

## 5 BLASPHEMY, RELIGIOUS DEFAMATION AND HATE SPEECH: A COMPARISON OF THE EUROPEAN COURT OF HUMAN RIGHTS AND THE RABAT PLAN OF ACTION

**Burkhard J. Berkmann<sup>1</sup>**

### INTRODUCTION

Blasphemy, religious defamation and hate speech are subjects which have been on the agenda on a global as well as a regional level quite frequently in recent last years. From the infamous Danish “cartoons crisis”, up to the tragic events concerning *Charlie Hebdo* in Paris, many examples prove the devastating effects that such behaviour can elicit and the urgent necessity to deal with it in legal systems. However, such legal measures must be implemented with the utmost consideration for the fundamental human right to freedom of speech, and any possibility to abuse these measures for political reasons or even persecution of minorities needs to be eliminated as far as possible.

### AIMS AND METHOD OF THIS CHAPTER

At the UN level, an important step towards implementing legal measures against hate speech in a sufficiently cautious manner was the adoption of the Rabat Plan of Action on the Prohibition of Advocacy of National, Racial or Religious Hatred that Constitutes Incitement to Discrimination, Hostility or Violence.<sup>2</sup> It covers advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence. An expert group adopted this document on 5 October 2012 in the capital of Morocco, Rabat. Its preparation was accomplished in 2011 at four regional meetings for Europe, Africa, Asia and Pacific as well as the Americas. This regional entrenchment suggests the need for an analysis of how the Rabat Plan’s subject matters are treated on the individual continents.

- 
- 1 The author holds the chair for Canon Law, especially Theological Principles of Canon Law, General Norms, Constitutional Law and Eastern Canon Law, at Ludwig-Maximilians-Universität Munich (Klaus Mörsdorf Institute of Canon Law). He further holds academic degrees in secular law, philosophy and Catholic theology. Translation by Fr. Augustinus Fries.
  - 2 Rabat Plan of Action on the prohibition of advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence. Conclusions and recommendations emanating from the four regional expert workshops organised by OHCHR in 2011, and adopted by experts at the meeting in Rabat, Morocco, on 5 October 2012, addendum to the Annual report of the United Nations High Commissioner for Human Rights, A/HRC/22/17/Add.4, 11 January 2013.

Concerning Europe, the responsibility for such matters lies with the Council of Europe. The central legal document is the European Convention on Human Rights (ECHR) from 1950, which is adjudicated by the European Court of Human Rights (ECtHR). For decades, this court has developed comprehensive case law on the subject matters which are now treated by the Rabat Plan, as well.

This chapter aims to compare this case law with the principles set forth in the Rabat Plan of Action. It is confined to Europe, but the results could be of interest for other continents, such as Africa, nonetheless. It is further confined to the religious dimension, disregarding the national and racial ones. The chapter investigates the similarities and differences between the Rabat Plan of Action and the European Court of Human Rights Case Law on blasphemy, religious defamation and hate speech.<sup>3</sup> The aim is show that the approach of the European Court of Human Rights in resolving conflicts between citizen's freedom of speech and the state regulatory power is a sophisticated one that can be applied to successfully implement the Rabat Plan of Action.

The chapter is based on a legal approach and follows a comparative method. A terminological clarification of concepts must be the first step. Subsequently, the comparison is accomplished in three steps: (1) formal differences concerning the legal nature; (2) comparison of the legal bases, and (3) comparison of content by reference to the concepts clarified in the beginning. Eventually, the significance of the Rabat Plan for inter-religious and inter-cultural dialogue shall be introduced and conclusions from the comparison shall be drawn.

## CLARIFICATION OF CONCEPTS

Terms like blasphemy or defamation of religions can mean different things to different people depending on contexts. Therefore, three different categories shall be distinguished to begin with.<sup>4</sup>

- 
- 3 See e.g. Parmar S. 2014. "The Rabat Plan of Action: a global blueprint for combating 'hate speech'", *European Human Rights Law Review* 1:21-31; Lerner N. 2015. "Incitement to Hatred and the United Nations Declaration on Religion or Belief", in Evans M, Petkoff P and Rivers J (eds). *The Changing Nature of Religious Rights Under International Law*. Oxford: Oxford University Press, 80-100; Temperman J. 2016. *Religious Hatred and International Law. The Prohibition of Incitement to Violence or Discrimination*. Cambridge: Cambridge University Press; Bielefeldt H, Ghanea N and Wiener M (eds). 2016. *Freedom of Religion or Belief. An International Law Commentary*. Oxford: Oxford University Press.
  - 4 The importance to distinguish the first two concepts is also emphasised by Schick L. 2014. "Blasphemie und der Glaube [Blasphemy and faith]", in Laubach T and Lindner K (eds). *Blasphemie – lächerlicher Glaube? Ein wiederkehrendes Phänomen im Diskurs* [Blasphemy – ridiculous faith? Discussing a recurring phenomenon]. Berlin: Lit Verlag, 11. However, a distinction from the third concept is equally important.

## 5. Blasphemy, religious defamation and hate speech

- **Blasphemy** covers “remarks or actions considered to be contemptuous of God”.<sup>5</sup> It is explicitly directed against God and based on the presumption that God needs to be protected from derogatory remarks.
- **Defamation** of religions consists in a “disparagement or vilification of particular religions or religion in general”.<sup>6</sup> It is directed against religions as abstract systems of teachings and practices. When a modern state penalises such defamation, it does not aim to protect God, but the religious feelings of the faithful or religious peace.
- **Incitement to religious hatred** is directed against individuals who are members of a certain religion, and it consists in a call for hatred, violence or discrimination of human beings because of their religious affiliation. As to be demonstrated in this chapter’s main part, this concept is based on a triangular relationship between inciter, audience and target group.

The common point of these three categories is that all of them contain a certain form of defamatory statement in religious matters. They differ, however, regarding the fact against whom this statement is directed: God, a religion or adherents of a religion. The definition of these three concepts, as presented here, is based on the common terminology in respective literature.<sup>7</sup> The question of how these concepts appear in the Rabat Plan of Action and the Case Law of the European Court of Human Rights shall be analysed in this chapter’s main part.

## COMPARING THE RABAT PLAN AND THE EUROPEAN COURT

*Formal differences between the Rabat Plan and the European Case Law regarding their legal nature*

In a formal sense, the Rabat Plan of Action and the case law of the European Court of Human Rights differ greatly. The Rabat Plan is a document, which originated in a UN environment and takes a global approach. The European Court of Human Rights (ECtHR), however, is a regional institution. It rules in its judgments whether the member states of the Council of Europe have violated the European Convention on Human Rights (ECHR).<sup>8</sup>

Sejal Parmar, a legal scholar and freedom of expression expert, characterises the Rabat Plan as follows: “Adopted by experts on 5 October 2012 in Rabat, Morocco, the RPA brings together the conclusions and recommendations of a series of workshops organised by the Office of the High Commissioner for Human Rights

5 Cf. Pew Forum on Religion & Public Life. 2012. “Laws Penalizing Blasphemy, Apostasy and Defamation of Religion are Widespread”, 21 November.

6 Cf. Pew Forum, “Laws Penalizing Blasphemy, Apostasy and Defamation of Religion”.

7 Cf. Schick, “Blasphemie und der Glaube”, 11.

8 Convention for the Protection of Human Rights and Fundamental Freedoms, 213 U.N.T.S. 222, entered into force Sept. 3, 1953, as amended by Protocols Nos 3, 5, 8 and 11 which entered into force on 21 September 1970, 20 December 1971, 1 January 1990, and 1 November 1998 respectively.

(OHCHR) in 2011.”<sup>9</sup> Natan Lerner, an international human rights law scholar, further elaborates on its legal nature: “The Rabat document is of course, not a mandatory text and its effectiveness will depend on the degree of readiness of states, international organizations, and voluntary non-governmental bodies to implement the recommendations it contains.”<sup>10</sup> However, as Parmar regrets, the member states are hardly paying attention to it.<sup>11</sup> Since it was implemented by an expert group rather than a body, institution or organisation of international law, it seems daring to refer to it as “soft law”.<sup>12</sup> After all, it appears as an appendix to an annual report of the High Commissioner for Human Rights,<sup>13</sup> and was mentioned in a resolution on religious intolerance by the Human Rights Council.<sup>14</sup> However, it owes its legitimacy less to its formal rank than to the process that led to its drafting as well as its substantive content.<sup>15</sup>

Conversely, the ECtHR’s judgments are legally binding between the parties of the proceedings.<sup>16</sup> Hence, their effect of legal force applies only to the specific case decided by the Court. Beyond that, the court’s decisions can have an indicative function especially towards other member states of the Convention. While the decision itself is not binding, a legal obligation to comply with the Convention in its interpretation specified by the ECtHR can be considered.<sup>17</sup> Moreover, the two instruments differ regarding their objectives. The Rabat Plan of Action drafts general recommendations, which, according to its authors, can lead to the best possible implementation of human rights standards on a global level.<sup>18</sup> The ECtHR, on the other hand, only rules whether a human right has been violated in a specific case. It does not decide, whether a law as such is in compliance with the ECHR. It is

9 Parmar S. 2014. “The Rabat Plan of Action: a global blueprint for combating ‘hate speech’”, *European Human Rights Law Review* 1:21.

10 Lerner N. 2015. “Incitement to Hatred and the United Nations Declaration on Religion or Belief”, in Evans M, Petkoff P and Rivers J (eds). *The Changing Nature of Religious Rights Under International Law*. Oxford: Oxford University Press, 88.

11 Parmar, “The Rabat Plan of Action”, 22.

12 Parmar, “The Rabat Plan of Action”, 26. Parmar phrases this most carefully in observing that “the RPA might be considered as a type of international soft law”.

13 Appendix in the Annual Report of the United Nations High Commissioner for Human Rights, A/HRC/22/17/Add.4, 11 January 2013.

14 Human Rights Council, Resolution No. 25/34: Combating intolerance, negative stereotyping and stigmatization of, and discrimination, incitement to violence and violence against, persons based on religion or belief (28 March 2014). A/HRC/RES/25/34, art 5.

15 Cf. Parmar, “The Rabat Plan of Action”, 22.

16 ECHR, art 46. (“The High Contracting Parties undertake to abide by the final judgment of the Court in any case to which they are parties.”)

17 Grabenwarter C and Pabel K. 2016. *Europäische Menschenrechtskonvention* [European Convention on Human Rights], Sixth Edition. München: Verlag C.H. Beck, sec 16 n 9.

18 Rabat Plan of Action, art 13. (“These conclusions – in the area of legislation, judicial infrastructure, and policy – aim to better guide all stakeholders in implementing the international prohibition of any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence.”)

## 5. Blasphemy, religious defamation and hate speech

not about realising an ideal, but defining minimal standards: up to which point can an interference still be justified without leading to a violation of human rights?

The Rabat Plan of Action was written in awareness that human rights instruments do not only exist on an international, but also on a regional level, and it encourages states to their effective implementation.<sup>19</sup> This definitely includes ECHR and ECtHR, although they are not explicitly mentioned. Regional organisations like the Council of Europe, African Union and Organisation of Islamic Cooperation are mentioned elsewhere.<sup>20</sup> The European Commission against Racism and Intolerance, associated with the European Council, has already cited the Rabat Plan in a recommendation regarding hate speech.<sup>21</sup> These connections between the European and the UN level alone make it worthwhile to compare the Rabat Plan of Action to the ECtHR case law, although the formal differences must always be borne in mind.

### *The legal bases of the Rabat Plan and the European Court*

Prohibitions on blasphemy, religious defamation and hate speech predominantly affect the fundamental right to freedom of speech. In this regard, the Rabat Plan refers to Article 19 of the International Covenant on Civil and Political Rights (ICCPR),<sup>22</sup> while the ECtHR leans on Article 10 of the European Convention on Human Rights.<sup>23</sup>

19 Rabat Plan of Action, art 19 rec 5. ("States are encouraged to ratify and effectively implement the relevant international and regional human rights instruments, remove any reservations thereto, and honour their reporting obligations thereunder.")

20 Rabat Plan of Action, art 29 rec 5 to the United Nations.

21 Council of Europe: European Commission Against Racism and Intolerance (ECRI), *ECRI General Policy Recommendation N° 15 on combating Hate Speech*, 8 December 2015, art 59.

22 International Covenant on Civil and Political Rights, GA Res 2200 (XXI) of 16 Dec 1966, 21 U.N. GAOR Supp. (No. 16) at 52, U.N. Doc A/6316, 999 UNTS 171, *entered into force* Mar. 23, 1976, art 19. Article 19 reads:

1. Everyone shall have the right to hold opinions without interference.
2. Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.
3. The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:
  - (a) For respect of the rights or reputations of others;
  - (b) For the protection of national security or of public order (ordre public), or of public health or morals.

23 ECHR, art 10. Article 10 on freedom of expression reads:

- (1) Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.
- (2) The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed

Both the ICCPR and ECHR are multilateral treaties, which are legally binding on all states who have ratified them. Both of these articles implementing freedom of speech resemble each other, right down to their wording. They outline their scope of protection first, before defining the limitations within which interferences can be justified. Regarding the scope of protection, both regulations apply to the right to hold opinions, as well as the right to freedom of expression. This further includes the freedom to seek, receive and impart information and ideas. In addition, the ICCPR lists different forms by which one may articulate an opinion: “either orally, in writing or in print, in the form of art, or through any other media of his choice”.<sup>24</sup>

The provision of limitations in the ICCPR only refers to the right to freedom of expression, while the one in the ECHR includes the freedom to hold opinions as well. In both cases, the possibility of restrictions is explained by stating that exercising rights entails duties and responsibilities. As legitimate purposes to justify interferences, the ICCPR lists: respect of the rights or reputations of others (Art. 19(3)(a)), protection of national security or of public order (*ordre public*), or of public health or morals (Art. 19(3)(b)). Beyond that, the ECHR mentions: territorial integrity or public safety, prevention of disorder or crime, maintaining the authority and impartiality of the judiciary. Both human rights instruments require a “three-part test” for restrictions: legality, proportionality and necessity. The Rabat Plan of Action insists on this test to be performed in any case (Art. 18). For the ECtHR, the test belongs to its standard array of methods anyway. Therefore, consensus exists regarding the procedure of examining possible human rights violations.

Consensus further exists to the fact, that there is no right to freedom from criticism regarding the religious sphere. The Rabat Plan states: “Moreover, the right to freedom of religion or belief, as enshrined in relevant international legal standards, does not include the right to have a religion or a belief that is free from criticism or ridicule.”<sup>25</sup> In its judgments, the ECtHR phrases even more pointedly: “Freedom of expression constitutes one of the essential foundations of [a democratic] society, one of the basic conditions for its progress and for the development of every man. Subject to Article 10(2), it is applicable not only to ‘information’ or ‘ideas’ that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb the State or any sector of the population.”<sup>26</sup>

---

by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.

<sup>24</sup> ECHR, art 19.

<sup>25</sup> ECHR, art 19.

<sup>26</sup> ECtHR No. 5493/72: *Handyside v United Kingdom*, sec 49; No. 13470/87: *Otto-Preminger-Institut v Austria*, sec 49, No. 44179/98: *Murphy v Ireland*, sec 61; No. 35071/97: *Gündüz v Turkey*, sec 37; No. 42571/98: *I.A. v Turkey*, sec 23; No. 54968/00: *Paturel v France*, sec 43; No. 64016/00: *Giniewski v France*, sec 43; 59405/00: *Erbakan v Turkey*, sec 55; No. 50692/99: *Tatlav v Turkey*, sec 22.

## 5. Blasphemy, religious defamation and hate speech

Besides that, the Court continues to stress: “Those who choose to exercise the freedom to manifest their religion, irrespective of whether they do so as members of a religious majority or a minority, cannot reasonably expect to be exempt from all criticism. They must tolerate and accept the denial by others of their religious beliefs and even the propagation by others of doctrines hostile to their faith.”<sup>27</sup>

Besides these similarities, one substantial difference can be found in the legal bases. ICCPR Article 20(2) constitutes an obligation to the states to prohibit incitement to religious hatred.<sup>28</sup> This regulation forms the essential point of reference for the Rabat Plan of Action. The ECHR and its protocols do not contain a comparable norm. The ECtHR still developed a comprehensive case law regarding hate speech, as shall be demonstrated later. At the European level, a framework decision of the Council of the European Union, which covers public incitement to hate or violence against a group of persons defined by the criterion of religion or against a member of such a group Art. 1(1), needs to be pointed out.<sup>29</sup> The member states of the EU are thereby obliged to enact corresponding sanctions in criminal law.

### *The three concepts in the Rabat Plan and at the European level*

#### *Blasphemy*

The Rabat Plan of Action proposes to rescind laws on blasphemy.<sup>30</sup> In this regard, it leans on General Comment 34 of the Human Rights Committee.<sup>31</sup> Similar recommendations can also be found in the sphere of the Council of Europe, especially from

27 ECtHR No. 13470/87: *Otto-Preminger-Institut v Austria*, sec 47; No. 42571/98: *I.A. v Turkey*, sec 28; No. 50692/99: *Tatlav v Turkey*, sec 27.

28 ICCPR, art 20(2). (“Any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law.”)

29 Council Framework Decision 2008/913/JHA of 28 November 2008 on combating certain forms and expressions of racism and xenophobia by means of criminal law, in L 328/55-58 (6 December 2008), art 1(1):

“Each Member State shall take the measures necessary to ensure that the following intentional conduct is punishable:

(a) publicly inciting to violence or hatred directed against a group of persons or a member of such a group defined by reference to race, colour, religion, descent or national or ethnic origin.”

30 Rabat Plan of Action, art 19. (“At the national level, blasphemy laws are counter-productive [...]”); art 19, rec 6. (“States that have blasphemy laws should repeal these [...]”).

31 UN Human Rights Committee, General Comment No. 34 (CCPR/C/GC/34): Article 19: Freedoms of opinion and expression (12 September 2011), sec 48.

the Parliamentary Assembly<sup>32</sup> and the Venice Commission.<sup>33</sup> Therefore, consensus exists in this respect as well.

The Rabat Plan of Action explains its rejection of blasphemy laws by stating that they frequently do not guarantee the same protection to all religions, are applied too eagerly or abused to persecute religious minorities, apostates and atheists.<sup>34</sup> As reprehensible as such misapplications might be,<sup>35</sup> this certainly does not mean that blasphemy laws necessarily entail such effects.<sup>36</sup> The very nuanced country reports,<sup>37</sup>

32 See e.g. Parliamentary Assembly of the Council of Europe, res 1510 (2006) 1, Freedom of expression and respect for religious beliefs (28 June 2006), No. 3: "[...] blasphemy laws should not be used to curtail freedom of expression and thought"; rec 1805, (2007) 1, Blasphemy, religious insults and hate speech against persons on grounds of their religion (29 June 2007), rec no. 4: "[...] the Assembly considers that blasphemy, as an insult to a religion, should not be deemed a criminal offence."

33 Venice Commission of the Council of Europe. 2010. *Blasphemy, insult and hatred – Finding answers in a democratic society (Science and Technique of democracy No.47)*. Strasbourg: Council of Europe Publishing, sec 89 ("That the offence of blasphemy should be abolished (which is already the case in most European states) and should not be reintroduced.")

34 Rabat Plan of Action, art 19: "In addition, many of these blasphemy laws afford different levels of protection to different religions and have often proved to be applied in a discriminatory manner. There are numerous examples of persecution of religious minorities or dissenters, but also of atheists and non-theists, as a result of legislation on religious offences or overzealous application of various laws that use a neutral language."

35 Example for misapplications can be found in Parmar S. 2015. "Uprooting 'defamation of religions' and planting a new approach to freedom of expression at the United Nations", in McConagle T and Donders Y (eds). *The United Nations and Freedom of Expression and Information*. Cambridge: Cambridge University Press, 393f.; Julius Q. 2016. "The Experience of Minorities Under Pakistan's Blasphemy Laws", *Islam and Christian-Muslim Relations* 27:95-115; Manea E. 2016. "In the Name of Culture and Religion: The Political Function of Blasphemy in Islamic States", *Islam and Christian-Muslim Relations* 27:117-127.

36 Cox N. 2015. "Pourquoi Suis-Je Charlie? Blasphemy, Defamation of Religion, and the Nature of 'Offensive' Cartoons", *Oxford Journal of Law and Religion* 4(3):349: "The point is that the criticisms of the Pakistani law centre on two factors, namely procedural abuses in its operation and the purportedly excessive sanctions following conviction. However, the legitimacy of the principle underpinning a law cannot be measured by such factors unless they are inherent to such a law, and it is simply not the case that 'all' blasphemy laws let alone laws justified by the UN resolutions must suffer from the same procedural flaws as does the Pakistani law."

37 See, e.g., Meeting Report Vienna (9-10 February 2011). Online at: <http://www.ohchr.org/Documents/Issues/Expression/ICCPR/Vienna/MeetingReportVienna.pdf> ("The study demonstrated that the legal practice on the issues discussed is very different across countries of the region. Also, the practical approach varies."), Meeting Report Nairobi (6-7 April 2011). Online at: <http://www.ohchr.org/Documents/Issues/Expression/ICCPR/Nairobi/MeetingReportNairobi.pdf> ("His findings were that legal systems differed widely in Africa.") Meeting Report Bangkok (6-7 July 2011). Online at: <http://www.ohchr.org/Documents/Issues/Expression/ICCPR/Bangkok/MeetingReportBangkok.pdf> ("It was also highlighted that blasphemy penalties range from fines to imprisonment and even to the imposition of the death penalty [...].")

which were presented at the four preliminary conferences, deserve continued recognition.<sup>38</sup>

### *Religious defamation*

Regarding religious defamation, however, there are substantial divergences. The Rabat Plan does not mention the term “defamation” at all, but this does not mean that it intended to remain indifferent on this subject. As its history clearly shows, its silence rather means that it distanced itself from the concept of “religious defamation”.

The UN Commission on Human Rights, and Human Rights Council respectively, passed several resolutions encouraging states to implement protection against human rights violations, which originate by defamation of religions.<sup>39</sup> Such resolutions were mostly pushed by the Organisation of Islamic Cooperation (OIC), while some Western states feared that they might be used as justification for the misapplication of blasphemy laws.<sup>40</sup> More recently, the OIC has backed away from this, and respective resolutions have only covered incitement to hate or violence,<sup>41</sup>

38 Further cf. Pew Forum on Religion & Public Life. 2012. “Laws Penalizing Blasphemy, Apostasy and Defamation of Religion are Widespread”, 21 November. (“In calendar year 2011, a total of 32 countries (16%) had laws penalizing blasphemy (remarks or actions considered to be contemptuous of God). Anti-blasphemy laws are particularly common in the Middle East and North Africa; 13 of the 20 countries in that region (65%) make blasphemy a crime. In the Asia-Pacific region, nine of the 50 countries (18%) had anti-blasphemy laws in 2011, while in Europe such laws were found in eight out of 45 countries (18%). Just two of the 48 countries in sub-Saharan Africa – Nigeria and Somalia – had such laws as of 2011.”)

39 Cf. Commission on Human Rights, Resolution 2002/9 (15 April 2002), sec 8. (“Encourages States, within their respective constitutional systems, to provide adequate protection against all human rights violations resulting from defamation of religions and to take all possible measures to promote tolerance and respect for all religions and their value systems.”)

40 Regarding Pakistan, cf. Uphoff P. 2009. “Beleidigung der Religion im Islam [Insult of religion in Islam]”, in Badewien J (ed). *Religionsbeschimpfung. Freiheit der Kultur und Grenzen der Blasphemie* [Defamation of religion. Freedom of culture and limits of blasphemy]. Berlin: Evangelische Zentralstelle für Weltanschauungsfragen, 33.

41 Cf. Angeletti S. 2012. “Freedom of religion, freedom of expression and the United Nations: recognizing values and rights in the ‘defamation of religions’ discourse”, *Stato, Chiese e pluralismo confessionale* [State, churches and confessional pluralism] 29:7; Bielefeldt H. 2014. “Streit um die Religionsfreiheit. Aktuelle Facetten der internationalen Debatte” [Argument on religious freedom. Current aspects of the international debate], in Arens E (ed). *Integration durch Religion? Geschichtliche Befunde, gesellschaftliche Analysen, rechtliche Perspektiven* [Integration by religion? Historic findings, social analyses, legal perspectives]. Baden-Baden: Nomos, 234; Bielefeldt H. 2013. “Umgang mit ‘Blasphemie’ und Religionshass: Meinungsfreiheit – Quo vadis?” [Treatment of “blasphemy” and religious hatred: Freedom of speech – quo vadis?], in Bielefeldt H (ed). *Jahrbuch Menschenrechte 2012/2013* [Yearbook on Human Rights]. Wien: Böhlau Verlag, 156.

since 2011.<sup>42</sup> A little later, the UN Human Rights Committee expressed the following stance in its General comment: “Prohibitions of displays of lack of respect for a religion or other belief system [...] are incompatible with the Covenant, except in the specific circumstances envisaged in article 20, paragraph 2, of the Covenant.”<sup>43</sup> The Rabat Plan cites this passage in Article 17. During the Nairobi preliminary workshop in preparation of the Rabat Plan, it was repeatedly acclaimed that the OIC receded from its prior position on this subject.<sup>44</sup>

However, does this mean that simple defamations, which do not amount to incitement to hatred in the sense of ICCPR Article 20(2), should not be prohibited?<sup>45</sup> Certain authors answer in the affirmative.<sup>46</sup> Others represent the view that prohibitions of defamation remain permissible as long as they can be justified according to the limitations clause of ICCPR Article 19(3).<sup>47</sup> Otherwise, expressions of opinion against religion would be less restrictable than such expressions in any other area. In the European context, the guidelines of the Council of the European Union could suggest the stance that anything not amounting to incitement to hatred is covered by freedom of speech.<sup>48</sup> But the following section already admits that restrictions to expressions of opinion for the sake of religion or ideology are permissible, as long as the limitations of ICCPR Article 19(3) are observed.<sup>49</sup>

42 See, e.g. Human Rights Council, Resolution 16/18: Combating intolerance, negative stereotyping and stigmatization of, and discrimination, incitement to violence and violence against, persons based on religion or belief (24 March 2011).

43 UN Human Rights Committee, General comment No. 34 (CCPR/C/GC/34): Article 19: Freedoms of opinion and expression (12 September 2011), sec 48.

44 Meeting Report Nairobi.

45 Cf. Parmar, “The Rabat Plan of Action”, 24. (“The apparent consensus forged by states around resolution 16/18 [...] is a fragile one.”); Bielefeldt, Ghanea, and Wiener M (eds). *Freedom of Religion or Belief*, 496. (“[...] members of the OIC emphasized that they would see resolution 16/18 in continuity to the previous defamation resolutions”).

46 See, e.g., Temperman J. 2016. *Religious Hatred and International Law. The Prohibition of Incitement to Violence or Discrimination*. Cambridge: Cambridge University Press, 193, 196.

47 Cf. Cañamares Arribas S. 2014. “Religious Freedom and Freedom of Expression in Spain”, *Religion and Human Rights* 9:223; Parmar, *Defamation*, 391. (Even Parmar, who generally interprets the Rabat Plan in a consistent manner, admits: “Thus, properly framed defamation laws may indeed be justified under the first of the legitimate grounds for restriction listed in paragraph 3, that of respect for ‘the rights or reputations of others’.” However, she remains short on an explanation why not every legal ground of justification can be considered.)

48 Council of the European Union, Guidelines on the promotion and protection of freedom of religion or belief (24 June 2013), sec 32(a): “If this expression does not rise to the level of incitement prohibited under article 20 of the ICCPR, and is thus an exercise of free speech [...]”.

49 COE Guidelines, sec 32(b). (“When faced with restrictions to freedom of expression in the name of religion or belief, the EU will recall that restrictions to freedom of expression shall only be such as are prescribed by law and are necessary to safeguard the rights or reputation of others, or for the protection of national security or of public order [*ordre*

## 5. Blasphemy, religious defamation and hate speech

The European Court of Human Rights examines any submitted application, according to its assignment, using the three-step test of ECHR Article 10. Depending on the outcome of this examination, it determines a violation of freedom of speech in some cases,<sup>50</sup> while in others it does not.<sup>51</sup> One of its criteria is whether such an expression contains factual criticism or rather is gratuitously offensive.<sup>52</sup> While this distinction may be difficult,<sup>53</sup> the concern that reasonable criticism must be permissible can be found in the Rabat Plan, as well. Some observe a tendency towards greater emphasis of freedom of speech in the jurisdiction of the ECtHR.<sup>54</sup> Others attribute this to different sets of facts.<sup>55</sup> At any rate, it can be observed that fewer defamation cases than those concerning incitation of hatred are submitted to the Court.

While the Venice Commission, as stated above, suggests rescinding blasphemy laws, it only deems sanctioning religious defamation as not necessary and not

---

public] or of public health or morals, and that no national security restriction is permissible for freedom of religion and belief.”)

50 See, e.g., No. 64016/00: *Giniewski v France* (31 January 2006); No. 50692/99: *Tatlav v Turkey* (2 August 2006); No. 46389/99: *Albert-Engelmann-GmbH v Austria* (19 January 2006); No. 72208/01: *Klein v Slovakia* (31 October 2006).

51 See, e.g., No. 10737/84, *Müller v Switzerland* (24 May 1988); No. 13470/87, *Otto-Preminger-Institut v Austria* (20 September 1994); No. 17419/90, *Wingrove v United Kingdom* (25 November 1996); No. 42571/98, *I.A. v Turkey*, (13 September 2005).

52 ECtHR No. 13470/87: *Otto-Preminger-Institut v Austria* (20 September 1994), sec 49. (“However, as is borne out by the wording itself of Article 10 para 2 (art 10-2), whoever exercises the rights and freedoms enshrined in the first paragraph of that Article (art 10-1) undertakes ‘duties and responsibilities’.”) Amongst them – in the context of religious opinions and beliefs – may legitimately be included an obligation to avoid as far as possible expressions that are gratuitously offensive to others and thus an infringement of their rights, and which therefore do not contribute to any form of public debate capable of furthering progress in human affairs. Similar reasoning: ECtHR No. 44179/98: *Murphy v Ireland* (10 July 2003), No. 67; ECtHR No. 35071/97: *Gündüz v Turkey* (4 December 2003), No. 37; ECtHR No. 64016/00: *Giniewski v France* (31 January 2006), No. 43; ECtHR No. 59405/00: *Erbakan v Turkey* (6 July 2006), No. 55; ECtHR No. 50692/99: *Tatlav v Turkey* (2 August 2006), No. 23.

53 Criticised by Temperman, *Hatred*, 194.

54 See, e.g., Temperman, *Hatred*, 194; Temperman, J. 2010. “Protection Against Religious Hatred under the United Nations ICCPR and the European Convention System”, in Ferrari S and Cristofori R (eds). *Law and Religion in the 21st Century. Relations between States and Religious Communities*. Farnham: Ashgate Publishing, 220.

55 Martínez-Torrón J. 2006. “Libertad de expresión y libertad de religión. Comentarios en torno a algunas recientes sentencias el Tribunal Europeo de Derechos Humanos” [Freedom of expression and freedom of religion. Commentary on several decisions of the European Court of Human Rights], *Revista General de Derecho Canónico y Derecho Eclesiástico del Estado* [General Journal of Canon Law and Ecclesiastical Law of the State] 11:17; Palomino R. 2009. “Libertad religiosa y libertad de expresión” [Religious freedom and freedom of expression], *Ius Canonicum* 49:538.

desirable.<sup>56</sup> Eight years earlier, the European Commission against Racism and Intolerance even suggested making public insult and defamation of an individual or a group for religious reasons a punishable offence.<sup>57</sup>

It is frequently proffered against prohibitions of defamation that they protect religions as abstract systems of teachings, whereas only individuals affiliated to certain religions or ideologies are deemed worthy of protection. Precisely this protection of individuals is implemented by the criminal offence of incitement to hatred.<sup>58</sup> Others object to this opinion stating that such a criminal provision only provides indirect protection, since it requires that third persons are incited to discrimination, hostility or violence. However, direct defamation of individuals because of their religion can occur as well, and those individuals are worthy of the same level of protection in such cases.<sup>59</sup> Prohibitions of defamation must therefore be justifiable in any case concerning a defamation of individuals. Along these lines, Italy decided on the occasion of a reform of its criminal code in 2006 to no longer penalise defamation of religions as such, but rather defamation of individuals for religious reasons.<sup>60</sup>

### *Incitement to religious hatred*

A greater accordance between the Rabat Plan of Action and the case law of the ECtHR becomes apparent regarding incitement to religious hatred, but there are differences in detail as well. This offence is based on a triangular relationship between inciter, audience and target group.<sup>61</sup> "The key term 'incitement' really points to the question as to whether other persons are mobilized to commit acts of discrimination or violence against the target group."<sup>62</sup> The Rabat Plan of

56 Venice Commission of the Council of Europe. 2010. *Blasphemy, insult and hatred – Finding answers in a democratic society (Science and Technique of democracy No. 47)*. Strasbourg: Council of Europe Publishing, sec 89(b). ("That it is neither necessary nor desirable to create an offence of religious insult (that is, insult to religious feelings) simpliciter, without the element of incitement to hatred as an essential component.")

57 ECRI, Recommendation No. 7 on national legislation to combat racism and racial discrimination (13 December 2002), sec 18. ("The law should penalise the following acts when committed intentionally: a) public incitement to violence, hatred or discrimination, b) public insults and defamation or c) threats against a person or grouping of persons on the grounds of their race, colour, language, religion, nationality, or national or ethnic origin.")

58 See, e.g., Bielefeldt, Ghanea and Wiener, *Freedom of Religion or Belief*, 496.

59 See, e.g., Cox, "Pourquoi Suis-Je Charlie?", 356-359; Lerner, *Incitement*, 81. ("The differences between 'group libel', directed against identified vulnerable persons or groups, and 'defamation of religions', directed against a religious doctrine, are apparent.")

60 Cf. Cianitto C. 2012. *Incitamento all' odio religioso. Stati Uniti, India, Gran Bretagna, Italia. Spunti comparativi* [Incitement to religious hatred. United States, India, Great Britain. Comparative ideas]. Torino: G. Giappichelli Editore, 103.

61 Correct: Temperman, *Hatred*, 371. Misleading in the Rabat Plan, art 22: "object", "subject", "audience".

62 Temperman, *Hatred*, 371.

## 5. Blasphemy, religious defamation and hate speech

Action principally adheres to the penalisation of incitement to hatred, leaning on ICCPR Article 20(2). Due to the lack of a special provision, the ECtHR can only perform an examination according to ECHR Article 10.<sup>63</sup> It repeatedly considered sanctions against hate speech as justifiable interferences with freedom of speech. In particularly severe cases, it declared applications inadmissible according to ECHR Article 17, because an individual is not covered by the protection of the Convention if he or she denies its fundamental values.<sup>64</sup> Most decisions concern Jews or Muslims as target group, while, depending on the case, the religious, national or ethnic aspect can have priority. Neither the ICCPR nor the ECHR implement a subjective right to freedom from hate speech.<sup>65</sup> Within the scope of the ECHR, victims could lean on Article 3<sup>66</sup> (inhuman treatment), Article 8<sup>67</sup> (privacy) or Article 9<sup>68</sup> (religious freedom) at most.

The Rabat Plan of Action wants to restrict freedom of speech in cases of hate speech only within strictly limited exceptions.<sup>69</sup> To this effect, it does not only suggest to strictly observe the language of ICCPR Article 20(2),<sup>70</sup> but proposes a six-part threshold test (Article 22). All six elements can be found in the case law of the ECtHR as well, as the following examples demonstrate:

63 Cf. Temperman, *Hatred*, 148.

64 Cf. Bielefeldt, Ghanea and Wiener, *Freedom*, 505; Temperman, *Hatred*, 148.

65 Cf. Temperman, *Hatred*, 158, 370.

66 A Hare Krishna follower suffered attacks ranging from harassment by telephone to knife stabbing; ECtHR, No. 44614/07 *Milanović v Serbia* (14 December 2010), sec 96. ("The Court considers that, just like in respect of racially motivated attacks, when investigating violent incidents State authorities have the additional duty to take all reasonable steps to unmask any religious motive and to establish whether or not religious hatred or prejudice may have played a role in the events.")

67 ECtHR, No. 4149/04 and 41029/04 *Aksu v Turkey* (15 March 2012), sec 59.

68 ECHR, No. 33490/96 and 34055/96 *Dubowska and Skup v Poland* (18 April 1997). ("However, the manner in which religious beliefs and doctrines are opposed or denied is a matter which may engage the responsibility of the State to ensure the peaceful enjoyment of the right guaranteed under Article 9 of the Convention to the holders of those beliefs and doctrines. Thus, the respect for the religious feelings of believers as guaranteed in Article 9 may in some cases be violated by provocative portrayals of objects of religious veneration.") Muslims successfully invoked Article 9 when demonstrators not only verbally attacked them, but also violently disturbed their Friday prayer, cf. ECtHR, No. 30587/13 *Karaahmed v Bulgaria* (24 February 2015), sec 108.

69 Rabat Plan of Action, art 22. ("It was suggested to have a high threshold for defining limitations on freedom of expression, for defining incitement to hatred, and for the application of article 20 of the ICCPR.")

70 Rabat Plan of Action, art 19, rec no. 2. ("States should ensure that, bearing in mind the interrelationship between articles 19 and 20 of the ICCPR, the domestic legal framework on incitement should be guided by express reference to article 20 of the ICCPR ('advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence') and should consider including robust definitions of key terms like hatred, discrimination, violence, hostility, etc.")

- **Context:** The ECtHR considers, whether insulting statements were made in an electoral context<sup>71</sup> or in the context of a general debate on the problems linked to the settlement and integration of immigrants.<sup>72</sup>
- **Speaker:** If a politician is concerned, the Court attributes great importance to free political debate in a democratic society, while noting that politicians should refrain from intolerant comments.<sup>73</sup> Regarding this, it is in accordance with Article 24 of the Rabat Plan.<sup>74</sup>
- **Intent:** A journalist is considered lacking intent if he records racist statements in a television documentary without aiming to propagate racism, but rather pointing towards social problems.<sup>75</sup> In another case, however, the Court determined that hate speech does not need to aim for a specific violent or criminal act.<sup>76</sup>
- **Content or form:** The Court considers “content and tone”,<sup>77</sup> the use of “military language”,<sup>78</sup> as well as the presence of a “general, vehement attack”.<sup>79</sup>
- **Extent of the speech:** An insult during a public event is considered severe.<sup>80</sup> Showing a poster in a window was considered sufficient.<sup>81</sup>
- **Likelihood, including imminence:** The guise of an artistic performance does not preclude that it was in fact as dangerous as a head-on and sudden attack.<sup>82</sup>

Though all six elements appear, this does not mean that the Court always considers them systematically and with equal scrutiny, as the Rabat Plan desires.<sup>83</sup> This particularly applies to the sixth element. While the Rabat Plan requires “some degree of risk of resulting harm”, the Court deems a more remote risk to be sufficient.<sup>84</sup> History certainly teaches that one should not wait until a threat becomes imminent. Besides that, too rigorous standards would not be covered by the language of ICCPR Article 20(2) (“any advocacy”). Although it was elaborated

---

71 ECtHR, No. 15615/07 *Féret v Belgium* (16 July 2009), sec 76.

72 ECtHR, No. 18788/09 *Le Pen v France* (20 April 2010), sec 1.

73 ECtHR, No. 59405/00 *Erbakan v Turkey* (6 July 2006), sec 55(4).

74 Rabat Plan of Action, art 24. (“Political and religious leaders should refrain from using messages of intolerance or expressions which may incite to violence, hostility or discrimination.”)

75 ECtHR, No. 15890/89 *Jersild v Denmark* (23 September 1994), sec 34.

76 ECtHR, No. 15615/07 *Féret v Belgium* (16 July 2009), sec 73.

77 ECtHR, No. 35071/97 *Gündüz v Turkey* (13 November 2003).

78 ECtHR, No. 15948/03 *Soulas v France* (10 July 2008), sec 43.

79 ECtHR, No. 35222/04 *Ivanov v Russia* (27 August 2004), sec 1.

80 ECtHR, No. 25239/13 *M’Bala M’Bala v France* (20 October 2015), sec 30.

81 ECtHR, No. 23131/03 *Norwood v United Kingdom* (16 November 2004).

82 ECtHR, No. 25239/13 *M’Bala M’Bala v France* (20 October 2015), sec 40.

83 Cf. Temperman, *Hatred*, 277.

84 Cf. Temperman, *Hatred*, 278.

during the Nairobi preliminary workshop<sup>85</sup> that no causation needs to be perceived regarding hate speech, the Rabat Plan now advises “that such causation should be rather direct”.

## RELEVANCE FOR INTERRELIGIOUS AND INTERCULTURAL DIALOGUE

The Rabat Plan of Action explains its rejection of prohibitions against blasphemy by stating that they are detrimental to the dialogue between and within religions and ideologies. While Article 19 first refers to this detrimental effect as a mere possibility,<sup>86</sup> the sixth recommendation for its implementation, which immediately follows the article itself, already names it as a fact without providing any further explanation.<sup>87</sup> It is true that dialogue requires freedom of speech. However, it would be false to assume the opposite, which is that blasphemous remarks could benefit dialogue.<sup>88</sup> As anyone committed to interreligious dialogue knows, slurs and provocations will undermine trust and understanding. This very point is expressed in different “rules of dialogue”.<sup>89</sup>

85 Meeting Report Nairobi, 30. The example refers to South Africa: “[A] prominent leader of young people was singing apartheid era songs related to the killing of Boers and, at the same time, white farmers were actually being murdered. While there was no direct link between the two, the hostile environment being created was troubling and could lead to further problems.”

86 Rabat Plan of Action, art 19. (“[...] they may result in the de facto censure of all inter-religious/belief and intra-religious/belief dialogue.”)

87 Rabat Plan of Action, art 19, rec 6. (“such laws have a stifling impact on the enjoyment of freedom of religion or belief and healthy dialogue and debate about religion”)

88 Unless this is supposed to mean that blasphemous speech could motivate religious communities to issue joint counterstatements. In this regard, blasphemy indeed fostered dialogue and cooperation between religions repeatedly, cf. Berkmann BJ. 2009. *Von der Blasphemie zur “hate speech”? Die Wiederkehr der Religionsdelikte in einer religiös pluralen Welt* [From blasphemy to “hate speech”? The return of offences against religion in a world of religious pluralism]. Berlin: Frank & Timme, 80-85; id., “Blasphemie, Diffamierung von Religionen und religiöser Frieden” [Blasphemy, defamation of religions and religious peace], in Graulich M, Meckel T and Pulte M (eds). *Ius canonicum in communione christifidelium. Festschrift zum 65. Geburtstag von Heribert Hallermann* [Canon Law in the community of Christian believers. Commemorative publication on occasion of the 65th birthday of Heribert Hallermann]. Paderborn: Ferdinand Schöningh, 641. Such counterstatements are perfectly in accordance with the Rabat Plan of Action, art 29, rec 8 to other stakeholders, which recommends to the stakeholders, regarding different groups and communities (“giving their members an opportunity to speak and to be heard in a way that promotes a better understanding of them, while at the same time reflecting the perspectives of those groups or communities”).

89 See, e.g., Inter Faith Network for the United Kingdom. 1993. “Building Good Relations with People of Different Faiths and Belief” (recommending “Not misrepresenting or disparaging other people’s beliefs and practices” and “Being sensitive and courteous”). Swidler L. *Dialogue Principles*. Online at: <http://dialogueinstitute.org/dialogue-principles> (Third principle: “It is imperative that each participant comes to the dialogue with complete honesty and sincerity.” Eighth principle: “Dialogue can only take place on the basis of mutual trust.” Tenth principle: “To understand another religion or ideology

The most interesting message of the Rabat Plan might be its preference for positive speech rather than restrictive measures as the most effective instrument to counter hate speech.<sup>90</sup> Thus, it encourages to intensify intercultural and interreligious dialogue in various passages.<sup>91</sup> Indeed, it is to be desired, that religions and ideologies, states and non-governmental actors continue to improve their efforts to realise this assignment.

## CONCLUSION

The aim of this comparison was to outline the most significant similarities and differences between the case law of the European Court of Human Rights and the Rabat Plan. The approach of the European Court in resolving conflict between citizens' freedom of speech and the state regulatory power is a sophisticated one and it can be applied for a successful implementation of the Rabat Plan of Action. In conclusion, it becomes apparent that the European legal instruments to protect human rights – namely the European Court of Human Rights and the former European Commission of Human Rights<sup>92</sup> – have developed very sophisticated methods to determine whether interferences with freedom of speech can be justified or constitute a violation of human rights. Therefore, European Court case law demonstrates a very balanced approach, bearing in mind the fundamental value that freedom of speech constitutes to every democratic society as well as the need to protect the religious feelings of individuals from insulting behaviour.

The Rabat Plan, on the other hand, is still a relatively new legal instrument. It certainly cannot be dismissed as “soft law” solely because of its formal rank, but the degree of its future implementation into national legal systems remains uncertain so far. The most substantial differences in terms of content can be reasonably explained by taking into account that the experts who drafted the Rabat Plan had

---

one must try to experience it from within, which requires a ‘passing over’, even if only momentarily, into another’s religious or ideological experience.”)

90 Bielefeldt, Ghana and Wiener, *Freedom of Religion or Belief*, 499. (“Hate speech can best be countered by ‘positive speech’. This may be the most interesting message of the Rabat Plan of Action [...].”)

91 See, e.g., Rabat Plan of Action, art 25. (“To tackle the root causes of intolerance, a much broader set of policy measures is necessary, for example in the areas of intercultural dialogue – reciprocal knowledge and interaction – or education for pluralism and diversity, and policies empowering minorities and Indigenous People to exercise their right to freedom of expression.”); art 29, rec 2 to States (“States should promote intercultural understanding.”); art 29, rec 1 to other Stakeholders (“Non-governmental organisations, national human rights institutions as well as other civil society groups should create and support mechanisms and dialogues to foster intercultural and inter-religious understanding and learning.”)

92 The European Commission of Human Rights was a special tribunal. From 1954 to 1998, individuals did not have direct access to the European Court of Human Rights, but had to apply to the Commission, which if it found the case to be well-founded would launch a case in the Court on the individual’s behalf.

## 5. Blasphemy, religious defamation and hate speech

to consider its global scope: for example, the strict opposition against blasphemy laws is comprehensible since their abuse by totalitarian governments to persecute dissidents or minorities is still a substantial threat in many countries of the world. In most European countries, however, this risk can fortunately be deemed negligible – preventing an exploitation of these countries' high standards of freedom of speech seems the more pressing matter there. Therefore, a correlation exists between the documents' legal nature, their global as opposed to merely regional scope and their material content. This was substantiated in this chapter by analysing the Rabat Plan of Action and the ECtHR Case Law regarding their legal nature, legal bases and content.

Eventually, these observations demonstrate that both legal instruments could benefit from each other. The ECtHR will certainly consider the principles set forth in the Rabat Plan in its future judicature, adjusting them to the specific situation in Europe. Countries intending to adopt these principles into their legal system or to establish institutions like a human rights court for the first time can take advantage of the long-term experience laid down in the European case law during this process, always considering that they need to be aligned with the particularities of their own cultural and legal circumstances. From an African point of view, it might be an interesting observation that, even in Europe, freedom of speech is not an absolute right, but can be restricted considering religious, historical and cultural prerequisites. However, since any such restriction is subject to a strict examination of its proportionality, harsh penalties are not justifiable by any means.