expression and Hate Speech

Like freedom from discrimination based on race and religion, freedom of expression is part of the U.N. Declaration on Human Rights. Article 19 ensures the “right to freedom of opinion and expression,” including the “freedom to hold opinions without interference and to seek, receive[,] and impart information and ideas through any media regardless of frontiers.”⁴⁰ As with freedom of religion, there is no binding international treaty focused solely on the freedom of expression, but the U.N. did appoint a Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression (SRPPRFOE) in 1993.⁴¹ The original mandate was “guided” by the UNDHR’s affirmation of the right to freedom of expression and “mindful” of its reiteration and limitation in the ICCPR.⁴²

Although the original mandate and subsequent renewals did not discuss hate speech, a 2002 report from the SRPPRFOE took up the issue. Writing in a post-9/11 context,⁴³ the SRPPRFOE defended the ideal of an “unabridged” right to freedom of expression but acknowledged instances where this ideal “conflicts with the rights of others,” namely when the freedom of speech “leads to incitement of hatred and/or discrimination.”⁴⁴ He concluded that,

[i]n light of these concerns, the Special Rapporteur recognizes that hate speech calls for reasonable restrictions which are necessary to prevent incitement to acts of imminent violence, hatred or discrimination on grounds, among others, of race, religion, colour, descent, or ethnic or national origin.

⁴⁰ UDHR, *supra* note 12, at art. 19.

⁴¹ Comm’n on Hum. Rts. Res. 1993/45, Right to Freedom of Opinion and Expression, ¶ 11 (Mar. 5, 1993).

⁴² *Id.* at Preamble. The special mandate gives further evidence of the impetus of the Commission on Human Rights (now the Human Rights Council) for establishing the Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression (SRPPRFOE). The preamble notes the Committee’s deep concern over reports of detention, discrimination, threats, and violence facing individuals within the “field of information” (journalists, editors, authors, printers, etc.). *Id.* The SRPPRFOE’s role was affirmed and extended in March 2008. Hum. Rts. Council Res. A/HRC/RES/7/36 (Mar. 28, 2008); *see also* Hum. Rts. Council Res. A/HRC/RES/16/4 (Mar. 24, 2011); Hum. Rts. Council Res. A/HRC/RES/25/2 (Mar. 27, 2014); Hum. Rts. Council Res. A/HRC/RES/34/18 (Mar. 24, 2017) (extending the mandate for three year periods).

⁴³ Writing four months after September 11, 2001, the SRPPRFOE’s report urged “all Governments to refrain from targeting groups such as religious and ethnic minorities, political activists and the media and not to respond to terror by adopting laws which have a negative impact for the realization of human rights, in particular the right to freedom of opinion and expression as stated in article 19 of the Universal Declaration of Human Rights.” Economic and Social Council, Comm’n on Hum. Rts., Civil and Political Rights, Including the Question of Freedom of Expression, E/CN.4/2002/75, 5–6 (Jan. 30, 2002).

⁴⁴ *Id.* at ¶ 62.

As such, and in accordance with the relevant international standards, the Special Rapporteur wishes to condemn any advocacy of national, racial or religious hatred that constitutes an incitement to discrimination, hostility or violence; such advocacy should be prohibited by law.⁴⁵

In doing so, the SRPPRFOE expressed concern that such laws would be used against those they were intended to protect, especially in situations where “respect for human rights and the rule of law is weak.”⁴⁶ The SRPPRFOE called for “great care” to be exercised in balancing this ongoing tension.⁴⁷

The SRPPRFOE’s report encouraged states to ratify the International Covenant for Civil and Political Rights,⁴⁸ which contains two articles pertaining to freedom of expression. Article 19 includes the right to hold opinions without interference and the freedom to seek knowledge and impart information and ideas.⁴⁹ Paragraph 3 of Article 19 notes that freedom of expression carries “special duties and responsibilities”⁵⁰ and therefore may be subject to restrictions if necessary to “respect the rights or reputations of others” or “for the protection of national security or of public order . . . or of public health or morals.”⁵¹ Article 20 prohibits advocacy of hatred that incites discrimination, hostility, or violence.⁵²

Similarly, Article 4 of ICERD prohibits the advocacy of racial superiority, which includes both the incitement of racial discrimination as well as the “dissemination of ideas based on racial superiority or hatred.”⁵³ States party also have the imperative to take positive steps, including enacting laws that punish the dissemination of such ideas and the violent acts or incitement they cause and the prohibition on “public authorities or public institutions, national or local, [from] promot[ing] or incit[ing]” such discrimination.⁵⁴

⁴⁵ *Id.* at ¶ 64.

⁴⁶ *Id.* at ¶ 65.

⁴⁷ *Id.*

⁴⁸ *Id.* at 5 (Executive Summary).

⁴⁹ ICERD, *supra* note 9, at art. 19 ¶¶ 1–2.

⁵⁰ Amal Clooney and Phillipa Webb note that the drafting history of this portion of Article 19 indicates that most states understood that these could include limitations to prevent “incitement to discrimination, hatred, and violence” but since these were included in the Article 20, enumerating them in Article 19 would have been “redundant.” Clooney & Webb, *supra* note 37, at 16.

⁵¹ ICERD, *supra* note 9, at art. 19 ¶ 3.

⁵² For a more detailed discussion, see Section III.B, *infra*.

⁵³ ICERD, *supra* note 9, at art. 4. Recall that Article 20(2) of the ICCPR requires legal prohibitions on “any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence.” *See also* Clooney & Webb, *supra* note 37, at 18 and n. 76 (noting that the plain language of Article 18 suggests states parties are required to criminalize speech, a conclusion the Committee on the Elimination of Racial Discrimination has recommended be reserved for “serious cases”).

⁵⁴ ICERD, *supra* note 9, at art. 4.

Later U.N. documents affirm ICERD's broad reach. For instance, the Durban Declaration and Programme of Action (DDPA),⁵⁵ adopted at the World Conference Against Racism, Racial Discrimination, Xenophobia and Related Intolerance in 2001, calls on states "as a matter of urgency" to "accede" to ICERD, with the goal of universal ratification of ICERD by 2005.⁵⁶ DDPA also builds on that broad mandate, going so far as to encourage

political parties to take concrete steps to promote equality, solidarity and non-discrimination in society, inter alia by developing voluntary codes of conduct that include internal disciplinary measures for violations therefore, so their members refrain from public statements and actions that encourage or incite racial discrimination, xenophobia and related intolerance.⁵⁷

The Committee on the Elimination of Racial Discrimination welcomed the DDPA and used it as an opportunity to further enumerate measures to be taken to strengthen its own work combating racial discrimination.⁵⁸

On the one hand, these articles can be seen as providing strong protection of minority rights.⁵⁹ Article 20 is particularly important because it is the only instrument that provides minorities with generalized protection from hate speech, whether by state or by non-state actors.⁶⁰ Dr. Nazila Ghanea⁶¹ argues that this

⁵⁵ The World Conference Against Racism, Racial Discrimination, Xenophobia, and Related Intolerance, Durban Declaration and Programme of Action (Sept. 8, 2001), <https://perma.cc/2MHS-5PBZ> [hereinafter DDPA]; see also World Conference Against Racism, *supra* note 27.

⁵⁶ DDPA, , *supra* note 55, at Programme of Action ¶ 75.

⁵⁷ P.O.E.M. v. Denmark, Communication No. 22/2002, Comm. on the Elimination of Racial Discrimination (CERD), U.N. Doc. CERD/C/62/D/22/2002, ¶ 7 (Mar. 19, 2003); see also A.W.R.A.P. v. Denmark, CERD, U.N. Doc. Communication No. 40/2007, CERD/C/71/D/37/2006 (Aug. 8, 2007); Andersen v. Denmark, Communication No. 1868/2009, Hum. Rts. Comm., U.N. Doc. CCPR/C/99/D/1868/2009 (Sept. 14, 2010).

⁵⁸ See Rep. of the CERD, U.N. Doc A/57/18, at 109–11 (2002).

⁵⁹ Ghanea understands minority rights to include the "collective aspects of individual rights" and "possibly also . . . the protection of groups *per se*." Nazila Ghanea, *Minorities and Hatred Protections and Implications*, 17 INT'L J. ON MINORITY & GROUP RTS. 423, 423 (2010) (emphasis in original); see also Robin Edger, *Are Hate Speech Provisions Anti-Democratic?: An International Perspective*, 26 AM. U. INT'L. L. REV. 119, 127, 154 (2011) (noting the proper balance is not between "free speech and offense "but between "free speech and equality").

⁶⁰ Ghanea, *supra* note 59, at 425–26. She compares the broad sweep of this article, which includes "national, racial or religious" hate or discrimination with the narrower focus of ICERD ("race, colour and ethnicity"). It is clear that sometimes targeted characteristics overlap and some may prove more salient than others. For instance, Ghanea approves of the fact that "linguistic minorities," although represented in the 1992 UN Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities, are not included in Article 20. "The whipping up of linguistic hatred, alone rather than in conjunction with the other two grounds of race or religion, seemingly posed too remote a possibility for consideration." *Id.* at 426.

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provision is not overly broad because it sets a threshold: only hate speech that “constitutes incitement to discrimination, hostility or violence” is prohibited.⁶² Ghana acknowledges that the rationales in favor of limiting hate speech are controversial⁶³ but sees the ICCPR as engaging in an adequate balancing of the speaker’s right to expression and the “listener’s right to have her inherent dignity protected from hate speech injuries.”⁶⁴

On the other hand, scholars have expressed concern that the concept of “special responsibilities” unduly restricts the rights associated with free expression.⁶⁵ Furthermore, broader concerns about the “profound disagreements” among states as to their responsibilities, manifested in the number of reservations to each treaty provision, have led some observers to conclude that “the requirements of international human rights law for each state will be determined on a case-by-case basis,” a troubling prospect for preventing an erosion of the freedom of expression.⁶⁶

Finally, the SRPPRFOE has suggested that politicians and other public figures have their own special responsibilities not to engage in hate speech.⁶⁷ In a 2012 report, he concluded that there has been a “worrying increase in the number of expressions of hate, incitement to violence and discrimination,” a concern because “every individual human being is entitled to the same dignity and rights, including the right not to be discriminated against, regardless of national origin, social, racial, ethnic or religious background, disability, gender, sexuality or any

⁶² Ghana, *supra* note 59, at 428.

⁶³ Ghana summarizes the three rationales identified and ultimately critiqued by D. Kretzmer. Those rationales are: 1) limiting the “spread of racist ideas”; 2) “protect[ing] the feelings of victims and maintain[ing] public peace”; and 3) highlight[ing] the “symbolic importance” of rejecting the “indignity of living in a society in which such speech is tolerated.” *Id.* at 432–33. She agrees with Kretzmer insofar as he concludes that there is “a sufficient enough relationship between racial prejudice and racial discrimination and violence to justify not disregarding it.” *Id.*; see David Kretzmer, *Freedom of Speech and Racism*, 8 CARDOZO L. REV. 445, 455–56 (1987).

⁶⁴ Ghana, *supra* note 59, at 432 (citing Scott J. Caitlin, A Proposal for Regulating Hate Speech in the United States: Balancing Rights Under the International Covenant on Civil and Political Rights, 69 NOTRE DAME L. REV. 771, 777 (1994)).

⁶⁵ Clooney & Webb, *supra* note 37, at 17. Clooney & Webb note that the drafting history of Article 20 reveals that it was first proposed by a Soviet diplomat seeking to provide a “powerful weapon . . . to restrict the dissemination of Nazi-Fascist propaganda.” *Id.* (quoting U.N. Comm. on Hum. Rts. Drafting Comm., 2nd Sess., 28th mtg. at 3, U.N. Doc. E/CN.4/AC.1/SR.28 (May 18, 1948)). It was adopted with fifty-two votes in favor, nineteen against, and twelve abstentions. *Id.* For a more in-depth discussion of the reservations, see generally Clooney & Webb, *supra* note 37.

⁶⁶ *Id.* at 21; see also Mark Osiel, *Rights to Do Grave Wrong*, 5 J. LEGAL ANALYSIS 107, 107 (2013) (arguing that some dangers ought to be “mitigated by extra-judicial encumbrances on their irresponsible exercise” rather than through laws).

⁶⁷ Clooney & Webb, *supra* note 37, at 27–28. (collecting and recounting cases decided before the European Court of Human Rights that have taken both approaches).

other grounds.”⁶⁸ The SRPPRFOE also urged policymakers and politicians to condemn hate speech rather than remain silent as “extremist groups” attempt “to hijack the freedom of expression debate and . . . cast themselves in the role of the ultimate defenders of free speech.”⁶⁹ When politicians are themselves the source of the hate speech, “additional sanctions should be imposed” according to article 4(c) of ICERD, which could include “removal from office, in addition to effective remedies for victims.”⁷⁰

The cases explored in the next Section demonstrate both the balancing act lauded by Ghana, and the discretionary challenges highlighted by Clooney and Webb.

III. RACE, RELIGION, AND VICTIM STATUS: WHO GETS STANDING?

The Human Rights Committee and the Committee for the Elimination of Racial Discrimination adopted a broad standard for determining who qualifies as a “victim” for the purposes of seeking relief.⁷¹ However, as the cases below demonstrate, the two bodies disagree as to the exact scope of that standard and, in the case of the Human Rights Committee, within the body itself from case to case. This creates uncertainty about who is recognized as harmed by hate speech.

A. The *Toonen* Standard

The Human Rights Committee first articulated a broad standing requirement in the 1993 case, *Toonen v. Australia*,⁷² in which the petitioner, an openly gay man and an activist for gay and lesbian rights, challenged laws in the state of Tasmania criminalizing private homosexual activity. While at the time of the case the laws had not been enforced in over a decade (and had never been enforced against Toonen personally), the petitioner argued that their presence “fuel[ed] discrimination and harassment of, and violence against, the homosexual community of Tasmania,”⁷³ could “lead to unlawful attacks on the honour and the

⁶⁸ G.A. Res. A/67/357, Report of the Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression, at 21 (Sept. 7, 2012).

⁶⁹ *Id.* at 19, ¶ 65.

⁷⁰ *Id.* at 23, ¶ 81.

⁷¹ *Toonen*, *supra* note 10; Oslo Jewish Community v. Norway, Communication No. 30/2003, CERD, U.N. Doc. CERD/C/67/D/30/2003, ¶ 3.2 (2005). The standard, established by the Human Rights Committee, has also been adopted by the European Court of Human Rights, a body whose decisions are outside the scope of this Comment.

⁷² *Toonen*, *supra* at note 10. Although this case did not involve hate speech or racial/religious discrimination, the standard CCPR adopted in *Toonen* has been applied in such cases.

⁷³ *Id.* at ¶ 2.7.

reputation of the individuals concerned”⁷⁴ and were a violation of the right to privacy under Article 17 of the ICCPR.⁷⁵ In support of these claims, he submitted that “‘figures of authority’ in Tasmania ha[d] made either derogatory or downright insulting remarks about homosexual men and women over the past few years.”⁷⁶ Furthermore, Toonen claimed that a “campaign of official and unofficial hatred” made it difficult for advocacy groups to disseminate information in favor of decriminalization.⁷⁷ He further argued that there were no effective state remedies, either legislative or administrative, because the Tasmanian Parliament remained “deeply divided” over the issue of decriminalization.⁷⁸

In determining whether Toonen qualified as a victim for the purposes of Article 1 of the Optional Protocol (the enabling document of the ICCPR),⁷⁹ the Committee explained that he had “made reasonable efforts to demonstrate the threat of enforcement and the pervasive impact of the continued existence of these provisions on administrative practices and public opinion had affected him and continued to affect him personally and that they could raise issues under articles 17 and 26 of the Covenant.”⁸⁰

In subsequent opinions, the Committee emphasized that *Toonen* did not establish a standing requirement so broad as to encompass *actio popularis* claims;⁸¹ rather, a claim must demonstrate that a state party “has by an act or omission already impaired the exercise of [the petitioner’s] right or that such impairment is imminent.”⁸² Yet the Committee has also stated that it is a “matter of degree how concretely this requirement should be taken.”⁸³

⁷⁴ *Id.* at ¶ 3.1(a). Article 17 of the ICCPR prohibits “arbitrary or unlawful interference” with “privacy, family, home or correspondence” and “unlawful attacks” on honor and reputation. ICCPR, *supra* note 8, at art. 17.

⁷⁵ *Toonen, supra* at 10, ¶ 3.1.

⁷⁶ *Id.* at ¶ 2.5.

⁷⁷ *Id.* at ¶ 2.6.

⁷⁸ *Id.* at ¶ 3.3.

⁷⁹ G.A. Res. 2200A (XXI) Optional Protocol to the International Covenant on Civil and Political Rights (Dec. 16, 1966).

⁸⁰ *Id.* at ¶ 5.1. The Committee ultimately found a violation of Article 17 and found it unnecessary to address the question of an Article 26 violation. *Id.* at ¶ 11. It is also worth noting that in this case, unlike the others discussed later in this Comment, the state party largely agreed with the charges brought by the petitioner insofar as they related to specifically to Tasmania, noting that the rest of the country had already repealed such laws.

⁸¹ Claims brought by a member of the public “in the interest of the public welfare.” *Actio Popularis, supra* note 5.

⁸² *A.W.P., supra* note 7; *Andersen, supra* note 7, at ¶ 6.4.

⁸³ *Mohamed Rabbae, supra* note 7.

CERD first applied the *Toonen* standard in its 2003 decision *Oslo Jewish Community v. Norway*,⁸⁴ a case challenging the “general inability of Norwegian law to protect [petitioners] adequately against the dissemination of anti-Semitic and racist propaganda, and incitement to racial discrimination, hatred[,] and violence.”⁸⁵ The two petitioners, a leader of the Jewish communities in Oslo and Trondheim and a leader of the Norwegian Antiracist Centre, brought their claim after a leader of a Nazi organization was acquitted by the Norwegian Supreme Court of domestic criminal charges that prohibit the “threatening, insulting, or subjecting to hatred, persecution or contempt, any person or group of persons because of their creed, race, color or national or ethnic origin.”⁸⁶

The petitioners acknowledged that their argument was one of first impression before the Committee on the Elimination of Racial Discrimination, but argued that *Toonen* should be applied as it had been by the Human Rights Committee, namely to extend victim status to “all members of a particular group, as the mere existence of a particular legal regime may directly affect the rights of the individual victims within the group.”⁸⁷ The Committee on the Elimination of Racial Discrimination affirmed this view, finding the petitioners qualified as “groups of individuals” for the purposes of Article 14 of ICERD.⁸⁸

B. ICCPR and the Human Rights Committee

The ICCPR, adopted by the U.N. General Assembly in 1966 and ratified in 1976, recognizes the “inherent dignity” and “equal and inalienable rights of all members of the human family.”⁸⁹ It also enumerates a number of rights, including the right to be free from discrimination on the basis of race or religion and the right to freedom of expression so long as that expression does not amount to the incitement of hatred, violence, or discrimination. Article 20(2) declares that “any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence” shall be “prohibited by law.”⁹⁰

Furthermore, Articles 2 and 3 establish that a state party has certain responsibilities toward individuals within its jurisdiction. These obligations include ensuring that equal rights are upheld regardless of “race, colour, sex, language, religion, political or other opinion, national or social origin, property,

⁸⁴ *Oslo Jewish Community*, *supra* note 71.

⁸⁵ *Id.* at ¶ 3.2.

⁸⁶ *Id.* at ¶ 2.5.

⁸⁷ *Id.* at ¶ 3.2.

⁸⁸ *Id.* at ¶ 7.4.

⁸⁹ ICCPR, *supra* note 8, at Preamble.

⁹⁰ *Id.* at art. 20(1) (prohibiting “war propaganda”).

birth or other status.”⁹¹ Article 2(3) requires a signatory to provide access to competent adjudicators when claims of violations are made, as well as to an effective remedy for anyone “whose rights or freedoms as herein recognized are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity.”⁹² Individuals who feel that a state party has not provided an effective remedy may bring a complaint before the Human Rights Committee.⁹³

The following cases were brought by individuals who claimed that a state party failed to sufficiently remedy discriminatory speech by a state actor who, at least in part, singled out the petitioner or the petitioner’s community on the basis of religion. These cases fall under Articles 20(2) and the enforcement articles (2 and 3) of the ICCPR. The discussion here focuses on Article 20(2) cases.⁹⁴

⁹¹ *Id.*, at art. 2(2).

⁹² *Id.* at art. 2(3). ICCPR contains an article for which there is no analog in ICERD. Article 4 grants states, in times of “public emergency which threatens the life of the nation and the existence of which is officially proclaimed,” to take measures derogating from their obligations under the present Covenant to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with their other obligations under international law and do not involve discrimination solely on the ground of race, colour, sex, language, religion or social origin. *Id.* Several articles are exempt from this derogation clause, including Article 18, which protects the “freedom of thought, conscience and relation,” and of individuals to be freedom from coercion that would impair that freedom to have/adopt a religion or belief of choice, subject only to “such limitations as are prescribed by law and are necessary to protect public safety, order, health or morals or the fundamental rights and freedoms of others.” *Id.* at art. 18. Other articles exempted from Article 4 include Articles 6 (inherent right to life), 7 (right not to be tortured), 8 (paragraphs 1 [prohibition on slavery] and 2 [prohibition on servitude]), 11 (no imprisonment for inability to fulfill a contract), 15 (right not to be convicted of a criminal offense if not an offense at time of commission), and 16 (right to be recognized everywhere as a “person before the law”). *Id.* at art. 4, ¶ 2; *see also id.* at art. 19 (protecting the right to “hold opinions without interference” and the right to freedom of expression,” which comes with “special duties and responsibilities,” which may lead to certain “restrictions” as are “necessary for “respect of the rights or reputations of others” or for the “protection of national security or of public order . . . or public health or morals”).

⁹³ *See* U.N. Hum. Rts. Office of the High Commissioner, *Jurisprudence*, <https://perma.cc/A33K-JBRG>. The Human Rights Council has been a subsidiary organ of the U.N. General Assembly since 2006; its predecessor was the Commission on Human Rights, the body that created the Special Rapporteur on Religious Tolerance in 1986. Michael Weiner, *Mandate of the Special Rapporteur on Freedom of Religion or Belief—Institutional, Procedural and Substantive Legal Issues*, 2 RELIGION & HUM. RTS. 3, 3–5 (2007). An individual may only bring a complaint against a state that is party to the First Optional Protocol to the ICCPR. *See* U.N. Hum. Rts. Office of the High Commissioner, *Complaint Procedures*, <https://perma.cc/GV9K-JQVY>.

⁹⁴ As discussed in Section II above, Article 18, in contrast to Article 20, guarantees the right to freedom of thought, conscience, and religion and therefore the role of the state party differs in cases brought under one article than cases brought under the other. In Article 20(2) cases (often in conjunction with Article(s) 2 and/or 3), the state’s prosecutorial, judicial, or administrative decisions toward a third party are being challenged as inadequate. In article 18 cases, the state itself is accused of infringing upon an individual’s right to freedom of religion.

1. *A.W.P. v. Denmark*

In a 2009 case, *A.W.P. v. Denmark*,⁹⁵ the petitioner relied upon the *Toonen* standard to argue that he should be considered a victim because he belonged to a group or class that might be adversely affected by remarks in a newspaper equating Muslims to Nazis.⁹⁶ The derogatory remarks were made by members of the Danish People's Party in response to the news that a female parliamentary candidate planned to wear her hijab while addressing Parliament.⁹⁷

The DPP member stated: "just like the Nazis believed that everyone from another race should be eliminated it is the belief in Islam that everyone of another faith must be converted if not eliminated."⁹⁸ Two days later, another politician from the same party stated that "Muslim societies are per definition losers. Muslims cannot think critically . . . and this produces losers."⁹⁹ Yet another politician from the same party made further comments stating that the idea of "a fundamentalist with headscarf [sic]" becoming a member of Parliament was "sick."¹⁰⁰

The petitioner, a Muslim man and Danish citizen, saw the comparison of Islam to Nazism as a personal insult that "create[d] a hostile environment" and amounted to "concrete discrimination against him."¹⁰¹ The petitioner's initial complaint to the Copenhagen Metropolitan Police did not result in the prosecution of the politicians for their remarks, a decision upheld on appeal to the Public Prosecutor General. The appellate authority determined that "neither the [petitioner] nor his counsel could be considered legitimate complainants" in this instance since they lacked a "substantial, direct, personal and legal interest in the outcome of the case."¹⁰² Furthermore, the Public Prosecutor General noted that statements covered by section 266(b) of the Criminal Code are usually of such a general nature that there generally would be no individuals who are "legitimate complainants."¹⁰³ Section 266(b) reads:

- (1) Any person who, publicly or with the intention of wider dissemination, makes a statement or imparts other information by which a group of people

⁹⁵ *A.W.P. v. Denmark*, *supra* note 7.

⁹⁶ See *Oslo Jewish Community v. Norway*, *supra* note 71; Case of Open Door and Dublin Well Women v. Ireland, 64/1991/316/387–388, Eur. Ct. Hr. Rts. (Oct. 29, 1992).

⁹⁷ *A.W.P. v. Denmark*, *supra* note 7, at ¶ 2.1.

⁹⁸ *Id.*

⁹⁹ *Id.*

¹⁰⁰ *Id.*

¹⁰¹ *Id.* at ¶ 2.2.

¹⁰² *A.W.P. v. Denmark*, *supra* note 7, at ¶ 2.4. Requirements needed to qualify as an "injured person" according to the Act of on the Administration of Justice section 749(3). *Id.*

¹⁰³ *Id.*

are threatened, insulted or degraded on account of their race, colour, national or ethnic origin, religion, or sexual inclination shall be liable to a fine or to imprisonment for any term not exceeding two years.¹⁰⁴

The fact that a statement is made “in the nature of propaganda activities” is considered an aggravating circumstance.¹⁰⁵

The state party challenged, inter alia, the petitioner’s claim that the remarks fell within the scope of Article 20(2), noting that the politicians’ remarks took place within the context of a public debate, were condemned by the majority of other members of Parliament and, although offensive, did not incite religious hatred.¹⁰⁶ Furthermore, the state rejected the petitioner’s evidence in support of the alleged likelihood of an attack, which consisted of a 1999 study that showed “racist attacks” against people from Turkey, Lebanon, and Somalia living in Denmark. The state argued that such evidence was not deemed compelling as to why the petitioner, “a native Dane,” had any “real reason to fear attacks or assaults.”¹⁰⁷

The Human Rights Committee determined that the petitioner did not qualify as a victim with regard to Articles 20(2) and 27 of the ICCPR, because he “failed to establish that those specific statements had specific consequences for him or that the specific consequences of the statements were imminent and would personally affect him.”¹⁰⁸ In its decision the Human Rights Committee reiterated that no one may challenge a law or practice by *actio popularis*.¹⁰⁹

In a concurring opinion, three Committee members argued, citing *Toonen*, that the HRC should dispose of the case based on the petitioner’s failure to substantiate his claims of violation of his rights, rather than because of a lack of victim status.¹¹⁰

¹⁰⁴ *Id.* (citing DANISH CRIMINAL CODE Sec. 266(b)). Denmark further argued that Section 266(b) was not intended to narrow political debate or curb the way in which topics are presented as it is especially important for elected representative to have freedom of expression. *Id.* at ¶ 4.10. The petitioner in this case challenged the state’s lack of investigation into whether the statements in question fell within section 266(b), ¶ 2 makes the use of “propaganda” for disseminating such messages an aggravating factor.

¹⁰⁵ *Id.* at ¶ 2.4 & n. 2.

¹⁰⁶ *A.W.P. v. Denmark*, *supra* note 7, at ¶¶ 4.5–4.6.

¹⁰⁷ *Id.* at ¶ 4.13.

¹⁰⁸ *Id.* at ¶ 6.4. See JEROEN TEMPERMAN, RELIGIOUS HATRED AND INTERNATIONAL LAW: THE PROHIBITION OF INCITEMENT TO VIOLENCE OR DISCRIMINATION 113 (2016).

¹⁰⁹ *Id.*

¹¹⁰ *A.W.P. v. Denmark* (concurring opinion by Mr. Yuva Shany, Mr. Fabian Omar Savlioli & Mr. Victor Manuel Rodríguez-Rescia), *supra* note 110, at ¶ 1.

2. *Andersen v. Denmark*

The facts and outcome of *Andersen v. Denmark*¹¹¹ are similar to those of *A.W.P. v. Denmark*. The petitioner, Fatima Andersen, brought a challenge to the Danish state's decision not to prosecute members of the Danish People's Party for remarks that she argued "form[ed] part of an overall ongoing campaign stirring up hatred against Danish Muslims."¹¹² In this instance, the petitioner, a Danish-born Muslim woman who wore a headscarf, challenged a particular statement made by Ms. Pia Kjærsgaard on National Danish Television that likened the hijab to the Nazi swastika.¹¹³ She too relied on the *Toonen* precedent to establish herself as a victim, since, as a member of a group singled out for attack, these statements "not only hurt her but put her at risk of attacks by some Danes who believe that Muslims are responsible for crimes they have in fact not committed" and inhibited her chances of finding employment.¹¹⁴

As in *A.W.P.*, the Committee determined that Andersen's claim amounted to an *actio popularis* attempt and was therefore inadmissible. In this case, Andersen had "failed to establish that the statement by Ms. Kjærsgaard had specific consequences for her or that the specific consequences of the statements were imminent and would personally affect" her.¹¹⁵

It is possible that the outcome of both *A.W.P.* and *Andersen* can be explained simply by "weak" facts: the speech in question just did not rise to the level of incitement.¹¹⁶ This explanation is unconvincing. To say the claims in *A.W.P.* and *Andersen* were facially weak elides a preliminary matter: Why did the decisions rely so heavily on the facts to determine standing when, as will be seen in the next case, petitioners who bring claims involving hate speech that targets both religious and racial minorities seem to be given the benefit of the doubt?¹¹⁷

3. *Mohamed Rabbae et al. v. Netherlands*

In contrast to *A.W.P.* and *Andersen*, petitioners in *Mohamed Rabbae v. Netherlands*¹¹⁸ were granted standing to bring their claim before the Human Rights Committee. Petitioners were Muslims and dual nationals of the Netherlands and Morocco and challenged the state's decision to acquit a politician who had

¹¹¹ *Andersen*, *supra* note 7.

¹¹² *Id.* at ¶ 3.2.

¹¹³ *Id.* at ¶ 2.1.

¹¹⁴ *Id.* at ¶ 3.4.

¹¹⁵ *Id.* at ¶ 6.4.

¹¹⁶ TEMPERMAN, *supra* note 108, at 113.

¹¹⁷ See Section IV.B, *infra*, and accompanying notes.

¹¹⁸ *Mohamed Rabbae*, *supra* note 7.

engaged in derogatory speech against both Muslims and migrants.¹¹⁹ The politician, Geert Wilders, was a member of Parliament and founder of the Party for Freedom, a right-wing political party in the Netherlands.¹²⁰ Over a three-year span, the police received hundreds of reports expressing concern about Mr. Wilders' "insults and incitement to discrimination, violence and hatred."¹²¹

The public prosecutor originally declined to prosecute, but was ultimately compelled to bring charges by an appellate court order.¹²² Mr. Wilders was charged with "insulting a group for reasons of race or religion" and "incitement to hatred and discrimination on grounds of race or religion."¹²³ The petitioners joined the proceedings as injured parties and argued that the statements "fell within the definition of criminal incitement," aiming to "clarify the limits of what can be said in political debate and to establish the practical meaning of their right to be protected from incitement to hatred, discrimination and violence."¹²⁴ They argued that Mr. Wilders' statements "were not directed at Islam as a religion but against Muslims as human beings or against non-Western migrants," going beyond insults and amounting to "incitement to hatred, discrimination, and violence."¹²⁵ For instance, on one occasion Mr. Wilders stated:

The demographic composition of the population is the biggest problem in the Netherlands. I am talking about what comes to the Netherlands and what multiplies here. If you look at the figures and its development. Muslims will move from the big cities to the countryside. We have to stop the tsunami of Islamization. That stabs us in the heart, in our identity, in our culture. If we do not defend ourselves, then all other items from my programme will prove to be worthless.¹²⁶

In other statements, he directly linked Islam, Moroccan young people, and violence and expressed support for commentators who said that a "third Islamic

¹¹⁹ *Id.* at ¶ 2.11. In *A.W.P. v. Denmark* and *Andersen v. Denmark* the race of the petitioners is not discussed; there is only reference to both being native-born Danes. See *A.W.P.*, *supra* note 7, at ¶¶ 1, 4.13.

¹²⁰ *Mohamed Rabbae*, *supra* note 7, at ¶ 2.1.

¹²¹ *Id.*

¹²² A number of victims exercised their right under domestic law and lodged complaints with the court of appeal against the prosecutor's decision not to prosecute. *Id.* at ¶ 2.2.

¹²³ *Id.* at ¶ 2.2. The charges were brought pursuant to sections 137(c) and 137(d) of the Dutch Criminal Code. *Id.*

¹²⁴ *Id.*

¹²⁵ *Id.* at ¶ 2.7; see also *id.* at ¶ 7.6 (noting that the domestic court had found that, while Mr. Wilders was "on the edge of criminal activity" with his comments about the need for the Dutch to defend themselves against the influx of Muslims to the country, he reined himself in when he said he was "not against Muslims but against Islam," a distinction the petitioners argued did not "alter the essence and effect of his utterances").

¹²⁶ *Id.* at ¶ 2.7.

invasion” is underway.¹²⁷ In the end, the domestic court acquitted Mr. Wilder and rejected the petitioners’ claims.¹²⁸

The petitioners in this case were Moroccan Muslims who felt that they were “personally and directly affected by Mr. Wilders’ hate speech” and claimed to have “suffer[ed] its effects in their daily lives,” either through personal attacks or threats and humiliation online.¹²⁹ Petitioner Rabbæ, a former refugee who came to the Netherlands in 1966 and served as a member of Parliament from 1994–2002, chaired a national organization of Moroccans living in the Netherlands and cited research data before the court “on intolerance and racism and the position of Moroccans in Netherlands society.”¹³⁰ Petitioner A.B.S., the daughter of Moroccan immigrants, stated that during the election campaign she was verbally harassed by a young man on a bicycle who yelled: “Wilders is right, piss off from here!”¹³¹ The third petitioner, N.A., received “aggressive and threatening emails, tweets and other hate messages,” many of which tracked Mr. Wilders’ language, after speaking before the first composition of the domestic court regarding the impact of Mr. Wilders’s language. She ultimately decided not to appear before the second composition of the court because of the backlash.¹³² All three claimed they were “affected” by the state’s decision not to convict Mr. Wilders for hate speech and by “the signal given to the public that his conduct [was] not criminal,” a signal that made them “anxious about their future in the Netherlands.”¹³³

Here, the Human Rights Committee rejected the state party’s contention that the claims in question amounted to *actio popularis*. The Committee explained that the petitioners

do not bring abstract claims as members of the general population of the State party. The authors are Muslims and Moroccan nationals, and allege that Mr. Wilders’ statements specifically target Muslims, Moroccans, non-Western immigrants and Islam. The authors are therefore members of the category of persons who were the specific focus of Mr. Wilders’ statements. . . . Mr. Wilders’ statements had specific consequences for them, including in creating discriminatory social attitudes against the group and against them as members of the group.¹³⁴

Although the Committee ultimately decided that there was no breach of the ICCPR on the merits, the fact that the petitioners were granted standing is interesting in light of the Committee’s decision in *A.W.P. v. Denmark* and *Andersen*

¹²⁷ *Id.* at ¶ 2.7.

¹²⁸ *Id.* at ¶ 2.6.

¹²⁹ *Id.* at ¶ 2.11.

¹³⁰ *Id.* at ¶ 2.1.

¹³¹ *Id.* at ¶ 2.9.

¹³² *Id.* at ¶ 2.10.

¹³³ *Id.* at ¶ 2.11.

¹³⁴ *Id.* at ¶ 9.6.

v. Denmark. The Human Rights Committee does not require that Article 20(2) claims—or claims pursuant to any article of the Covenant—allege multiple forms of discrimination. However, the Committee’s decisions about who counts as a “victim” for the purposes of initial standing determinations raise the issue.

The following cases before the Committee on the Elimination of Race Discrimination bear a striking resemblance to *Mohamed Rabbah* and offer a useful comparison of how each body analyzes standing.

C. ICERD and the Committee on the Elimination of Racial Discrimination

The Committee on the Elimination of Racial Discrimination, the adjudicatory body charged with overseeing the implementation of the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD),¹³⁵ has addressed similar issues.¹³⁶ ICERD does not list religion as a separate protected element,¹³⁷ although it is not surprising that several Article 4 cases involve discrimination based on religion as well as race.¹³⁸ At the same time, José Lindgren Alves notes that the Committee on the Elimination of Racial Discrimination has engaged with questions of religious freedom, although

¹³⁵ As of October 2017, there were 178 states party to the Convention on the Elimination of All Forms of Racial Discrimination. U.N. Hum. Rts., Office of the High Commissioner, Statement by Ms. Anastasia Crickley, Chairperson of the Committee on the Elimination of Racial Discrimination at the 72nd session of the General Assembly (Oct. 31, 2017), <https://perma.cc/LF4N-FJ5W>. As of July 2017, only 57 of the 177 member states have made “an optional declaration recognizing the Committee’s competence to receive communications under article 14 of the Convention.” U.N. Hum. Rts., Office of the High Commissioner, Opening Address by Adam Abdelmoula, Director Human Rights Committee and Treaty Mechanisms Division, at the 93rd session of the Committee on the Elimination of Racial Discrimination (July 31, 2017), <https://perma.cc/K5BF-MQ8K>.

¹³⁶ Recall that Article 4 prohibits both advocacy that may incite racial discrimination and the “dissemination of ideas based on racial superiority or hatred.” ICERD, *supra* note 9, at art. 4.

¹³⁷ Lindgren Alves, *supra* note 25, at 942. However, the Committee on the Elimination of Racial Discrimination does review the status of religious discrimination as presented in country reports submitted to the committee. *Id.* at 950.

¹³⁸ Other cases brought alleging a violation of Article 4 involve remarks against a Roma minority. *See, for example*, Zentralrat Deutscher Sinti und Roma et al. v. Germany, Communication No. 038/2006, CERD, U.N. Doc. CERD/C/72/D/38/2006 (Mar. 3, 2008) (dismissing complaint brought against vice-chairman of the German Detective Police Officers because opinion article expressing anti-Roma views was written in his private capacity and he had been disciplined); Durmic v. State Union of Serbia and Montenegro, Communication No. 29/2003, CERD, U.N. Doc. CERD/C/68/D/29/2003 (Feb. 20–Mar. 10, 2006) (finding violation of Article 4 because state failed to question the thoroughness of the investigation into alleged discrimination of a man of Roma descent). Cases involving other minorities have also been brought before the CERD, including T.B.B. v. Germany, Communication No. 48/2010, CERD, U.N. Doc. CERD/C/82/D/48/2010 (2013) (finding a violation of Article 2 because Germany failed to investigate whether a finance minister’s derogatory statements about people of Turkish origin amounted to “dissemination of ideas based upon racial superiority or hatred”).

“not as an aim in itself . . . but mostly as a means of countering the repression of ethnic minorities.”¹³⁹

As discussed above, the Committee on the Elimination of Racial Discrimination adopted the *Toonen* standard in a 2003 case, *Oslo Jewish Community v. Norway*. The Committee’s usage of the *Toonen* standard in *Oslo Jewish Community* has been broader than its counterpart, the Human Rights Committee.¹⁴⁰ One explanation for this difference is that the ICERD, unlike the ICCPR, includes a prohibition on the “dissemination” of ideas (setting a lower threshold for victimhood than “incitement”), and therefore the new standard may not dramatically alter a petitioner’s chances of being considered a victim under the ICERD as it appears to have done in ICCPR cases. It is, however, instructive to explore a few of the Committee on the Elimination of Racial Discrimination’s decisions to see how race and religion continue to be intertwined and protected together.

In a pre-*Oslo Jewish Community* case, *Quereshi v. Denmark*,¹⁴¹ a Danish national and member of the Danish Parliament brought a claim against the state party for its rejection of his complaints against members of the Executive Board of the Progressive Party who made anti-Muslim statements, including statements that encouraged people to engage in a “civil war” against Muslims in Denmark.¹⁴² Similar statements were also made during the party’s convention, an event required by law to be broadcast on public television.¹⁴³ Criminal complaints were lodged against each of the speakers and the speakers were convicted. In *Quereshi II*,¹⁴⁴ the Committee took note of these convictions and determined that the petitioner had not been deprived of his right to an effective remedy with respect to a general statement about “foreigners,” made by the one politician who was not convicted. The Committee found that the statement did not amount to an act of racial discrimination.¹⁴⁵

¹³⁹ Lindgren Alves, *supra* note 25, at 946. Lindgren Alves also notes that the Committee on the Elimination of Racial Discrimination has been able to “adapt to new circumstances” in no small part because of the “flexibility allowed by its rules of procedure.” *Id.* at 948.

¹⁴⁰ See TEMPERMAN, *supra* note 108.

¹⁴¹ *Quereshi v. Denmark*, Communication No. 27/2002, CERD, U.N. Doc. CERD/C/63/D/27/2002 (Oct. 23, 2002).

¹⁴² These included a party press release that decried the rape of Danish women by “the Mohammedans,” who ought to “behave like the guests they are in this country” and if not, “then the politicians in the parliament [sic] have to change course and expel them all.” *Id.* at ¶ 2.1.

¹⁴³ *Id.* at ¶ 2.2.

¹⁴⁴ *Id.* at ¶ 7.2.

¹⁴⁵ *Id.* at ¶ 7.3.

In *Gelle v. Denmark*,¹⁴⁶ a Danish citizen of Somali origin challenged an appellate decision not to prosecute Pia Kjærsgaard, a politician with the Danish People's Party, for likening a colleague's decision to engage with the Somali community on potential legislation banning female genital mutilation to "consulting with pedophiles" about a law aimed at protecting children from molestation.¹⁴⁷ Her remarks were published in an op-ed in a national newspaper. Like A.W.P., Gelle brought a claim under Section 266(b) of the Danish Criminal Code.¹⁴⁸ On appeal, the regional public prosecutor noted that the legislator's comments did not compare all Somalis to pedophiles; the legislator may have used an offensive example as a comparison, but this was made within the context of a current political debate.

On the question of whether the challenge had been sufficiently substantiated by the petitioner, the Committee determined that Kjærsgaard's statements were offensive enough to clear the initial hurdle of whether they fell within the scope of Articles 2.1(d), 4, and 6.¹⁴⁹ The Committee determined that the comparison to pedophiles and rapists could be understood as "degrading or insulting to an entire group of people"¹⁵⁰ because of their national or ethnic origin rather than their views on a particular topic and recalled General Recommendation No. 30, which calls on state parties to take "resolute action to counter any tendency to target, stigmatize, stereotype or profile, on the basis of race, colour, descent, and national or ethnic origin, members of 'non-citizen' population groups, especially by politicians."¹⁵¹

In a related case, *Adan v. Denmark*,¹⁵² a Danish citizen of Somali descent sought criminal charges against a legislator who had not only expressed support for Pia Kjærsgaard's statements, but further claimed that the practice of female genital mutilation was endorsed by all Somalis.¹⁵³ The petitioner was an activist who worked to counter the practice of female genital mutilation within the Danish

¹⁴⁶ *Gelle v. Denmark*, Communication No. 34/2004, CERD, U.N. Doc. CERD/C/68/D/34/2004 (Mar. 6, 2006).

¹⁴⁷ *Id.* at ¶ 2.2. This is the same member of Parliament whose remarks were the impetus for the ICCPR challenge in *Andersen v. Denmark*, see discussion in Part II(A)(2), *supra*.

¹⁴⁸ See *id.* at ¶ 2.2 & n. 1; see also Section III.B.1, *supra*.

¹⁴⁹ *Id.* at ¶ 6.2.

¹⁵⁰ *Gelle*, *supra* note 146, at ¶ 7.4.

¹⁵¹ *Id.* at ¶ 7.5 (citing Rep. of CERD on its Sixty-Fourth Session, General Recommendation 30: Discrimination against non-citizens, U.N. Doc. CERD/C/64/Misc.11/rev.3, ¶ 12 (Feb. 23–Mar. 12, 2004)). The legislation was enacted in March 2004 and it added a new provision of section 81 of the Criminal Code.

¹⁵² *Adan v. Denmark*, Communication No. 43/2008, CERD, U.N. Doc. CERD/C/77/D/43/2008 (Sept. 21, 2010).

¹⁵³ *Id.* at ¶ 2.2.

Somali community and argued that she had a personal interest in the outcome of the case as a member of a particular group likely to be affected by the legal regime.¹⁵⁴ The petitioner explained that, as someone who is “black Somali and Muslim,” she was a double target of the Danish People’s Party.¹⁵⁵ The Committee found Ms. Adan’s claims admissible and went on to find that the state party had violated Article 2 by failing to carry out an effective investigation into the incident to determine whether an act of racial discrimination had taken place.¹⁵⁶

In *Adan, Gelle, and Queresbi*, the Committee largely accepted the petitioner’s status as a victim without much discussion. Even in instances like *Queresbi*, where no breach of the Convention was found, the preliminary question of standing was passively answered in the affirmative.¹⁵⁷

IV. IMPLICATIONS AND RECOMMENDATIONS

The U.N. decided long ago to protect religious and racial discrimination through different and distinct human rights instruments.¹⁵⁸ Yet, in the hate speech context, it is clear that the intersection of race and religion remains salient. The development of ICERD jurisprudence demonstrates an appreciation for the ways in which discriminatory speech often reaches beyond the targeting of race to include religious identity, too. The Committee on the Elimination of Racial Discrimination recognizes petitioners like Ms. Adan who are “doubly targeted.” The Human Rights Committee also appears to easily recognize petitioners, like Mr. Rabbae et al., who allege that a state party failed to protect them and others from hate speech targeting race and religion. At the same time, the Committee appears skeptical of claims from petitioners like Ms. Andersen who challenge a state party’s response to hate speech that targets a religious community.

This different treatment raises questions about how religion and religious membership are defined by adjudicatory bodies. It also highlights some of the recurring challenges in enforcing hate speech criminalization generally, namely deciding what content and context elevates speech to incitement. Nevertheless,

¹⁵⁴ *Id.* at ¶ 3.4.

¹⁵⁵ *Id.* at ¶ 5.6.

¹⁵⁶ *Id.* at ¶ 7.7. A note on terms: I am using the same broad definition of racial discrimination in this analysis as is used in ICERD. See discussion in Section II.A, *supra*.

¹⁵⁷ *But see* *Jama v. Denmark*, Communication No. 41/2008, U.N. Doc. CERD/C/75/D/41/2008 (Aug. 21, 2009) (determining the Committee did not have authority to issue judgement in case involving a complaint brought by a Danish national of Somali origin challenging the determination that the statements of politician who claimed during a media interview that Somalis were responsible for a physical attack did not fall within the scope of section 266(b) of the Criminal Code prohibiting racist propaganda).

¹⁵⁸ Recall the broad interpretation the U.N. General Assembly adopted in ICERD, which includes ethnicity and national origin in the definition of racial discrimination. See Section II(a), *supra*.

the current framework of the U.N., including the Human Rights Committee, offers religious minorities protection from hate speech that has the potential to incite violence. If this protection is to be effective, the Human Rights Committee's admissibility decisions cannot screen out tough cases as a means of avoiding analysis of the impact of such speech on all members of religious minority communities.

A. Defining Victims of Hate Speech: Who Counts?

It is important to appreciate the intersectionality of identities and the unique and often compounding experience of being a "double" target of hate speech.¹⁵⁹ In this regard it is encouraging to see adjudicatory bodies like the Human Rights Committee acknowledging these connections.¹⁶⁰

At the same time, it is important to be aware of implicitly or explicitly conflating a particular religion with a racial or ethnic group because this can diminish the impact of hate speech protections. First, this conflation minimizes the pool of potential petitioners based on whether or not they identify as members of both a religious *and* a racial or ethnic minority. Second, and relatedly, the conflation of a particular religion with a racial or ethnic group may limit the range of hate speech content that is perceived as rising to the level of incitement.

José Lindgren Alves, a Brazilian diplomat and former member of the U.N. Sub-Commission on Prevention of Discrimination and Protection of Minorities, notes that racism and religious prejudice, while "commonly interlinked," are "in essence different phenomena."¹⁶¹ Lindgren Alves' claim that past civil rights violations were "mostly based on physical features" justifies the development of stronger U.N. protections for racial minorities.¹⁶² It is also clear that the U.N. remains concerned about protecting religious minorities. This is evidenced by the work of the SRFRRB *inter alia* and the Committee on the Elimination of

¹⁵⁹ See *Adan v. Denmark*, *supra* note 152, at ¶ 5.6. For a discussion of intersectionality, see EMILY GRABHAM ET AL., INTERSECTIONALITY AND BEYOND: LAW POWER, AND THE POLITICS OF LOCATION 1 (Emily Grabham et al. eds., 2009).

¹⁶⁰ This is perhaps even more true for the Committee for the Elimination of Racial Discrimination as it continues to broaden its reach to include ethnic and religious discrimination. Stephanie E. Berry argues that the Committee on the Elimination of Racial Discrimination should continue this trend and that Muslim minorities living in non-Muslim majority countries should be brought more fully into its fold. See Stephanie E. Berry, *Bringing Muslim Minorities within the International Convention on the Elimination of All Forms of Racial Discrimination—Square Peg in a Round Hole?*, 11 HUM. RTS. L. REV. 423 (2011). She recognizes this move places outside the fold native-born converts and young Muslims who may wish to acknowledge their Muslim identity but not foreground ethnic or national ties. *Id.* at 441. This author finds these reasons, coupled with the concerns raised in Section IV(A) of this Comment, sufficient not to pursue such a strategy.

¹⁶¹ Lindgren Alves, *supra* note 25, at 942.

¹⁶² See Section II, *supra*.

Racial Discrimination’s evolving recognition that the “intersection between racial and religious discrimination [is] a fact.”¹⁶³

The Human Rights Committee’s decisions on Article 20(2) claims brought by Muslims in Europe raise questions about the weight the Committee gives to such claims when the content facially includes religious discrimination alone. In cases involving hate speech directed at Muslims generally, the Human Rights Committee twice denied standing on the basis of religion alone¹⁶⁴ while affording standing to petitioners with compound religious and racial discrimination claims.¹⁶⁵

Not granting standing in cases of hate speech on the basis of religious identity alone fails to appreciate both the way in which religious and racial identity may be intertwined within religious communities and the way in which an individual may foreground one aspect of her identity over another. It is true, for instance, that the majority of Muslims living in Western Europe are either immigrants or from an immigrant background.¹⁶⁶ However, immigration and conversion can lead to religious communities that are increasingly heterogenous. Certain identity markers may also take on different valences depending on a person’s generation. For instance, in at least some European contexts, researchers have found that young Muslims are identifying as “Muslim” rather than with a particular cultural or ethnic group as they seek to develop a more “European” identity.¹⁶⁷

Furthermore, religious and racial discrimination implicitly, even if not explicitly, may be linked in the content of the hate speech, both from the perspective of the victim and from the perspective of broader society. For instance, in a survey of Muslims living in Europe, focus group participants in four large cities were asked about their state’s immigration policies. The consensus was that their religion was “a major reason for discrimination and exclusion,” because it clearly marked them as “other” against the backdrop of a Christian majority.¹⁶⁸ Indeed, this perception tracks what researchers have found in Germany and in

¹⁶³ Lindgren Alves, *supra* note 25, at 942.

¹⁶⁴ *A.W.P. v. Denmark*, *supra* note 7, at ¶ 6.4; *Andersen*, *supra* note 7, at ¶ 6.4.

¹⁶⁵ *Mohamed Rabbae*, *supra* note 7, at ¶ 9.6 (finding petitioners were “members of the category of persons who were the specific focus of Mr. Wilder’s statements,” namely “Muslims, Moroccans, and non-Western immigrants.”).

¹⁶⁶ Jocelyne Cesari, *Securitization of Islam in Europe*, in *MUSLIMS IN THE WEST AFTER 9/11: RELIGION, POLITICS, AND LAW* 9, 10–11 (Jocelyne Cesari ed., 2010).

¹⁶⁷ Yasemin Shooman & Riem Spielhaus, *The Concept of the Muslim Enemy in the Public Discourse*, in *MUSLIMS IN THE WEST AFTER 9/11: RELIGION, POLITICS, AND LAW* 198, 198 (Jocelyne Cesari ed., 2010).

¹⁶⁸ Cesari, *supra* note 166, at 12.

Turkey where religion is replacing ethnicity and immigration status within public debate.¹⁶⁹

Professor Spencer Dew's recent commentary on the meaning of the label "Muslim" in Danish society tracks this sentiment. The term "is a catch-all for non-white immigrants, refugees, and others considered alien to Danish culture."¹⁷⁰ In partial response to the recent tweets of an American celebrity declaring, *inter alia*, "ISLAM is not a RACE, lefties,"¹⁷¹ Dew notes that the Danish example is a "textbook" case for how "race is more complicated than that."¹⁷²

If a petitioner is Muslim but cannot or does not claim status as a racial minority, the *Toonen* standard, properly applied, is still broad enough to recognize that individual has standing to bring an ICCPR Article 20(2) claim. The denial of standing in the *Andersen* case is a good example of the odd result if the standard is applied otherwise. While Ms. Andersen's race is not made explicit—she is described only as a native-born Dane—she is visibly identifiable as Muslim because of her headscarf.¹⁷³ Further, to the extent that a religious identity is racialized within broader society, there is some evidence from Great Britain to suggest that white Muslim converts are not completely immune from this process of racialization, despite their skin color.¹⁷⁴ The *Toonen* net should at least be wide enough to protect all members of religious minority communities who may be targeted on the grounds of religion. This approach does not minimize the complex relationship between religious and racial identity or negate the fact that religious and racial minorities are often doubly targeted.

Determining what amounts to hate speech that rises to the level of "incitement" for the purposes of Article 20(2) remains challenging.¹⁷⁵ The

¹⁶⁹ Shooman & Spielhaus, *supra* note 167, at 198 ("[R]eligion is equated with the national majority and keeps the religious minority outside the national imagination, no matter how well integrated or assimilated the members of the minority are.") (quoting Esra Ozyurek, *Convert Alert: German Muslims and Turkish Christians as Threats to Security in the New Europe*, in 51 COMP. STUD. SOC. & HIST. 91, 109 (2000)).

¹⁷⁰ Spencer Dew, *Something Rotten in the State of Denmark*, SIGHTINGS, THE MARTIN MARTY CENTER FOR THE PUB. UNDERSTANDING OF REL., UNIV. OF CHI. DIV. SCH. (June 14, 2018), <https://perma.cc/8X2Q-KNX4>. Professor Dew is a visiting assistant professor of religion at Denison University.

¹⁷¹ *Id.* (quoting Roseanne Barr (@therealroseanne)), TWITTER, <https://perma.cc/YJ4W-VRU5> (last visited June 17, 2018).

¹⁷² *Id.*

¹⁷³ See *Andersen*, *supra* note 7, at ¶ 1; see also *supra* note 119.

¹⁷⁴ See Leon Moosavi, *The Racialization of Muslim Converts in Britain and Their Experiences of Islamophobia*, 41 J. CRIT. SOC. 41 (2014). Moosavi conducted 37 in-depth interviews with white Muslim converts in Greater Manchester and explored how they, once identified as "Muslim" by non-Muslims, undergo a process he calls "re-racialization" within society. *Id.* at 43.

¹⁷⁵ See generally Section II.C, *supra*.

argument here is not that all claims alleging inadequate protection by the state from hate speech by public figures should automatically succeed on the merits.¹⁷⁶ What is crucial is consistency. It is important for the Human Rights Committee to be consistent in its consideration of standing. Furthermore, consistent application of the broader standard endorsed by the Human Rights Committee is appropriate not only for the sake of recognizing the internal diversity of religious communities but also because there are limited avenues for redress available for claims calling for adequate protection against hate speech on the basis of religious discrimination.

B. Defining Victims of Hate Speech: Who Decides?

The Human Rights Committee's decisions not to grant standing to Muslim petitioners in *A.W.P.* and *Andersen*, despite the broad *Toonen* standard, also raise questions about how adjudicatory bodies view religious group membership. To be clear, none of these decisions have challenged a petitioner's claim of belonging to a Muslim community. However, the Human Rights Committee's unfavorable admissibility decisions implicitly, if not explicitly, have the effect of signaling who is and who is not personally affected by hate speech within the same religious community. This judicial parsing raises similar concerns to those raised by judicial attempts to define religion.¹⁷⁷

Legal efforts to define religion often end up establishing "rules for regulating social and legal relationships among people who may have sharply different attitudes about what religion is and what manifestations of it are entitled to protection."¹⁷⁸ Legal definitions of religion therefore "may contain serious deficiencies when they (perhaps unintentionally) incorporate particular social and cultural attitudes towards (preferred) religions, or when they fail to account for social and cultural attitudes against (disfavored) religions."¹⁷⁹ To counter this

¹⁷⁶ See *A.W.P.* (concurring opinion by Mr. Yuval Shany, Mr. Fabian Omar Savlioli, & Mr. Victor Manuel Rodríguez-Rescia), *supra* note 7, at ¶ 2.

¹⁷⁷ These concerns are not for the judiciary alone; they are also raised by legislative or executive/administrative attempts to define religion.

¹⁷⁸ T. Jeremy Gunn, *The Complexity of Religion and the Definition of Religion in International Law*, 16 HARV. HUM. RTS. J. 189, 195 (2003). T. Jeremy Gunn is an associate professor of international studies at Al Akhawayn University in Morocco, a senior fellow at the Center for the Study of Law and Religion at Emory Law School, and a member of the Organization for Security and Co-operation in Europe's Office for Democratic Institutions and Human Rights' Advisory Panel of Experts on Freedom of Religion.

¹⁷⁹ *Id.* Although Article 18 is not the focus of the Comment, a brief look at some of the cases that have come before the Human Rights Committee illustrate Gunn's point. See, for example, *Arenz et al. v. Germany*, Communication No. 1138/2002, Hum. Rts. Comm., U.N. Doc. CCPR/C/80/D/1138/2002 (Apr. 29, 2004) (finding claims against the state by members of the Church of Scientology who were ousted from a political party because of their beliefs were

tendency within themselves, Professor T. Jeremy Gunn suggests that judges should consider religion from the perspective of its “adversaries,” namely “those who are doing the discriminating and persecuting” to see what definitions are being employed to further the discrimination.¹⁸⁰

Recall that in *Mohamed Rabbae*, the Human Rights Committee did not state it was relying on direct evidence of injury when deciding the petitioners were in fact victims. The Committee, noting the fact that the petitioners were members of targeted group(s), namely Muslims as well as Moroccans and immigrants, concluded that their claims were not being brought *actio popularis*.¹⁸¹ This stands in direct contrast to the Committee’s determination in *A.W.P.* and *Andersen*. What is striking about this distinction is that *actio popularis* refers to a member of the “general public.”¹⁸² Here the Committee does not explicitly consider in its opinion A.W.P.’s or Fatima Andersen’s membership within the Muslim community—the community targeted by the remarks in both cases. Thus, Gunn’s question can be tweaked for the purposes of this Comment to ask not *what* counts as “religion” but rather *who* counts as a member of a religious community affected by hate speech.

The cases discussed above present a range of remarks flagged as inciteful hate speech, some of which targeted Muslims generally, while others focused on Muslims and racial and ethnic minorities. By denying initial victim status, the decisions of the Human Rights Committee appear to reify, even if

inadmissible on the grounds that it was not shown the courts acted arbitrarily); *Goyet v. France*, Hum. Rts. Comm., U.N. Doc. CCPR/C/94/D/1746/2008 (Oct. 30, 2008) (rejecting a challenge to state’s inclusion of Soka Gokkai, a Buddhist organization, on its list of “cults,” citing no injury could be shown by petitioner); *Ch.H.O. v. Canada*, Hum. Rts. Comm., U.N. Doc. CCPR/C/118/D/2195/2012 (Dec. 21, 2016) (upholding state’s decision to deport a Korean national who, because he identifies as a Jehovah’s Witness, refused conscription and was seeking asylum out of fear of reprisal). *But see* *Sister Immaculate Joseph and 80 Teaching Sisters of the Holy Cross of the Third Order of Saint Francis in Menzingen of Sri Lanka v. Sri Lanka*, Hum. Rts. Comm., U.N. Doc. CCPR/C/85/D/1249/2004 (Oct. 17–Nov. 3, 2005) (finding a successful challenge to state’s practice of preventing the incorporation of Christian organizations engaged in charity and teaching).

¹⁸⁰ See Gunn, *supra* note 178, at 197. Gunn suggests abandoning scholarly definitions of religion altogether because they generally lack this perspective. *See id.* The author appreciates the complexity of the task but is wary of such a drastic move, especially given the continual evolution of scholarly definitions and thinking about religion.

¹⁸¹ *Mohamed Rabbae*, *supra* note 7, at ¶ 9.6. The petitioners “allege that Mr. Wilders’ statements specifically target Muslims, Moroccans, non-Western immigrants and Islam. The authors are therefore members of the category of persons who were the specific focus of Mr. Wilders’ statements. . . . Mr. Wilders’ statements had specific consequences for them, including in creating discriminatory social attitudes against the group and against them as members of the group.” *See* text accompanying notes 130–35, *supra*.

¹⁸² *Mohamed Rabbae*, *supra* note 7, at ¶ 9.6.

unintentionally,¹⁸³ racialized notions of religious identity. This undermines or ignores the recommendations of the SRFRB that urge the Human Rights Committee to recognize the connection between race and religion, but not conflate them.¹⁸⁴

C. Free Speech and Equality: Considerations for Protection

As noted in Section II, the question of whether international law ought to criminalize hate speech is a lively one. Some critics of hate speech criminalization point to the use of such laws to attack journalists and others in the “information business.”¹⁸⁵ Others see the current regime under the ICCPR as striking a proper balance by requiring states to prohibit hate speech insofar as it “incites to discrimination, hostility or violence.”¹⁸⁶ Others might see these cases as inviting further reflection on whether law is the proper channel for regulating hate speech.¹⁸⁷

The different outcomes at the admissibility stage highlight one of the concerns of critics who see penalizing hate speech as risky line-drawing. It is, after all, not easy to pin down what constitutes “incitement,” especially preemptively.¹⁸⁸ This imprecise standard necessarily depends on the surrounding societal context. Even focusing, as this Comment does, on remarks made by politicians and public figures, can lead to different outcomes. The SRPPRFOE takes the position that hateful remarks made by public figures reach a wider audience and thus may have more of an impact.¹⁸⁹ Other courts, such as the European Court of Human Rights, have ruled both ways—arguing at times that politicians contribute to public discussion and therefore should be granted wider latitude, and at other times that politicians have special responsibilities because their words are more likely to incite.¹⁹⁰

Furthermore, these different standing outcomes for petitioners from the same religious community highlight fissures between how the Human Rights

¹⁸³ Recall that in *A.W.P. and Andersen* the race of the petitioners is not discussed; the opinions state only that they are both native born Danes and their claims are distinguished from those in *Mohamed Rabbah* and *Oslo Jewish Community* insofar as the latter allege the state failed to intervene in instances of both religious *and* racial hatred.

¹⁸⁴ Lindgren Alves, *supra* note 25, at 974 (citing CERD, 71st Sess. 1826th mtg. at 8, ¶ 39, U.N. Doc. CERD/C/SR. 1826 (Aug. 9, 2007)).

¹⁸⁵ See text accompanying notes 40–47, *supra*.

¹⁸⁶ ICCPR, *supra* note 8, at art. 20(2).

¹⁸⁷ See, for example, G.A. Res. A/67/357, *supra* note 68, at 17.

¹⁸⁸ See generally Clooney & Webb, *supra* note 37.

¹⁸⁹ See G.A. Res. A/67/357, *supra* note 68, and accompanying text.

¹⁹⁰ See Clooney & Webb, *supra* note 67, at 27–28.

Committee conceives of protection of minority rights and the broad mandate of the ICCPR. For instance, one scholar analyzing hate crime protections in Canada notes that the debate is usually framed as between “free speech and offense,” but argues that the proper balance to consider is “free speech and equality.”¹⁹¹ The proper consideration, then, is whether “everyone’s individual interest [is being] treated equally.”¹⁹² This re-framing is helpful and captures the intentions behind the development of ICCPR and the U.N.’s stance on minority rights.

While the “free speech and equality” framing may not satisfy those critical of the potential scope of hate speech criminalization, this framing is useful for holding the Human Rights Committee to its own standard when it comes to hate speech cases involving religious minorities. This is, again, not to say that every Article 20(2) case should be decided in favor of the petitioners. It is, however, a call for consistency in initial determinations of standing.

V. CONCLUSION

At the time of this writing, the tension enshrined in Article 19 (the right to freedom of expression) and Article 20 (obligation of states to prevent hate speech that incites discrimination or violence) of the International Covenant on Civil and Political Rights shows no sign of resolution or irrelevancy. Internal diversity within religious communities and evolving notions of membership in these groups are also a reality and will likely continue to challenge social and legal notions of “who counts.” The ICCPR cases discussed in this Comment offer a glimpse into the complexity of victim experiences and the breadth of the vitriol aimed at minority communities.

This Comment examines several standing determinations by the Human Rights Committee in claims by Muslim petitioners alleging inadequate state response to inciteful hate speech by public figures. This Comment argues that irregular application of the *Toonen* standard truncates the scope of potential protections for religious minorities under ICCPR’s Article 20(2). It provides an examination of these cases in light of the historical development of the U.N.’s human rights instruments holding states parties accountable for protecting religious and racial minorities from discrimination. The SRPPPRFOE¹⁹³ urged for “great care” to be taken when striking a balance between the right to freedom of expression and the need to address speech that rises to the level of incitement to hatred and discrimination.¹⁹⁴ For adjudicatory bodies, like the Human Rights

¹⁹¹ Edger, *supra* note 59, at 127–28.

¹⁹² *Id.*

¹⁹³ Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression. See discussion in Section II.C, *supra*.

¹⁹⁴ See E/CN.4/2002/75, *supra* note 43, at ¶ 62.

Committee, great care must also be taken to ensure consistent recourse for members of religious minority communities whose claims challenge inciteful hate speech by public figures.