

## North Korea and the Politics of International Trade Law: the Kaesong Industrial Complex and WTO Rules of Origin. By Daniel J. Knudsen & William J. Moon<sup>†</sup>

The Kaesong Industrial Complex (KIC), a new joint economic venture between the Democratic People's Republic of Korea (North Korea) and the Republic of Korea (South Korea), is becoming a nexus of controversial issues in international trade law. The manufacturing centers at Kaesong, located in North Korea, use North Korean labor and South Korean capital to produce labor-intensive products like clothes, shoes and watches.<sup>1</sup> These goods are then shipped to South Korea and either consumed there or exported.<sup>2</sup>

The export of KIC goods could be problematic under the World Trade Organization's (WTO) Rules of Origin and rules on preferential treatment. North Korea is not a member of the WTO, and its human rights record and isolationism make it a highly polarizing state.<sup>3</sup> States that have allowed KIC goods to be treated as goods produced in South Korea are pursuing a policy that may violate WTO regulations. Through South Korea's membership in the WTO and South Korean Free Trade Agreements (FTAs), the goods produced in the KIC bypass many of the trade sanctions placed upon North Korean goods.

With the resumption of daily cross-border traffic into the KIC this summer, the resurgence of economic cooperation between North and South Korea brings these trade issues into international focus once again.<sup>4</sup> There are also important issues for the U.S. government to consider, in light of the U.S.-Korea Free Trade Agreement, signed but not yet in force. While the issue of the KIC has received some attention in the literature, scholars have yet to scrutinize WTO law and the other legal issues that surround the topic. This piece presents an overview of the KIC and the legal issues it raises, provides preliminary analysis of these issues, and raises awareness of the important policy implications that the U.S. government should consider.

The development of the KIC dates to 1989, when Hyundai Asan, one of the largest conglomerates in South Korea, first engaged with North Korean leadership to develop a special economic zone in North Korea. In 2000, Hyundai Asan offered US\$500 million to Pyongyang in return for exclusive

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1. Moon Ihlwan, *North Korea's Kaesong Clamor*, BUS. WK., June 11, 2009, available at [http://www.businessweek.com/globalbiz/content/jun2009/gb20090611\\_786969.htm](http://www.businessweek.com/globalbiz/content/jun2009/gb20090611_786969.htm).

2. Ho Cheol Kim, *Does Annex 22-B of the Proposed United States-Korea Free Trade Agreement Contemplate and Allow for Trade with Respect to North Korea?*, 40 GEO. J. INT'L L. 67, 71-73 (2008).

3. See generally James T. Laney & Jason T. Shaplen, *How To Deal with North Korea*, FOREIGN AFF., Mar.-Apr. 2003, at 16 (2003) (discussing rising tensions in the Korean peninsula); Stephan Haggard & Marcus Noland, *North Korea in 2008: Twilight of the God?*, 49 ASIAN SURVEY 98 (2009), available at <http://caliber.ucpress.net/doi/pdf/10.1525/as.2009.49.1.98> (discussing recent developments in North Korean international relations).

4. Choe Sang-Hun, *North Korea Opens Border; Again Calls for U.S. Treaty*, N.Y. TIMES, Sept. 2, 2009, at A8; Evan Ramstad & Sungha Park, *Pyongyang Raises Ire on Industrial Complex*, WALL ST. J., June 12, 2009 (describing how production at the KIC has frequently been interrupted by changing political circumstances in the region).

business rights over the development of sixty-six million square meters in Kaesong.<sup>5</sup> Despite political setbacks between the two countries,<sup>6</sup> North Korea eventually passed the Kaesong Industrial Zone Law on November 20, 2002. On December 23, 2002, North Korea granted Hyundai a Land Use Permit and on June 30, 2003 groundbreaking ceremonies took place.<sup>7</sup> Production of goods started in 2004, and has progressed unevenly since then.<sup>8</sup>

From a business perspective, the KIC has several attractive features. First, North Korean authorities established the minimum wage at US\$68.10 per month in 2007,<sup>9</sup> which is “lower than the average wage of workers at Qingdao, China, which is approximately US\$100 [per month], and is only 43% of the wages of Ho Chi Minh City, Vietnam (US\$134 per month).”<sup>10</sup> Secondly, the corporate income tax rate of 10-14% is better than South Korea’s 13-25%, China’s 15%, and Vietnam’s 10-15%.<sup>11</sup> These features have led to a proliferation of trade between North Korea and South Korea since the opening of the KIC: in 2008, the total commercial exchange reached US\$1.82 billion, accounting for 45% of North Korea’s total trade.<sup>12</sup> As of February 2009, 101 South Korean companies employ about thirty-nine thousand North Koreans in the complex.<sup>13</sup> The explosive growth of the KIC is only the beginning, as estimates from the South Korean government suggest that when the complex is fully operational sixteen hundred businesses, employing ninety-nine thousand workers, will account for US\$17.1 billion in annual output.<sup>14</sup>

Despite these ambitious plans and the resumption of manufacturing in the KIC, there has been little transnational legal scrutiny of the treatment of goods manufactured at the KIC with regards to rules of origin. Controversially, the policy of treating the goods as South Korean in origin would de facto grant some goods produced in North Korea the treatment accorded to those from a state with most-favored-nation (MFN) status under the WTO,<sup>15</sup> and these goods would benefit even further from some of South Korea’s FTAs. In this section, we discuss the WTO Rules of Origin and highlight one WTO panel decision that may be instructive in predicting the outcome of legal challenges relating to the production of goods at the KIC.

5. LIM EUL-CHUL, *KAESONG INDUSTRIAL COMPLEX: HISTORY, PENDING ISSUES, AND OUTLOOK* 15-17 (2007).

6. Joongi Kim, *The Challenges of Attracting Foreign Investment into North Korea: The Legal Regimes of Sinuiju and Gaeseong*, 27 *FORDHAM INT’L L.J.* 1306, 1309 (2004) (discussing the impact of the war against terror, a skirmish in the Yellow Sea between North Korean and South Korean naval forces, and Hyundai Asan’s financial troubles).

7. *Id.* at 1309-10.

8. *See, e.g.*, Choe Sang-Hun, *Joint Project Puts 2 Koreas at Odds Again*, *N.Y. TIMES*, Apr. 21, 2009, at A7.

9. EUL-CHUL, *supra* note 5, at 147.

10. *Id.* at 72.

11. *Id.* at 73. In addition, South Korean companies conducting business in North Korea are not required to pay taxes in South Korea. *See id.*

12. U.S. Dep’t of State, *Background Note: South Korea* (Oct. 2009), <http://www.state.gov/r/pa/ei/bgn/2800.htm>.

13. *Id.*

14. EUL-CHUL, *supra* note 5, at 60.

15. The most-favored-nation principle of the WTO articulates that importing nations may not treat member states differently when granting trade advantages (for example, tariffs or quotas).

Since there is no doctrine of *stare decisis* in WTO dispute settlements, our analysis is necessarily rooted in the context of the political economy of international trade.

In response to concerns about rules of origin as barriers to trade, the WTO passed the 1994 Agreement on Rules of Origin,<sup>16</sup> attempting to harmonize disparate sets of rules.<sup>17</sup> The Agreement sets out two types of rules of origin: preferential rules of origin and nonpreferential rules of origin. Preferential rules of origin are rules tied to side agreements between two or more states and are different from nonpreferential rules in that “[nonpreferential rules of origin] are not related to contractual or autonomous trade regimes leading to the granting of tariff preferences going beyond the application of paragraph 1 of Article I of GATT 1994.”<sup>18</sup> The WTO Rules of Origin do not apply to preferential trading arrangements between two or more countries, such as the “Generalized System of Preferences (GSP), free trade areas, [and] bilateral and regional integration agreements.”<sup>19</sup> Rules not falling under these exceptions are treated as nonpreferential, bound by the WTO Rules of Origin.

Export of KIC goods involves both types of rules of origin. For countries that have bilateral trade agreements with South Korea, the specific FTAs will govern the origin status of KIC goods. South Korea has aggressively negotiated with its trading partners to treat goods from the KIC as South Korean goods, using special rules in their FTAs to determine origin status. This resulted in the Association of South East Asian Nations (ASEAN) acknowledging KIC products as “Made in Korea,” and the European Free Trade Association (EFTA) and Singapore have also granted tariff preferences for KIC-manufactured goods, treating them as South Korean goods.<sup>20</sup> South Korea’s FTA with Singapore uses an Integrated Sourcing Initiatives rule in which “the sole requirement [for origin] . . . is that goods must be directly exported from the territory of South Korea, irrespective of the origin status of the goods.”<sup>21</sup> The FTAs with EFTA and ASEAN use an Outward Processing approach.<sup>22</sup> These are both methods of avoiding a North Korean designation for Kaesong goods.

For countries that have not entered into FTAs with South Korea, KIC goods follow the nonpreferential rules of origin. China, for example, announced that goods produced in the KIC would be treated as South Korean goods.<sup>23</sup> Since China has not entered into an FTA with South Korea, nonpreferential rules of origin apply. But origin determinations under these rules are ambiguous; the WTO’s determinations have been subject to various

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16. Agreement on Rules of Origin, Apr. 15, 1994, 1868 U.N.T.S. 397.

17. John Coyle, Essay, *Rules of Origin as Instruments of Foreign Economic Policy: An Analysis of the Integrated Sourcing Initiative in the U.S.-Singapore Free Trade Agreement*, 29 YALE J. INT’L L. 545, 550 (2004).

18. Agreement on Rules of Origin, *supra* note 16, art. 1.

19. INT’L TRADE CTR., RULES OF ORIGIN IN EXPORT CREDIT INSURANCE 1 (2000).

20. EUL-CHUL, *supra* note 5, at 189.

21. Kim, *supra* note 2, at 78.

22. *Id.*

23. *China To Recognize Kaesong Goods as Made in S. Korea*, CHOSUN ILBO (Seoul, S. Korea), July 3, 2006, [http://english.chosun.com/site/data/html\\_dir/2006/07/03/2006070361043.html](http://english.chosun.com/site/data/html_dir/2006/07/03/2006070361043.html).

criticisms for their subjectivity and inconsistent outcomes.<sup>24</sup> According to Article II of the Agreement on Rules of Origin, a product is conferred the status of origin where “wholly obtained” or, if multinationally produced, “the country where the last substantial transformation has been carried out.”<sup>25</sup> The WTO has not clearly defined “substantial transformation.” In fact, according to a panel report interpreting Article II of the Agreement on Rules of Origin, members are granted “considerable discretion in designing and applying their rules of origin” until the harmonization of the rules is completed.<sup>26</sup>

It seems that it will be difficult for KIC products to qualify as South Korean goods under Article II of the Rules of Origin.<sup>27</sup> First, KIC goods, by definition, cannot possibly be “wholly obtained” in South Korea. Second, they are unlikely to meet the standards of the proposed ways of ascertaining “substantial transformation.” The general principle largely accepted is to grant origin status to the place where the “last substantial process” took place.<sup>28</sup> Three alternative methods further define substantial transformation: a “domestic content test,” which enumerates the degree of transformation necessary to confer origin to the good; a “technical test,” which confers origin to the product if the product undergoes a specific processing procedure; and the “change in tariff classification” method, which determines rules of origin based on changes in tariff classification.<sup>29</sup> While the majority of the products from the KIC are shipped to South Korea before being exported, no material transformation goes into the goods after they are produced in the KIC. Despite the large degree of discretion granted by the rules of origin in the transitional period, granting origin status to a country that simply served as an intermediary merchant seems to defy any common understanding of “substantial transformation.”

On the other hand, arguments can be made for conferring South Korean origin status on goods produced in the KIC due to the unique nature of the special economic zone. First, South Korea plays a large role in supplying the inputs used in production. The South Korean government, for example, chose Korea Electric Power Corporation (KEPCO) as the electricity provider for the KIC. KEPCO provides to the KIC fifteen thousand kilowatts per hour of South Korean electricity.<sup>30</sup> More importantly, KIC companies bring all resources—sand, gravel, and agricultural goods—from South Korea, as North Korea is not providing any raw materials.<sup>31</sup> All these factors could allow some KIC goods to fail the WTO rules, depending on how much transformation actually occurs in North Korea.

24. See N. David Palmetier, *The U.S. Rules of Origin Proposal to GATT: Monotheism or Polytheism?*, J. WORLD TRADE, Apr. 1990, at 36.

25. Agreement on Rules of Origin, *supra* note 16.

26. Panel Report, *United States—Rules of Origin for Textiles and Apparel Products*, WT/DS243/R (June 20, 2003) [hereinafter WTO Panel Report].

27. This would mean that the Chinese policy of treating KIC goods as South Korean goods could be in violation of WTO rules.

28. Moshe Hirsche, *Asymmetric Incidence of Rules of Origin*, J. WORLD TRADE, Aug. 1998, at 44.

29. *Id.*

30. EUL-CHUL, *supra* note 5, at 202.

31. *Id.* at 194.

While the origin of KIC products is theoretically debatable, due consideration should be given to whether a WTO challenge will ever take place. Three factors suggest that the KIC origin policies are unlikely to be challenged in the foreseeable future. First, since broad authority is given to the importing country in interpreting the Rules of Origin,<sup>32</sup> WTO members will be wary of litigating an issue that is unlikely to win. Second, even if granting South Korean origin to KIC goods is legally questionable, it conforms to the general WTO principle of reducing trade barriers. Third, countries importing KIC-produced goods will economically benefit from the cheap North Korean labor supply. In calculating the realistic possibility of a WTO challenge, these factors should be weighed against the tendency for governments to use Rules of Origin as a tool for protectionism and against the deep political concerns that many countries have relating to both human rights violations and the nuclear program in North Korea.<sup>33</sup>

The KIC presents large policy implications for the United States. The development of the KIC has allowed goods produced by North Korean labor unprecedented access to international markets, allowing the regime to secure much-needed foreign currency. This could weaken U.S. leverage in negotiations with North Korea, since the United States has relied heavily on trade sanctions.<sup>34</sup>

The U.S.-South Korea FTA (KORUS FTA), signed in 2007 and awaiting legislative approval in both countries, complicates the issue further. Should the United States approve the KORUS FTA, the WTO preferential rules of origin would govern, displacing default nonpreferential rules of origin. Currently, the language of the KORUS FTA denies goods produced in the KIC duty free status, although the two states have set up a committee that will consider whether KIC goods will be deemed goods originating in South Korea.<sup>35</sup> Special rules used in past U.S. FTAs, including Integrated Sourcing Initiatives, Outward Processing, and Qualifying Industrial Zone regimes, could influence the committee in its KIC deliberations.<sup>36</sup> Since trade sanctions have been the primary tool for U.S. leverage over North Korea, this committee could serve as an important instrument for inducing political change in North Korea.

The U.S. government needs to weigh multiple issues in considering whether to treat KIC goods as South Korean goods. On the one hand, the rise of the KIC will increase North Korea's access to foreign funds, which could be used to continue its nuclear program and fuel the authoritarian regime. On the other hand, improvement in North Korea's foreign funds supply could reduce the tendency of North Korea to sell weapons to international terrorist

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32. WTO Panel Report, *supra* note 26.

33. See MICHAEL E. O'HANLON & MIKE MOCHIZUKI, *CRISIS ON THE KOREAN PENINSULA: HOW TO DEAL WITH A NUCLEAR NORTH KOREA 2* (2003) (proposing an agenda that will address the "acute nuclear weapon crisis" and "human rights issues").

34. See Franklin L. Lavin, *Asphyxiation or Oxygen? The Sanctions Dilemma*, FOREIGN POL'Y, Fall 1996, at 138, 151 (discussing various ways in which the United States could impose or lift sanctions to induce certain behavior by the North Korean government).

35. Suk Hi Kim, *The Korea-U.S. Free Trade Agreement of April 1, 2007, and Kaseong Industrial Complex*, 3 N. KOREAN REV. 119, 126 (2007).

36. See Kim, *supra* note 2, at 75.

organizations for fast foreign currency.<sup>37</sup> As Michael E. O'Hanlon and Mike Mochizuki have argued, such economic improvement would be an important piece in discouraging the regime's "extortionist behavior."<sup>38</sup> Moreover, increased access to foreign currency could be used to alleviate domestic food shortage by facilitating the import of more food. The KIC could also serve as an important starting point for North Korean economic integration that could induce a political shift in the region.

The KIC represents a new avenue for the international community to deal with North Korea. WTO Rules of Origin play an extremely important role here because if KIC goods are treated as South Korean goods, North Korea is presented with the opportunity to bypass high tariff barriers that previously made its products prohibitively expensive for international consumers. The WTO Rules of Origin appear to permit a policy treating KIC goods as South Korean goods for those states that have bilateral trade agreements with South Korea (assuming that they include specific provisions to that effect), but the issue remains complicated for states that do not have such agreements with South Korea. This has large implications for the United States, because acceleration of North Korea's access to international markets could undermine U.S. leverage over the authoritarian regime. We argue that the United States should be carefully attuned to the new challenges and opportunities that the KIC presents in developing further policy decisions toward North Korea and the pending KORUS FTA.

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37. See O'HANLON & MOCHIZUKI, *supra* note 33, at 4 ("Pushing North Korea to the brink may also increase the odds that it will sell plutonium to the highest bidder to rescue its economy."); see also Daniel A. Pinkston & Phillip C. Saunders, *Seeing North Korea Clearly*, 45 SURVIVAL 79, 89 (2003) (discussing President Bush's 2002 State of the Union Address, in which the President suggested that North Korea might provide terrorist groups with weapons of mass destruction).

38. See O'HANLON & MOCHIZUKI, *supra* note 33, at 4.

## The Rise (and Fall?) of Defamation of Religions. By Lorenz Langer

In the autumn of 2009, the controversy over the Muhammad cartoons<sup>1</sup> reached Yale University. The decision by Yale University Press to remove not only the reproduction of the Danish drawings, but also *any* depiction of the prophet from an upcoming book on the cartoons<sup>2</sup> drew angry comments from several quarters.<sup>3</sup> Defenders of free speech clashed with those demanding consideration for Muslim feelings, as well as those worried about a potentially violent response to the cartoons.<sup>4</sup>

This latest episode in the cartoon saga shows that the balance between freedom of expression and the protection of religious sensitivities is still elusive. Whether reprinted by the Press or not, the cartoons are now in the public domain, where they will provide a ready means to cause offense for decades to come. Adherents of a religion might be more hurt by insults to their faith than by (penalized) libel of their own person. Yet making religions (or their interpreters) the arbiter over what may be said would impose considerable constraints on public discourse.

Discussion about the limits of speech can be framed in moral, religious, legal, or political terms, or a combination thereof.<sup>5</sup> When the Muslim world took offence at Salman Rushdie's novel *The Satanic Verses*, the response was almost exclusively religious, with Ayatollah Ruhollah Khomeini's *fatwa* as the sad apogee.<sup>6</sup> The Danish cartoons sparked violence,<sup>7</sup> but also court proceedings in national, regional, and international fora. The reaction of Muslim governments was couched in legal terms instead of religious condemnation: from the outset, elites in Muslim states relied on international law and human rights norms to denounce defamation of religions as a violation of human dignity.<sup>8</sup> They also insisted that the international legal framework addressing the balance between freedom of expression and protection of religion was deficient, claiming that it did not sufficiently

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1. The cartoons first appeared in Flemming Rose, *Muhammeds Ansigt* [The Face of Muhammed], JYLLANDS-POSTEN, Sept. 30, 2005, at 3 (Den.).

2. JYTTE KLAUSEN, *THE CARTOONS THAT SHOOK THE WORLD* (2009).

3. Patricia Cohen, *PEN Makes Appeal to Yale Press*, N.Y. TIMES, Sept. 12, 2009, at C2; Mona Eltahawy, *Yale's Misguided Retreat*, WASH. POST, Aug. 29, 2009, at A15.

4. See Marcia Inhorn, *A Major Form of Blasphemy*, YALE ALUMNI MAG., Sept. 9, 2009, available at [http://www.yalealumnimagazine.com/issues/2009\\_11/yup\\_inhorn057.html](http://www.yalealumnimagazine.com/issues/2009_11/yup_inhorn057.html); John Negroponte, *A Risk of "Violence of an Unpredictable Nature,"* YALE ALUMNI MAG., Sept. 9, 2009, <http://www.yalealumnimagazine.com/extras/yup/negroponte149.html>; Michael Steinberg, *Light and Truth and a Free Press*, YALE ALUMNI MAG., Sept. 9, 2009, available at <http://www.yalealumnimagazine.com/extras/yup/steinberg149.html>.

5. The lines between these different types of discussions can often be difficult to draw. Swearing, for instance, is morally frowned upon, but can also lead to religious sanctions, see *Exodus* 20:7; *Leviticus* 20:9, 24:10-16, or legal sanctions, see *FCC v. Pacifica Found.*, 438 U.S. 726 (1978). The Sedition Act used legal means for political ends. Act of July 14, 1798, ch. 74, 1 Stat. 596.

6. For an overview, see *THE RUSHDIE FILE* (Lisa Appignanesi & Sara Maitland eds., 1990). Legal proceedings under blasphemy laws did take place in the United Kingdom, see *R v. Chief Metropolitan Stipendiary Magistrate, Ex parte Choudhury*, [1991] 1 Q.B. 429, with an unsuccessful appeal to the European Commission of Human Rights, see *Choudhury v. United Kingdom*, App. No. 17439/90, 12 HUM. RTS. L.J. 172, 172-73 (1991).

7. For a detailed account, see KLAUSEN, *supra* note 2.

8. See Letter from Ahmed Aboul Gheit, Minister of Foreign Affairs of Egypt, to the U.N. Sec'y-Gen., U.N. Doc. A/60/566 (Nov. 23, 2005).

safeguard religious feelings, that its implementation was ridden with double standards, and that it therefore needed to be complemented with provisions banning defamation of religions outright. This view is consistent with the abortive attempts by Muslim associations to obtain a ruling on the cartoons in an international forum; however, both the European Court of Human Rights and the Committee on Human Rights dismissed the respective applications on procedural grounds.<sup>9</sup>

This Recent Development retraces the demands for protecting religions from offense and the attempts to initiate the drafting of new legal instruments to ensure such protection. While several international human rights conventions contain provisions that address freedom of religion, there is no instrument that exclusively focuses on religion or its protection. Efforts to draft a convention against religious intolerance date back to the 1960s, but resulted only in the nonbinding 1981 Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief.<sup>10</sup> The Declaration was directed against discrimination of individuals by “any State, institution, group of persons or person on the grounds of religion or belief.”<sup>11</sup> In contrast, the broader concept of “defamation of religions” raised by the cartoons controversy encompasses the creed itself. This concept made its first appearance before the cartoons, when Pakistan, on behalf of the Organization of the Islamic Conference (OIC), introduced a draft resolution on combating “[d]efamation of Islam” in the U.N. Human Rights Commission in 1999.<sup>12</sup> The resolution was to counter “new manifestations of intolerance and misunderstanding, not to say hatred, of Islam and Muslims,” and to oppose portrayals of Islam as a religion hostile to human rights.<sup>13</sup>

Suggestions by some Commission members to broaden the scope to other religions were first resisted by an insistence that “the problem faced by Islam was of a very special nature.”<sup>14</sup> After protracted haggling, however, Pakistan introduced a revised draft resolution which encompassed religions in general while still emphasizing the particularly vulnerable situation of Islam. This second draft was adopted by the Commission without a vote.<sup>15</sup> The resolution’s operative part expressed concern about “negative stereotyping of religions”<sup>16</sup> and about “any role in which the print, audio-visual or electronic media or any other means is used to incite acts of violence, xenophobia or

9. Human Rights Comm., Decision: Communication No. 1487/2006, U.N. Doc. CCPR/C/92/D/1487/2006 (Apr. 18, 2008); Ben El Mahi v. Denmark, App. No. 5853/06 (Eur. Ct. H.R. Dec. 11, 2006), <http://www.echr.coe.int/echr>.

10. G.A. Res. 36/55, U.N. Doc. A/RES/36/55 (Nov. 5, 1981).

11. *Id.* art. 2, para. 1.

12. Comm’n on Human Rights, *Draft Resolution on Racism, Racial Discrimination, Xenophobia and All Forms of Discrimination*, U.N. Doc. E/CN.4/1999/L.40 (Apr. 20, 1999). Pakistan had been repeatedly criticized for its own blasphemy laws. *See, e.g.*, Comm’n on Human Rights, Sub-comm’n on Prevention of Discrimination and Protection of Minorities, 50th Sess., 23d mtg. ¶¶ 45-48, U.N. Doc. E/CN.4/Sub.2/1998/SR.23 (Aug. 21, 1998).

13. Comm’n on Human Rights, 55th Sess., 61st mtg. ¶ 1, U.N. Doc. E/CN.4/1999/SR.61 (Oct. 19, 1999).

14. *Id.* ¶ 7.

15. Comm’n on Human Rights Res. 1999/82, 55th Sess., 62d mtg. U.N. Doc. E/CN.4/Res/1999/82 (Apr. 30, 1999).

16. *Id.* art. 1.

related intolerance and discrimination towards Islam and any other religion.”<sup>17</sup> Under this formulation, the objects of protection are Islam and other religions, rather than individual adherents of religions. In international law, discrimination on racial, ethnic, or religious grounds, however, is generally understood to be directed against persons or groups of persons.<sup>18</sup> The resolution did not elaborate on how the same concept could be applied to religions, beliefs, or ideologies, or who would decide when a religion had been defamed.

The Commission adopted a similar resolution by consensus in 2000, after several draft resolutions and amendments, and protracted discussion<sup>19</sup> with the European Union urging the sponsors not to raise the issue again in the Commission.<sup>20</sup> Unperturbed, Pakistan introduced another draft resolution in 2001.<sup>21</sup> This time, however, consensus proved elusive. The Belgian representative, speaking on behalf of the EU, criticized the OIC for protecting religions rather than the rights of individuals.<sup>22</sup> Nevertheless, the resolution was adopted.<sup>23</sup> The Commission also voted on resolutions on defamation of religions in 2002,<sup>24</sup> 2003,<sup>25</sup> 2004,<sup>26</sup> and 2005.<sup>27</sup>

Thus, defamation of religions and Islamophobia figured prominently on the international agenda of Muslim states even prior to the publication of the cartoons in September 2005. At that stage, no claims for additional legal instruments were being made, and the issue was receiving a muted institutional response within the United Nations<sup>28</sup> and little news coverage. Once the cartoons were published, the campaign against defamation of religions and Islamophobia garnered greater attention and was raised in

17. *Id.* art. 3.

18. International Convention on the Elimination of All Forms of Racial Discrimination art. 1, para. 1, *entered into force* Jan. 4, 1969, 660 U.N.T.S. 212; Comm. on the Elimination of Racial Discrimination, *General Recommendation Concerning Article 1 of the Convention*, ¶ 1, U.N. Doc. A/54/18(Supp.), Annex V (Aug. 27, 1999).

19. Comm’n on Human Rights, 56th Sess., 67th mtg. ¶¶ 72-73, U.N. Doc. E/CN.4/2000/SR.67 (Dec. 1, 2000) [hereinafter Record of the 67th Meeting]; Comm’n on Human Rights, Draft Resolution on Racism, Racial Discrimination, Xenophobia and All Forms of Discrimination, 56th Sess., U.N. Doc. E/CN.4/2000/L.18 (Apr. 10, 2000); Comm’n on Human Rights, Draft Resolution on Racism, Racial Discrimination, Xenophobia and All Forms of Discrimination, 56th Sess., U.N. Doc. E/CN.4/2000/L.96 (Apr. 20, 2000); Comm’n on Human Rights, Draft Resolution on Racism, Racial Discrimination, Xenophobia and All Forms of Discrimination, 56th Sess., U.N. Doc. E/CN.4/2000/L.6 (Apr. 5, 2000).

20. Record of the 67th Meeting, *supra* note 19, ¶ 75.

21. Comm’n on Human Rights, *Draft Resolution on Racism, Racial Discrimination, Xenophobia and All Forms of Discrimination*, U.N. Doc. E/CN.4/2001/L.7 (Apr. 11, 2001).

22. Comm’n on Human Rights, 57th Sess., 61st mtg. ¶¶ 4-6, U.N. Doc. E/CN.4/2001/SR.61 (Dec. 4, 2001).

23. All European countries on the Commission as well as Canada, Japan, and the United States voted against. *Id.* ¶ 10.

24. Comm’n on Human Rights Res. 2002/9, U.N. Doc. E/CN.4/Res/2002/9 (Apr. 15, 2002).

25. Comm’n on Human Rights Res. 2003/4, U.N. Doc. E/CN.4/Res/2003/4 (Apr. 14, 2003).

26. Comm’n on Human Rights Res. 2004/6, U.N. Doc. E/CN.4/Res./2004/6 (Apr. 8, 2004).

27. Comm’n on Human Rights Res. 2005/3, U.N. Doc. E/CN.4/Res/2005/3 (Apr. 12, 2005).

28. *See, e.g.*, U.N. Econ. & Soc. Council [ECOSOC], Comm’n on Human Rights, *Civil and Political Rights, Including Religious Intolerance*, U.N. Doc. E/CN.4/2001/63 (Feb. 13, 2001) (*prepared by Abdelfattah Amor*). Special Rapporteur on Racism Doudou Diène had some sympathy for the claims of defamation, but concluded that a stricter implementation of *existing* norms was needed. ECOSOC, Comm’n on Human Rights, *Racism, Racial Discrimination, Xenophobia and All Forms of Discrimination*, at 2, U.N. Doc. E/CN.4/2003/23 (Jan. 3, 2003).

additional fora. Yemen introduced a resolution condemning defamation of religions in the U.N. General Assembly, which was adopted in a vote split along the trenches established by the previous votes in the Commission on Human Rights.<sup>29</sup> The OIC held an Extraordinary Islamic Summit session in Mecca in December 2005 to address the defamation campaigns against Muslims and Islam itself. The assembled head of states expressed “concern at rising hatred against Islam and Muslims and condemned the recent incident of desecration of the image of the Holy Prophet Mohammad (PBUH) in the media of certain countries” and emphasized “the inapplicability of using the freedom of expression as a pretext to defame religions.”<sup>30</sup>

Over the next four years, defamation of religion was a constant topic at international and regional meetings. The newly established Human Rights Council decided at its first session to request reports on defamation of religions by the Special Rapporteur on Freedom of Religion, by the Special Rapporteur on Contemporary Forms of Racism, and by the High Commissioner for Human Rights.<sup>31</sup> The reports were to focus on the implications of defamation under Article 20(2) of the International Covenant on Civil and Political Rights, which requires states party to prohibit by law any advocacy of national, racial, or religious hatred that constitutes incitement to discrimination, hostility, or violence.<sup>32</sup> The reports, however, were cautious about subsuming defamation under Article 20(2).<sup>33</sup>

Representatives of Muslim countries therefore felt justified in insisting on stronger remedies, suggesting that the Human Rights Council draft “a legally binding instrument to combat defamation of religions and uphold respect for religions and beliefs.”<sup>34</sup> The OIC Summit conference in 2008 declared all acts “which defame Islam as heinous acts that require punishment.”<sup>35</sup> The OIC authorized its Secretary-General to constitute a group of experts to draft “a legally-binding international instrument to promote respect for all religions and cultural values and prevent discrimination and instigation of hatred vis-à-vis the followers of any religion.”<sup>36</sup>

At the same time, the OIC continued to press the issue of defamation at the United Nations. Both the General Assembly and the Human Rights

29. G.A. Res. 60/150, 60th Sess., 64th mtg., U.N. Doc. A/RES/60/150 (Dec. 16, 2005).

30. Organization of the Islamic Conference [OIC], Final Communiqué of the Third Extraordinary Session of the Islamic Summit Conference, at II (Dec. 7-8, 2005), available at <http://www.oic-oci.org/ex-summit/english/fc-exsumm-en.htm>.

31. Human Rights Council Dec. 1/107, 24th mtg., U.N. Doc. A/DEC/1/107 (Nov. 13, 2006).

32. International Covenant on Civil and Political Rights art. 20(2), entered into force Mar. 23, 1976, 999 U.N.T.S. 171.

33. Human Rights Council, *Implementation of General Assembly Resolution 60/251 of 15 March 2006 Entitled “Human Rights Council,”* ¶ 47, U.N. Doc. A/HRC/2/3 (Sept. 20, 2006) (prepared by Asma Jahangir & Doudou Diène); High Comm’r for Human Rights, Human Rights Council, *Implementation of General Assembly Resolution 60/251 of 15 March 2006 Entitled “Human Rights Council,”* ¶¶ 19, 22, U.N. Doc. A/HRC/2/6 (Sept. 20, 2006).

34. Human Rights Council, 2d Sess., 9th mtg. ¶¶ 24, 31, U.N. Doc. A/HRC/2/SR.9 (Oct. 25, 2006).

35. OIC, *Final Communiqué of the Eleventh Session of the Islamic Summit Conference*, ¶ 176, OIC Doc. OIC/SUMMIT-11/2008/FC/Final (Mar. 13-14, 2008).

36. *Id.* ¶ 177.

Council passed resolutions in 2007 and 2008.<sup>37</sup> The OIC and the Groups of Arab and African States also amended the resolution extending the mandate of the Special Rapporteur on Freedom of Expression to cover “instances in which the abuse of the right of freedom of expression constitutes an act of racial or religious discrimination.”<sup>38</sup> The concept of defamation of religions, now seemingly established on the international level, figured prominently on the agenda of NGOs<sup>39</sup> and was reported by the media.<sup>40</sup>

Proponents of defamation hoped to further entrench and codify the concept at the U.N. Durban Review Conference scheduled for 2009.<sup>41</sup> The 2001 World Conference against Racism in Durban had not addressed the issue of religious defamation, but the Durban Programme of Action had recommended preparing complementary international standards to strengthen international instruments against racism, racial discrimination, xenophobia, and related intolerance.<sup>42</sup> To this end, the Council convened a group of experts to analyze the gaps in existing international instruments and to deliberate on the adoption of additional protocols or new conventions.<sup>43</sup> An ad hoc committee of Council members was then to implement their findings.<sup>44</sup> When the experts concluded that current legal instruments sufficiently covered the combination of religious intolerance and racial prejudices,<sup>45</sup> they were chastised by Muslim member states for disregarding their mandate.<sup>46</sup>

This was arguably the high point of the push for international defamation law. In March 2009, an extensive version of the obligatory resolution was passed by the Council.<sup>47</sup> Western countries feared and Muslim

37. G.A. Res. 62/154, U.N. Doc. A/RES/62/154 (Dec. 18, 2007); G.A. Res. 63/171, U.N. Doc. A/RES/63/171 (Dec. 18, 2008); Human Rights Council Res. 7/19, 40th mtg., U.N. Doc. A/HRC/Res/7/19 (Mar. 28, 2008); Human Rights Council Res. 4/9, 31st mtg., U.N. Doc. A/HRC/Res/4/9 (Mar. 30, 2007).

38. Human Rights Council Res. 7/36, art. 4(d), 42d mtg., U.N. Doc. A/HRC/RES/7/36 (Mar. 28, 2008).

39. Human Rights Council, *Racism, Racial Discrimination, Xenophobia and Related Forms of Intolerance, Follow-Up and Implementation of the Durban Declaration and Programme of Action*, U.N. Doc. A/HRC/10/NGO/69 (Feb. 26, 2009) (joint written statement submitted by Freedom House & the Beckett Fund for Religious Liberty); Human Rights Council, *Promotional Protection of All Human Rights, Civil, Political, Economic, Social and Cultural Rights, Including the Right to Development*, U.N. Doc. A/HRC/9/NGO/15 (Aug. 29, 2008) (joint written statement submitted by ARTICLE 19 (The International Centre Against Censorship) & the Cairo Institute for Human Rights Studies).

40. See, e.g., *Bad Counsel*, ECONOMIST, Apr. 4, 2007, at 58-59 (referring to the 2007 defamation resolution as “new”); *Zwischen Meinungsfreiheit und Hassreden: Der Uno-Menschenrechtsrat debattiert über Religion [Between Freedom of Expression and Hate Speech: The UN Human Rights Council Debates Religion]*, NEUE ZÜRCHER ZEITUNG, Sept. 28, 2006, at 7.

41. G.A. Res. 61/149, U.N. Doc. A/RES/61/149 (Dec. 19, 2006).

42. World Conference Against Racism, Racial Discrimination, Xenophobia and Related Intolerance, Durban, S. Afr., Aug. 31-Sept. 8, 2001, *Report*, at 71, ¶ 199, U.N. Doc. A/CONF.189/12 (2001).

43. Human Rights Council Res. 1/5, ¶ 2, 24th mtg., U.N. Doc. A/HRC/RES/1/5 (June 30, 2006).

44. Human Rights Council Dec. 3/103, 3d mtg., U.N. Doc. A/HRC/DEC/3/103 (Apr. 23, 2007).

45. Human Rights Council, Intergovernmental Working Group on the Effective Implementation of the Durban Declaration and Programme of Action, *Complementary International Standards*, ¶ 130, U.N. Doc. A/HRC/4/WG.3/6 (Aug. 27, 2007).

46. Human Rights Council, *Racism, Racial Discrimination, Xenophobia and All Forms of Discrimination*, ¶¶ 23, 41, 42, U.N. Doc. A/HRC/10/88 (Feb. 24, 2009).

47. Human Rights Council Res. 10/22, 10th Sess., U.N. Doc. A/HRC/RES/10/22 (Mar. 26, 2009).

countries hoped that the Durban Review Conference would see a decade of promoting religious defamation rewarded by the initiation of codification.<sup>48</sup> Yet “defamation of religions” did not feature at all in the outcome document of the Review Conference, despite Muslim states’ insistence on the importance and validity of the concept.<sup>49</sup> Instead, the document underscored the paramount importance of freedom of expression.<sup>50</sup> At the Review Conference, the Special Rapporteur on Freedom of Expression had stated that it was “crucial” to remove defamation from the final outcome document.<sup>51</sup> Eventually, the OIC accommodated the Western states’ insistence on omitting defamation.<sup>52</sup> Clearly, this came as a surprise.<sup>53</sup> As late as October 2008, the proposals for the outcome document of the Review Conference had still made numerous references to defamation and demanded new normative standards.<sup>54</sup>

For some time after the Review Conference, defamation all but vanished from the international agenda. The 11th and 12th sessions of the Human Rights Council did not pass resolutions on defamation, but instead adopted a compromise resolution on freedom of expression co-sponsored by Egypt and the United States.<sup>55</sup> The end of defamation of religion seemed to be imminent.<sup>56</sup> While the OIC still pushed to draw up new legal instruments,<sup>57</sup> the momentum on the international level seemed lost. Even if the OIC itself adopted a new legal instrument, the effect would be limited since the organization primarily takes issue with the treatment of Muslims in non-Muslim states. It would seem that the representatives of OIC member states were somewhat flushed with their influence in U.N. bodies. In the flood of resolutions they overlooked that U.N. rapporteurs and experts consistently argued against the need for new legal standards.

It is too soon to say whether this indicates the waning of defamation.

48. Neil MacFarquahr, *Concerns Keep U.S. from Talks on Racism*, N.Y. TIMES, Apr. 20, 2009, at A7.

49. Press Release, Durban Review Conference, Afternoon, at 2, U.N. Doc. RC/09/3 Rev.1 (Apr. 20, 2009), [http://www.un.org/durbanreview2009/coverage/pdf/20.04.09\\_meeting\\_summary\\_pm\\_rev1\\_en.pdf](http://www.un.org/durbanreview2009/coverage/pdf/20.04.09_meeting_summary_pm_rev1_en.pdf) [hereinafter Durban Conference April 20 Afternoon]; Press Release, Durban Review Conference, Morning, at 2, 6, U.N. Doc. RC/09/4 (Apr. 21, 2009), [http://www.un.org/durbanreview2009/coverage/pdf/21.04.09\\_meeting\\_summary\\_am\\_en.pdf](http://www.un.org/durbanreview2009/coverage/pdf/21.04.09_meeting_summary_am_en.pdf).

50. Durban Review Conference, Geneva, Switz., Apr. 20-24, 2009, *Report*, at 6-7, ¶¶ 54, 58, U.N. Doc. A/CONF.211/8 (2009).

51. Press Release, Durban Review Conference, Afternoon, at 5, U.N. Doc. RC/09/11 Rev.1 (Apr. 23, 2009), [http://www.un.org/durbanreview2009/coverage/pdf/23.04.09\\_meeting\\_summary\\_pm\\_rev1\\_en.pdf](http://www.un.org/durbanreview2009/coverage/pdf/23.04.09_meeting_summary_pm_rev1_en.pdf).

52. Durban Conference April 20 Afternoon, *supra* note 49, at 3, 9; Closing Statement of the High Commissioner for Human Rights (Apr. 24, 2009), <http://www.un.org/durbanreview2009/stmt05-01-09.shtml>.

53. *See, e.g., Avoiding the Worst: UN Conference on Racism*, ECONOMIST, Apr. 25, 2009, at 62-63.

54. Preparatory Comm. for Durban Review Conference, *Implementation of the Mandate of the Working Group*, ¶ 46, U.N. Doc. A/CONF.211/PC/WG.2/CRP.1 Annex (Oct. 27, 2008).

55. Human Rights Council Res. 12/16, 12th Sess., U.N. Doc. A/HRC/RES/12/16 (Oct. 2, 2009).

56. ARTICLE 19, UN Human Rights Council: Beginning of the End for Defamation of Religion? (Sept. 23, 2009), <http://www.article19.org/pdfs/press/un-human-rights-council-beginning-of-the-end-for-defamation-of-religions-.pdf>.

57. The working group to that end is still not established. OIC, Council of Foreign Ministers, *Combating Islamophobia and Eliminating Hatred and Prejudice Against Islam*, ¶ 10, Res. 34/36-POL (May 23-25, 2009).

The OIC might well decide that the domestic benefits of passing annual resolutions in the Human Rights Council outweigh the cost of antagonizing the Western states. Muslim members of the Ad Hoc Committee continue to insist that new legal instruments are indispensable.<sup>58</sup> New efforts are underway to pass another resolution on defamation in the General Assembly in 2010 with a view to drafting a binding instrument.<sup>59</sup> Suddenly, defamation of religions seems to be well and alive again.

But repetitive resolutions without result would underscore that nothing beyond grandstanding can be achieved. Even if a new international instrument or additional protocol were eventually to emerge at the United Nations, it is unlikely that Western governments would feel compelled to become a party to it. While indicating that they were not unsympathetic to complaints of discrimination against Muslims, European regional institutions have also made it clear that they do not see the prohibition of defamation of religions as a viable solution to such grievances.<sup>60</sup>

Defamation of religions will be with us for some time to come. But its proponents have yet to provide a convincing rationale why—and especially how—religions rather than individuals should be protected from insult or discrimination. The mere fact that some Muslim countries impose severe penalties for blasphemy cannot warrant a ban on the international level.<sup>61</sup> Nor is it clear who would authoritatively decide when a transgression has occurred; courts would be ill-equipped to adjudicate religious commands. The emancipation of the public sphere from control by religious authorities is too important an achievement to be jeopardized by a vague, novel concept.

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58. Human Rights Council, Ad Hoc Comm. on the Elaboration of Complementary Standards, *Outcome Referred to in Paragraph 2(D) of the Road Map on the Elaboration of Complementary Standards*, U.N. Doc. A/HRC/AC.1/2/2 (Aug. 26, 2009).

59. Frank Jordans, *Islamic Nations Pressing UN Panel for Treaty That Would Ban Blasphemy*, ASSOCIATED PRESS, Nov. 20, 2009, at 7.

60. See Eur. Parl. Ass., Recommendation 1805, *Blasphemy, Religious Insults and Hate Speech Against Persons on Grounds of Their Religions* (2007), <http://assembly.coe.int/main.asp?link=/Documents/AdoptedText/ta07/EREC1805.htm>; see also European Comm'n for Democracy Through Law, *Report on the Relationship Between Freedom of Expression and Freedom of Religion*, ¶ 64, Doc. No. CDL-AD(2008)026 (Oct. 23, 2008).

61. See Inhorn, *supra* note 4.