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Richard Lombardi

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INTRODUCTION

On September 29, 2012, over 1,000 Muslim activists gathered at the Ford Performing Arts and Community Center in Dearborn, Michigan. The activists were protesting an online video that some then considered to have motivated the attacks on the American Embassy in Benghazi, Libya, resulting in the assassination of the American Ambassador on September 11, 2012. The protesters consider the video to be an example of anti-Islamic hate speech. To combat such hate speech the Muslim activists have proposed the passage of laws throughout the world banning speech which ridicules Islam.¹

The Dearborn Muslim activists are not alone in their criticism of speech that slanders Islam and the prophet Mohammed. On September 26, 2012 Mohamed Morsi, the newly elected President of Egypt, referred to the insulting video as an obscenity that has been “released as part of an organized campaign against Islamic sanctities which are unacceptable”. In his address President Morsi urged the United Nations to promote international legislation criminalizing speech that insults religion.²

Since 1999, international organizations, including the Organization of the Islamic Conference, have proposed resolutions before the United Nations, that encourage member nations to enact laws outlawing conduct and speech which foments “discrimination, extremism and misperception leading to polarization and fragmentation with dangerous unintended and unforeseen consequences.” Essentially, the proposals seek international regulations banning

¹ Joe Newby, *Muslims in Dearborn rally against free speech, call for anti-blasphemy laws*, The Dearborn Examiner, September 29, 2012.

² Anne Gearan, *Egypt's President Morsi tells U.N.: Insults to Muhammad 'unacceptable'*, The Washington Post, September 26, 2012.

blasphemy. The earliest proposals sought specific international bans against blasphemy of Islam. Later proposals have broadened the proposed prohibition to include all religions.

Efforts directed toward the international criminalization of blasphemy have been thwarted by the western democracies in the United Nations to date due to the conflict of such laws with the right of freedom of expression, and due to a concern that such laws would be used as the basis for religious persecution and oppression. One day before Mr. Morsi's speech, President Obama addressed the same assembly and contended that speech that insults religion, however blasphemous, must be tolerated. President Obama said that "Given the power of faith in our lives, and the passions that religious differences can inflame, the strongest weapon against hateful speech, is not repression, it is more speech."³

The conflict between the attempts of Muslim activists to ban speech that ridicules Islam on the one hand, and the comments of President Obama advancing the protections of free speech, thought and religion found in the American constitution on the other, demonstrates the international conflict between fundamentalist Islamic nations that abhor speech that ridicules their faith, and those nations which have constitutional foundations protecting such expressions. That conflict has had consequences for the international legal community, particularly in the United Nations and its member nations, to balance free speech rights with efforts to curtail speech which has caused violent outbursts in the Muslim world.

This paper will examine the manner in which the United Nations, principally through the adoption and implementation of the International Covenant on Civil and Political Rights, has attempted to achieve such a balance. The conclusion reached are: 1) the international

³ Helene Cooper, "Obama Tells UN New Democracies Need Free Speech.", New York Times , September 25, 2012.

jurisprudence of the United Nations Human Rights Committee interpreting individual rights of free speech and religion have guarded those rights with great vigilance. 2) the sensitivity to the rights of free speech and religion reflected in the decisional law of the Human Rights Committee makes unlikely any agreement by Muslim nations with powerful fundamentalist political factions, such as Pakistan, to agree to the jurisdictional authority of the United Nations Committee concerning issues of freedom of religion within their territory. 3) notwithstanding the refusal of such nations to submit to the jurisdiction of the Human Rights Committee of the United Nations, other provisions of the Covenant, notably the reporting obligations of signatory nations, have modestly blunted the effect of the most onerous aspects of the Muslim anti-blasphemy laws and 4) the very existence of the Covenants as the articulation by the international community of the standard of basic human rights and the status of many Islamic nations as a signatories to those standards as members of that community of nations are substantial factors in combating the anti-blasphemy laws. In that manner, the United Nations has achieved a tenuous, delicate and imperfect balance. In essence, the United Nations has been an advocate for personal freedoms and has prevented the executions resulting from the capital sentences imposed for violations of anti-blasphemy laws.

In conducting its analysis, this paper will focus on the anti-blasphemy laws of one particular Islamic nation, the Islamic Republic of Pakistan. That nation is constitutionally designated as a Muslim nation. It has an overwhelmingly Muslim population of 97%. It has small minorities of Hindus, Muslims and other non-Muslims. Pakistan has codified anti-blasphemy laws that specifically prohibit speech and conduct that ridicules Islam. Prosecutions under those laws have resulted in international attention and protest. Simply stated, the anti-blasphemy laws of Pakistan are the “poster child” of the campaigns to reform those laws.

This paper will explore the origins of the modern international declaration of basic human rights through proclamations of the United Nations. It will then contrast those declarations with those portions of the Pakistani Penal Code outlawing blasphemy, and the harsh practical results of those laws. An analysis of decisional law of the Human Rights Committee concerning protections of religious freedoms relative to the likelihood of Islamic nations to submit to the jurisdiction of the United Nations on such issues will follow. Finally, this paper will consider the modest, but critical influence that the United Nation's declarations have had on the harshest aspects of those laws.

ORIGINS OF COVENANT

The international civil rights movement was given impetus by the adoption on December 10, 1948, of the Universal Declaration of Human Rights by the United Nations General Assembly. That document was historical in that for the first time an international organization made declarations as to a standard of the civil, political and individual rights that belong to all people.⁴ On December 16, 1966, the United Nations General Assembly adopted the International Covenant on Civil and Political Rights (hereafter ICCPR or the covenant). Those conventions represent a comprehensive articulation of rules for the promotion of “universal respect for, and observance of, human rights and freedoms.”⁵ Included in the 53 articles comprising the ICCPR are rules prohibiting discrimination, genocide, compulsory labor, unfair imprisonment, and rules encouraging freedom of movement, marriage, and participation in public affairs. Article 18 of the covenant preserves the right to all individuals of freedom of thought, conscience, and religion. That article reads as follows:

⁴ Declaration of Human Rights, <http://www.ohchr.org/EN/professionalinterest/pages/internationallaw.aspx>

⁵ Purpose of Human Rights Committee, Office of the United Nations High Commission for Human Rights, Human Rights Committee, <http://www2.ochr.org/english/bodies/hrc/index.htm>

1. Everyone shall have the right to freedom of thought, conscience and religion. This right shall include freedom to have or to adopt a religion or belief of his choice, and freedom, either individually or in community with others and in public or private, to manifest his religion or belief in worship, observance, practice and teaching. 2. No one shall be subject to coercion which would impair his freedom to have or to adopt a religion or belief of his choice. 3. Freedom to manifest one's religion or beliefs may be 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. 4. The states parties to the present covenant undertake to have respect for the liberty of parents and when applicable, legal guardians to ensure the religious and moral education of their children in conformity with their own convictions.

The body created for judicial review of issues that arise out of the covenants is the United Nations Human Rights Committee. That Committee consists of 18 members, called experts, who are elected by the nations who have signed the covenant. The members are elected in their individual capacity and not as a representative of their nation. They serve terms of four years, may be re-elected and are required to be people of high moral character and recognized experts in the field of human rights.⁶

The Human Rights Committee has primary functions under the covenant to review human rights compliance reports that each participating nation is obligated to submit at regular intervals or upon request by the Committee. It also reviews and adjudges complaints concerning human rights violations that one signatory nation may file against another. The First Optional Protocol to the International Covenant on Civil and Political Rights, so named because not all nations agreeing to the covenant have accepted the provision of the protocol, allows for the disposition by the Committee, of complaints alleging human rights violations filed by individuals

⁶ Purpose of Human Rights Committee, Office of the United Nations High Commission for Human Rights, Human Rights Committee, <http://www2/ochr.org/englisg/bodies/hrc/index.hcm>

against states that have agreed to that protocol.⁷ The United States has not signed onto the first Optional Protocol.⁸ All majority Muslim nations, having a population greater than 10 million, are not signatories to the protocol with the exception of Algeria, Niger, Turkey and Uzbekistan.⁹ Indonesia, Pakistan, Egypt, Iran, Iraq, Syria, Saudi Arabia and Afghanistan are not signatories to the First Protocol.¹⁰ An implication of the refusal of the largest Muslim nations to submit to the jurisdiction of the Human Rights Committee relative to individual grievances is a distrust on the part of those nations of the international community to respect Islamic values that are foundational for those countries.

The sensitivities of Muslim nations to conduct that disrespects the Islamic faith is exemplified by the codification of anti-blasphemy laws in Pakistan. Chapter XV of the Penal Code of Pakistan, entitled “Of Offenses Relating to Religion” contains the sections of that nation’s laws making criminal any conduct or speech which is religiously offensive. Those provisions include the following prohibitions:

Section 295 the defiling of any place of worship, punishable by a term of imprisonment up to 2 years;

Section 295 A. malicious acts intended to outrage religious feelings punishable by a term of imprisonment up to 10 years;

Section 295 B Desecration of the Qur’an punishable by imprisonment up to life;

295 C Use of derogatory words against the prophet Muhammad punishable by death or imprisonment for life.

⁷ Members of Human Rights Committee, <http://www2.ohchr.org/english/bodies/hrc/members>

⁸ Parties of Human Rights Committee, <http://www2.ohchr.org/english.bodies.hrc.index.htm>

⁹ ChartsBin statistics collector team 2011, *Muslim Population by Country*, ChartsBin.com (Jan. 28, 2011), <<http://chartsbin.com/view/557>>.

¹⁰ Muslim nations participating in First Protocol, http://treaties.un.org/pages/viewdetails.aspx75rc=TREATY8mtdsg_no=IV_58chapter=48lang=en

Prosecutions under the section prohibiting derogations of the prophet Muhammad have resulted in the greatest amount of international concern and controversy. The following cases are illustrative.

The Case of the “Unclean” Farm Girl

In the summer of 2009, Aasia Bibi was a poor Christian farm worker in the village of Ittan Wali in Pakistan’s Punjab province. During a hot work day, Aasia dipped her cup into a communal bucket to retrieve water. Muslim co-workers rebuked Aasia as they believe that Christians are unclean and that Aasia had contaminated the community water. Aasia was expected to accept the indignity quietly. She did not. Instead, she presented a strong defense of Christianity and maintained that she had done nothing wrong. According to Aasia’s family and others familiar with the case, Aasia’s defense of her own faith was understood by the Muslim co-workers as being blasphemous toward Islam.

Aasia was accused by her co-workers as having insulted the prophet Muhammad. Villagers took their accusation to a local iman, who urged the faithful on the mosque loudspeakers to punish Aasia. An angry village mob gathered outside of Aasia’s home. The police took Aasia into custody whereupon Aasia was charged with insulting the prophet. On November 8, 2010, after having spent 18 months in prison awaiting trial, Aasia was convicted of violating the anti-blasphemy laws and was sentenced to death.¹¹

The Case of the Offensive Author

¹¹ Munzer Munnir, Digital Journal “Aasia Bibi and Impurities in the Land of The Pure”, Pakistanis for Peace, (Dec. 7, 2010).

According to Amnesty International, on February 3, 2005 Younus Shaikh was arrested and charged under the Pakistani anti-blasphemy laws for insults against Islam and Muhammed. The insults were contained in a book written by Shaikh entitled “Satanic Cleric”. Shaikh had contended in his book that stoning as a punishment for adultery is not mentioned in the Quran and that four historical leaders of Islam were Jews. Shaikh has been sentenced to life in prison.¹²

The Case of the Strident Bricklayer

On October 14, 1996, Pakistani police arrested Ayub Masih, a Christian bricklayer, who was accused by a neighbor of having said that Christianity was “right”, and for having recommended that the neighbor read Salman Rushde’s “Satanic Verses”. On the same day of Masih’s arrest, the entire Christian population of his village consisting of 14 families was forced to leave. According to International Christian Concern, an organization that raises awareness of and advocates against persecution of Christians, the prosecution of Masih was in retaliation for his submitting an application to a government program providing for housing plots for homeless people. Due to the absence of available housing, particularly for the Christian community, local landlords had been able to obtain labor from the Christian families at low wages in exchange for housing. On April 20, 1998, Masih was sentenced to death.¹³

The Offensive Medical Teacher

¹² Amnesty International Release, Public AI Index ASA 33/023/ 2005 UA 215.05, Fear for safety/Prisoner of Conscience (POC), August 19, 2005

¹³ Barry Bearak, “*Death Sentence Upheld*,” New York Times (Jul. 27, 2001), <http://www.nytimes.com/2001/07/27/world/world-briefing-asia-pakistan-death-sentence-upheld.html?scp=59&sq=barry+bearak&st=nyt>

In October, 2000, Dr. M. Younus Shaikh, a Muslim teacher at a medical college in Islamabad, was charged with violating the anti-blasphemy laws of Pakistan based upon complaints registered by some of his students. The students contended that in a lecture, Shaikh insulted Islam and the prophet by contending among other things, that the parents of the prophet Muhammad could not have been Muslims, because Islam began when Muhammad was 40 years of age, and Muhammad's parents died before Islam existed. When Dr. Shaikh was arrested, a fundamentalist Muslim group of which the accusing students were members mobbed the police station and threatened to burn it down in the event that a summary prosecution of Dr. Shaikh was not undertaken. On August 18, 2001, Dr. Shaikh was found guilty in a private hearing and sentenced to death.¹⁴

Assassinations of Reformers

The effect of the blasphemy laws in Pakistan is not limited to criminal prosecutions. There are collateral consequences as well. On January 4, 2011, Salman Taseer, the then governor of Punjab province, was assassinated by a member of his security detail. Taseer was a vocal supporter of Aasia Bibi, the Christian farmworker sentenced to death under the anti-blasphemy laws and was a vocal opponent of those laws. Taseer's assassin, Muntaz Qadri, cited Taseer's opposition to the anti-blasphemy laws as his motivation for the murder.¹⁵

¹⁴ Barry Bearack, *Death to Blasphemers: Islam's Grip on Pakistan*, The New York Times, May, 12, 2001.

¹⁵ Karin Brulliard, *Salman Taseer assassination points to Pakistani extremists mounting power*, The Washington Post, January 5, 2011

On March 2, 2011, Shahbaz Bhatti, the Roman Catholic head of Pakistan's Ministry of Minority Affairs, was assassinated shortly following his vows to pursue the repeal of Pakistan's anti-blasphemy laws, notwithstanding death threats against him.¹⁶

The U.N. Human Rights Committee to the Rescue

The anti-blasphemy laws of Pakistan represent the entrenchment of centuries old and deeply held religious convictions. They arouse great passions and have the propensity to be used to persecute and oppress religious and ideological minorities. The volatile eruptions of blasphemy claims represented by the above cited cases are reminiscent of the charges of witchcraft as told by Arthur Miller in his play, "the Crucible". These cases arouse a sense of pity and sympathy for anyone who lives in a society where such laws subject them to a charge of blasphemy at any time.

The covenants can be thought of as the effort of the international community to calm the morass of religious and ideological passions result from the anti-blasphemy laws. The Human Rights Committee of the United Nations is a board consisting of 18 experts appointed by the signatory states to the Covenant. The Committee monitors the implementation of the obligations contained in the Covenant by the signatory states. It receives and reviews reports of the signatory states that detail the steps taken by those states to implement the rights contained in the Covenant. The committee makes statements called "general comments", which provide greater detail to signatory states so as to guide them in their compliance efforts. The committee also receives and reviews complaints filed by individuals who contend that they are aggrieved by the

¹⁶ Orla Guerin, *Pakistan Minorities Minister Shahbaz Bhatti shot dead*, BBC News South Asia, March, 2, 2011

failure of a signatory state to comply with the Covenant, as well as complaints filed by one signatory state against another.

The Human Rights Committee may only consider claims against a signatory to the Covenant if that state is a party to the First Optional Protocol to the International Covenant on Civil and Political Rights, allowing for such a review.¹⁷ Pakistan is not such a nation-party. However, there are various decisions of the Human Rights Committee, although not having the force of law in Pakistan that provides logical precedence for determining the validity of the Pakistani anti-blasphemy laws under the ICCPR. These decisions demonstrate a clear sensitivity on the part of the international community to the religious rights of individuals and an intention of the United Nations to protect those rights and curtail any conduct on the part of national governments that offend those individual rights. It is virtual certain, when considering the decisions of the Human Rights Committee, that the anti-blasphemy laws of Pakistan would be found to be violations of the covenant.

Communication No. 931/2000 is a decision of the United Nations Human Rights Committee on a complaint filed by Ms. Raihon Hudoyberganova against Uzbekistan. Ms. Hudoyberganova was a student in the Farsi Department of the Tashkent State Institute for Eastern Studies and a practicing Muslim. In her second year of studies, Ms. Hudoyberganova began wearing the traditional Muslim headscarf (“hijab”). Regulations were adopted by the University whereby no students were allowed to wear religious dress. Ms. Hudoyberganova was expelled from the University for violation of those regulations. In finding that the

¹⁷ ICCPR, “Selected Decisions of the Human Rights Committee under the Optional Protocol – Volume 8, United Nations, New York and Geneva, 2007

regulations constituted a violation of Article 18 of the Covenant, the Committee stated at section 6.2 of its decision:

The Committee has noted the author's (complainant) claim that her right to freedom of thought, conscience and religion was violated as she was excluded from University because she refused to remove the headscarf that she wore in accordance with her beliefs. The Committee considers that the freedom to manifest one's religion encompasses the right to wear clothes or attire in public which is in conformity with the individual's faith or religion. Furthermore, it considers that to prevent a person from wearing religious clothing in public or private may constitute a violation of article 18, paragraph 2, which prohibits any coercion that would impair the individual's freedom to have or adopt a religion. As reflected in the Committee's General Comment No. 22 (para. 5), policies or practices that have the same intention or effect as direct coercion, such as those restricting access to education are inconsistent with article 18, paragraph 2.

The coercion applied by the state against Ms. Hudoyberganova was the denial of an educational opportunity that chilled her right to express her religious beliefs through the clothing that she wore. The Pakistani criminal statute under which Aasia Bibi has been prosecuted, would necessarily fail scrutiny under the Covenants, because the right to proclaim one's own religious views as good or "right" as stated by Ms. Bibi, is fundamental and necessary to the right of holding a religious belief. In this manner, the wearing of a hijab by a Muslim woman and the proclamation of the truth of her religion by a Christian are analogous religious expressions. If that expression constitutes a defilement of another religion under a criminal statute that includes death as the punishment for its violation, the coercive effect and the vitiation of the right to hold a religious belief is obvious and extreme. The Hudoyberganova opinion would therefore, represent logical

precedent demonstrating that the Pakistani anti-blasphemy laws are inconsistent with the ICCPR.

In Communication No. 1155/2003, the Committee considered the claims of the Leirvag family and other families against Norway, (where the Evangelical Lutheran Church is constitutionally identified as the state church), to a provision that required students to participate in a religious education program, entitled “Christian Knowledge and Religious and Ethical Education”. If parents desired to exempt their children from certain aspects of that religious education program, they were required to provide reasons for that request. The complainants adhered to a non-religious humanist philosophy and contended that the limits placed on their ability to exempt their children from the religious education program violated their right to freedom of religion pursuant to Article 18 of the Covenants.

In finding that the Norwegian regulation did constitute a violation, the Committee stated at 14.6:

The Committee considers, however, that even in the abstract, the present system of partial exemption imposes a considerable burden on persons in the position of the authors, insofar as it requires them to acquaint themselves with those aspects of the subject which are clearly of a religious nature, as well as with other aspects, with a view to determining which of the other aspects they may feel a need to seek – and justify – exemption from. Nor would it be implausible to expect that such persons would be deterred from exercising that right, insofar as a regime of partial exemption could create problems for children which are different from those that may be present in a total exemption scheme. Indeed as the experience of the authors demonstrates, the system of exemptions does not currently protect the liberty of parents to ensure that the religious and moral education of their children is in conformity with their own convictions.

In the Leirvag case, the Committee opined that the Covenants would be violated by an educational scheme that required parents to learn about the state sponsored religion, sufficient to articulate and present an objection to those aspects of a religious course of study to which the parents objected. In effect, in order for the parents to prevent their children from participating in religious studies they found objectionable, the parents were required to study the state religion. The Committee therefore determined that the Norwegian regulation violated the Conventions.

Consider section 295 C of the Pakistan Penal Code entitled “Use of derogatory remarks, etc. in respect of the Muslim prophet” which states: “Whoever by words, either spoken or written, or by visible representation or by any imputation, innuendo, or insinuation, directly or indirectly, defiles the sacred name of the Holy Prophet Muhammad (peace be upon him) shall be punished with death, or imprisonment for life, and shall also be liable to fine.” It seems obvious that if the defilement statute of the Pakistani Penal Code were presented to the Committee for evaluation under the Covenants, it too would be found to be in violation. A person with an obvious interest in avoiding directly or indirectly, by insinuation, innuendo or imputation, any defilement of the prophet Muhammad, would of necessity study all aspects of Islam necessary to accomplish such avoidance, given that the failure to do so could result in a prosecution with a mandatory death sentence, the coercive effects on the individual’s right to religion in Pakistan dwarfs those under the Norwegian educational program.

The Human Rights Committee has also considered claims against a highly populated Islamic nation that is a signatory to the First Optional Protocol. Communications Nos. 1853/2008 and 1854/2008 is a consolidated decision of the Human Rights Committee concerning complaints of two Turkish citizens who argued that their country was violating the Article 18 right of freedom of religious expression by failing to provide an alternative to compulsory military service. The complainants, Cenk Atasoy and Arda Sarkut were Jehovah Witnesses who contended that their religious beliefs compelled a conscientious objection to military service and each refused such service. Each complainant did indicate a willingness to provide civil service to their country, so long as that service was not military. The failure of the complainants to report for military service resulted in a criminal prosecution against them, and the loss of employment of one of the complainants. Turkey argued that Article 18 does not expressly require signatory states to accept conscientious objection to military service, and invoked the exceptions provided for in paragraph 3 of Article 18, which allow a signatory state to place restrictions on religious expression that are necessary for public safety and order. Turkey argued that military service is necessary for the protection of all residents as a component of a national defense. Turkey also argued that in a separate part of the Conventions, i.e. Article 8, prohibiting forced labor, the phrase “in countries where conscientious objection is recognized” appears, in the context of declaring that an alternative to military service does not constitute forced labor. If the recognition of conscientious objection was required

by the Conventions, Turkey argued, Article 8 would not have referred to it as an option among signatory states.

In finding that Turkey did violate the religious freedoms provisions of the Conventions, the Committee stated at 10.5 to 12:

In the present cases, the Committee considers that the authors' (Claimants) refusal to be drafted for compulsory military service derives from their religious beliefs, which have not been contested and which are genuinely held, and that the authors' subsequent prosecution and sentences amount to an infringement of their freedom of conscience, in breach of article 18, paragraph 1, of the Covenant. The Committee recalls that repression of the refusal to be drafted for compulsory military service, exercised against persons whose conscience or religion prohibits the use of arms, is incompatible with article 18, paragraph 1, of the Covenant.

The Atasoy decision exemplifies aspects of the complaint resolution powers provided to the Human Rights Committee, and the way in which that power is exercised by it, that likely contribute to the reluctance of countries like Pakistan to sign the First Protocol and submit to the jurisdiction of the Committee. First, the Committee demonstrated in the decision that prior decisional precedent is not binding under circumstances where it seeks to broaden the rights provided by the conventions. In that regard, in considering Turkey's claim that Article 8 clearly implies no covenant right to conscientious objection, the communication states:

The Committee also notes the State party's argument concerning article 8 of the Covenant, which states that "in countries where conscientious objection is recognized", national service by conscientious objectors does not constitute forced or compulsory labour. The Committee recalls that in its decision of inadmissibility regarding communication No. 185/1984, *L.T.K. v. Finland*, it had indeed regarded this phrase as reinforcing a conclusion that article 18 did not specifically confer a right to conscientious objection. Since that time, however, the Committee

has confirmed that the oblique use of this phrase in a different context “neither recognizes nor excludes a right of conscientious objection”, and so does not contradict the necessary consequences of the Covenant’s guarantee of the right to freedom of thought, conscience and religion.¹⁸

In determining a compulsory obligation on the part of signatory states to recognize conscientious objection, notwithstanding the implicit absence of such an obligation in article 8 of the conventions, and reversing its prior opinion to the contrary, the Committee did signal to signatory states that the Committee constituted an activist international judicial body. Such a court is likely to be feared by nationalist groups within every country that are protective of their nation’s sovereignty. That fear results in the reluctance of countries to agree to the jurisdiction of an international judicial body such as the United Nations Committee on Human Rights. That fear is particularly acute in Islamic nations like Pakistan, where loss of sovereignty can be seen by fundamentalists as jeopardizing that nation’s religious foundations. Thus, the United Nations, as the international governing body to which individuals turn to remedy religious violations, must tread lightly. On the one hand, it’s judicial bodies must be strident in protecting those rights. On the other, it’s advocacy of those rights will likely inhibit fundamentalist forces with a nation like Pakistan to submit to the jurisdiction of the United Nations.

Compulsory Remedies under the Covenants

In the Atasoy decision, as in most decisions where the Committee has determined that a violation of the Covenants has occurred and where a remedy

¹⁸ See communications Nos 1321-1322/3004, Yoon and Choi v. the Republic of Korea, Views adopted on November 3, 2006, para. 8.2.

should be provided to the complaining party, the Committee recited the basis of its jurisdictional authority to fashion such a remedy. At para. 12-13 of the decision states:

In accordance with article 2, paragraph 3 (a), of the Covenant, the State party is under an obligation to provide the authors with an effective remedy, including expunging their criminal records and providing them with adequate compensation. The State party is under an obligation to avoid similar violations of the Covenant in the future.

Bearing in mind that, by becoming a party to the Optional Protocol, the State party has recognized the competence of the Committee to determine whether there has been a violation of the Covenant or not and that, pursuant to article 2 of the Covenant, the State party has undertaken to ensure to all individuals within its territory and subject to its jurisdiction, the rights recognized in the Covenant and to provide an effective and enforceable remedy in case a violation has been established, the Committee wishes to receive from the State party, within 180 days, information about the measures taken to give effect to the Committee's Views. The State party is also requested to publish these Views and to have them translated in the official language of the State party and widely distributed.

Each remedy fashioned by the Committee represents a loss of some of the sovereignty of the State party obligated to provide it. In the Atasoy case, reasonable persons could dispute the obligation of a signatory state to acknowledge conscientious objection. A fundamentalist nation like Pakistan, which has a history of tensions with its large neighbor India, would likely find the injunctive aspects of the Atasoy decision, a frightening danger to its national security, and the directive to pay damages to an individual who refuses compulsory military service, as a galling intrusion into its affairs.¹⁹

¹⁹ Other complaints have been presented to the Committee against other state parties aggrieved over the failure to acknowledge conscientious objection and the failure to provide for civil alternatives to military service, The

Other Decisions of the Human Rights Committee Likely to Offend Fundamentalists

Decisions of the Human Rights Council that would likely offend fundamentalist Muslims are not only those based upon a right to religious expression. *Toonen v. Australia* resulted from a complaint filed by a gay activist whose complaint concerned a criminal code section in the Australian territory of Tasmania which criminalized all form of sexual contact between men. Notwithstanding the fact that no prosecutions under the law had been initiated in years, *Toonen* argued that the existence of the statute subjected homosexuals to harassment and discrimination. The Tasmanian authorities defended the laws on the grounds of public health, so as to avoid the spread of aids, and on moral grounds, which Tasmania argued, are deemed to be domestic issues under Article 17 of the covenant. In finding that the impugned law constituted a violation of the covenants, the Committee stated at para. 8.5 to 8.6:

As far as the public health argument of the Tasmanian authorities is concerned, the Committee notes that the criminalization of homosexual practices cannot be considered a reasonable means or proportionate measure to achieve the aim of preventing the spread of AIDS/HIV. The government of Australia observes that statutes criminalizing homosexual activity tend to impede public health programs by driving underground many of the people at the risk of infection.

Criminalization of homosexual activity thus would appear to run counter to the implementation of effective education programs in respect of the HIV/AIDS prevention. Secondly, the committee notes that no link has been shown between the continued criminalization of homosexual activity and the effective control of the spread of the HIV/AIDS virus. The Committee cannot accept either that for the purposes of article 17 of the Covenant, moral

Committee has found Article 18 violations based upon similar reasoning. See Min-Kyu Jeong et al v. The Republic of Korea, communication No.1642-17410/2007, April 26, 2011.

issues are exclusively a matter of domestic concern, as this would open the door to withdrawing from the Committee's scrutiny a potentially large number of statutes interfering with privacy.

In the Toonen decision, the Committee was concerned that by leaving domestic moral issues as the business of the individual state parties, the Committee would then be precluded from declaring invalid any laws with a moral component that violated the covenant. The likely corollary Muslim concern is that the moral laws compelled by the Islamic faith would be subject to wholesale invalidation by a group of 18 unelected bureaucrats that have shown enthusiastic judicial activism. That concern, relative to anti-homosexuality laws, would be particularly acute in many Muslim nations where anti-gay sentiment is so extensive that experts have said that obtaining persecution asylum in the United States on behalf of gays from Muslim nations based upon anti-gay persecution is routinely easy.²⁰ In that regard, fundamentalist nations such as Pakistan, base their attitudes on contemporary social issues, such as aids and homosexuality upon their religious convictions. Their views on those issues are seen as harsh by most persons who do not share their religious convictions. Decisions such as the Toonen opinion would be particularly likely to raise the ire of fundamentalists in Pakistan and make the ability of the United Nations to influence the anti-blasphemy laws of that country more difficult.

The decision of the Committee in the matter of *Waldman v. Canada* is notable in that it demonstrates that the remedies fashioned by the Committee will

²⁰ Walter L. Williams, *Islam and the Politics of Homophobia: The Persecution of Homosexuals in Islamic Malaysia Compared to Secular China*, Islam and Homosexuality, Volume 1, Samar Habib Greenwood Publishing Group, 2012, Santa Barbara, California

sometimes require the state parties to act affirmatively to provide accommodations to minority faiths. In the Waldman case, the complainant was a Jewish parent who wished to provide a Jewish education to his children. Canada has a bifurcated educational system in the province of Ontario, where the government provides full funding to public secular schools and to Roman Catholic schools. Jewish and other religious schools receive only limited funding in the form of tax deductions and property tax exemptions. Canada argued before the Committee that the bifurcated system was enshrined in the Canadian Constitution of 1867. At that time a compromise was incorporated in the Canadian Constitution calling for the aforementioned funding scheme, because there was concern among the Roman Catholic minority of Ontario, that the educational system would be controlled by the Protestant majority.

The Committee determined that Canada's refusal to provide a religious education to members of all faiths desiring such, while paying for religious education for Roman Catholic students constituted a violation of Article 18 of the Conventions. The Committee determined that the enshrinement of the bifurcated system in the Canadian Constitution did not render that system inviolate. It concluded that no matter what prejudice was suffered by Roman Catholics in Canada in 1867, there was no such contemporary prejudice and therefore no basis for the Canadian government to provide preferential treatment of Roman Catholics in the payment of education at religious schools.

Many Islamic nations are constitutionally self-identified as such. Their educational systems as well as their laws, such as the aforementioned Pakistani

anti-blasphemy provisions, are expressly Islamic. Those countries have special rules and afford special protections to the Muslim faith and its members. It is highly likely that a Muslim government, when presented with a judicial ruling setting forth a requirement of providing state paid religious educations to adherents of minority faiths, even in a country that is a constitutionally designated Muslim nation, would be highly motivated to avoid the jurisdiction of the judicial authority that produced such a ruling.

Practical Influence of the Covenants

It is clear that Pakistan is presently not likely to submit to the jurisdiction of the Committee so as to allow its anti-blasphemy laws to be invalidated by the protections afforded by the International Covenant on Civil and Political Rights. However, it is equally clear that the very existence of the Covenant and the fact that it has been ratified by the Pakistan government as an articulation of basic human rights, and as an agreement reached in the most visible international forum known to humankind, has been effective in vitiating the harshest aspects of those anti-blasphemy laws. The Covenant has also been a powerful moral and practical force assisting those segments of Pakistan society who wish to bring about substantial human rights reform in that country so as to bring it in substantial if not full compliance with the guarantees of the Covenants.

The government of Pakistan established the Ministry of Human Rights in November, 2008. That ministry was instrumental in Pakistan's ratification of the ICCPR on June 23, 2010. The conflict found in Pakistan between the

fundamentalist segments who resist the Covenant's guarantees and the progressive sectors seeking to implement those guarantees can be easily observed in the publications of that Ministry as well as in non-governmental Pakistani watch groups. Mustafa Nawaz Khokhar, the present Pakistani Minister of Human Rights has stated in recognition of these conflicting sectors and in recognition of the need for Pakistan to align itself with the international community the following:

The creation of an independent Ministry of Human Rights is an indication of the importance that the Government of Pakistan attaches to issues of human rights' abuses..... Furthermore, no discrimination can be made on the bases of religious beliefs, race, language, ethnicity, gender, et cet... Some of our centuries old customs and mores are contrary to the notions of individual's rights and liberties. We have to create awareness that these practices are detrimental to realization of an individual's full potential and thus hamper national progress. Simultaneously, we must see to it that perpetrators of such atrocities are brought to justice swiftly and their victims are provided all the assistance that they may require.²¹

The statement by the Minister demonstrates a critical self-evaluation of the Pakistani government on the issue of human rights, an expression that the country falls short on protecting civil rights, a clear acknowledgement that the "centuries old customs and mores" found in segments of Pakistani society represent the primary obstacle in eradicating human rights violations, and a practical acknowledgement that complying with international standards of human rights will allow Pakistan to progress.

²¹ Ministry of Human Rights, Government of Pakistan, http://www.mohr.gov.pk/the_minister.html

According to the United Nations Office of the High Commissioner for Human Rights, the initial report of Pakistan concerning its compliance with its obligations under the Covenant, was due on September 23, 2011, but has not been issued. The failure to report strongly suggests a reluctance of Pakistan to detail the state of human rights in that country and a discomfort with the international scrutiny of that situation that would then ensue when that report is issued. Non-governmental organizations in Pakistan, such as the independent, non-political, Human Rights Commission of Pakistan, have presented to the world, blunt assessments of the state of human rights in that country. In its publication “State of Human Rights in Pakistan” for 2010, the Commission makes the following statement concerning freedom of religion and the blasphemy laws of Pakistan:

There were few positive developments in Pakistan in the year 2010 with regard to the freedom of thought, conscience and religion and all indications suggested that there were even worse times ahead.....The year had begun with the government indicating its intent to reform the blasphemy law to prevent its abuse. However, by the end of 2010 any change in the controversial law seemed more remote than ever. This list of victims of the blasphemy law continued to grow.

Further comments in the human rights publication make it obvious that the government of Pakistan is fighting a real and ideological war against Islamic fundamentalists which impede progress to blunt anti-blasphemy laws. The publication states as follows:

A glance at developments with regard to the blasphemy law in the year 2010 characterized not only the government’s flip-flopping on reform of the controversial law but also showed how it lost its nerve in the face of intimidation by extremists after flirting with the idea of reform. In February 2010, the federal minister for minorities’ affairs, Shahbaz Bhatti, stated that the government

intended to change the blasphemy law to check its misuse by extremists. He said the government was proposing the changes to counter “some elements that misuse the law to create violence and disharmony in society”

With regard to the death sentence of Aasia Bibi, the farm worker convicted of blasphemy, the Commission noted that the Pakistan government had first given signals, in response to protests from the Christian community, that it would pardon that sentence, but did not do so when confronted with vows of Islamic fundamentalist religious leaders that in the event of such a pardon, there would be widespread civil unrest. A Muslim leader promised 500,000 rupees to anyone who killed Bibi, and told a rally that if the government did not hang Bibi, he would ask the Taliban to do so. The government backed down on efforts to reform the anti-blasphemy laws and did not prosecute the cleric; notwithstanding that incitement to murder is a violation of Pakistani law.

Modest but Critical Influence in Blunting Anti Blasphemy Laws

The government of Pakistan is in a very difficult position. Its leaders seek to participate with other nations in full economic, political and cultural relationships. Its diplomats would like to demonstrate that their nation wishes to comply with the obligations it has agreed to as signatories to an international covenant as part of a member of the United Nations. At the same time, there are powerful cultural influences that resist the reform of harsh anti-blasphemy laws. There are also powerful forces within that country that make use of force and intimidation to resist such reform. The most substantial weapon available to that government is the consensus of the international community as memorialized in the Covenant.

The Covenant can be thought of as the equivalent of a speed limit sign. The sign is often ignored by the immature and/or irresponsible driver to whom it is directed. Although motorists whip by that sign, it is made use of by more responsible occupants of a speeding vehicle, or those with authority concerning the driver's conduct. Others make use of the moral imperative manifested by the sign to influence, implore or coerce compliant conduct of the driver. In a similar way, it is obvious that concerning its anti-blasphemy laws, Pakistan has not complied with its obligations under the International Covenant on Civil and Political Rights. However, the Covenants may be instrumental in the efforts by the responsible segments of that society, as the collective voice of the international community, to influence the provision of human rights in that country.