

Motion 103 in Action: Canada's international obligations toward religious and racial minorities

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International Justice and Human Rights Clinic



**PETER A. ALLARD
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toward religious and racial minorities

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Cover Image: “Our Children's Future,” from Yemen, by Giles Clarke - photographed for UNOCHA in May 2017. The cover photograph depicts a student at the Aal Okab school in Saada City, Yemen, standing in the ruins of one of his former classrooms, destroyed in June 2015 during the Yemeni Civil War. Giles Clarke is a photojournalist with Getty Images Reportage based in New York City.

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EXECUTIVE SUMMARY

Amidst an increasingly turbulent geopolitical landscape, Canada has not been immune to populist polarization and deepening political divides. These phenomena have manifested, in part, in a higher frequency of incidences of prejudice and discrimination against minority groups and, in particular, Muslim people. A worrisome spike in “Islamophobia” — used in this report to describe discriminatory and hateful views toward people of actual or perceived Muslim faith based on prejudices and stereotypes accompanied by correspondent hate speech and action — has occurred across the Provinces and Territories of Canada, as well as throughout the world. While criticizing any religion is a legitimate exercise of freedom of expression, hateful and stereotypical narratives can interfere with the exercise of fundamental protected rights. This briefing paper underlines the obligations of the Canadian government to counter prejudicial discourse by upholding and promoting a culture of rights in accordance with international law.

Canada has an obligation to address racial and religious intolerance under various international human rights treaties that it chose to ratify. These human rights covenants obligate Canada to protect the fundamental rights to freedom of religion and equality for all groups, including different religious and racial minorities, and to ensure freedom from discrimination. Intercultural and human rights-focused education aimed at promoting tolerance and preventing discriminatory narratives and conduct are key elements Canada should include in its approach to combating intolerance. Soft law and foreign and regional jurisprudence provide additional support for combating religious and racial intolerance, as well as useful guidance for Canada with respect to implementing its own anti-discrimination legislation. Multiple international bodies state that no religion should be equated with terrorism, a phenomenon cited as justification for Islamophobia. The experience of prejudice and discrimination on the basis of religion is also recognized to have a gender dimension, as can be seen in Canada through the gendered impacts of, for example, restrictions on the niqab, in opposition to various international gender-related legal norms. Further, Islamophobic incidents often intersect with race and migrant status, as discrimination and prejudice on the basis of race, religion, and migrant status frequently overlap.

In order to uphold its international obligations and to lead in combating discrimination and intolerance, Canada should form a collective, sustainable response to counter Islamophobia. The government should acknowledge this phenomenon, and other types of racial and religious discrimination, as a systemic, pervasive problem, rather than mere isolated incidents. Canada should support existing efforts to enact measures in Provincial Legislatures and in Parliament to counter all forms of racial and religious discrimination.

M-103, a non-binding federal motion passed in March 2017, calls on the Canadian government to take steps to address Islamophobia and other forms of racism and religious discrimination, and recommends ways for Canada to address these issues. It is a step in the right direction — however, there is still much that can be done, both at the federal and provincial level, to proactively combat Islamophobia and other

forms of racism and religious discrimination in line with international law.

Responses should be contextual, take into account the differences between respective communities throughout Canada, and engage with other forms of oppression that exist in Canadian society. Recognition of the intersections between Islamophobia and other forms of discrimination, including discrimination based on gender, gender expression, class, sexuality, and disability, will allow the government to further promote diversity and a culture of rights in Canada.

Bearing this in mind, this briefing paper **recommends** that Canada take the following actions to strengthen its rights-protecting capacity and efforts to combat extreme forms of hatred and prejudice, such as Islamophobia:

In relation to international human rights bodies:

- 1) In order to promote religious and racial tolerance, Canada should effectively inform citizens of their right to submit petitions to the Human Rights Committee following the exhaustion of domestic remedies. The government should also properly disseminate decisions of the Human Rights Committee, making them accessible for all individuals within Canada.
- 2) Canada should make a declaration recognizing the Convention for the Elimination of Racial Discrimination (“CERD”) Committee as competent to receive individual communications for potential State violations of their obligations under this Convention. It should mention and include instances of Islamophobia and anti-Muslim sentiment in future reports to the Committee.

For domestic legislation and policy:

- 1) In line with the recommendations of the Special Rapporteur on Racism, Canada should take proactive steps to ensure members of Muslim communities, and other minorities, have equal access to the services of law enforcement and the justice system, in practice. Specifically,
 - a) the government should assess the level of trust, safety, and access that members of Muslim communities have with law enforcement and the justice system, and take steps to improve this relationship as necessary;
 - b) law enforcement personnel should receive specific training on anti-discrimination obligations and hate speech laws; and
 - c) the government should institute systems to monitor whether law enforcement personnel are engaging in discriminatory practices against Muslim communities, such as profiling.
- 2) In developing its approach to combating Islamophobia and related intolerance, Canada should keep in mind the advice of the Special Rapporteur on cultural rights and draw on the longstanding work of anti-racist, migrant rights, intercultural, and interfaith groups and human rights defenders. Canada should also, in developing laws and programs, consult with groups most affected by hatred on the basis of religion, race, and migrant status. This should include consultations with women and other marginalized members of affected communities.
- 3) The federal government should consult provincial governments to ensure that educational

policies adequately promote religious and racial tolerance, especially toward minority groups within their respective regions.

- 4) In its most recent review of Canada, the Committee on the Elimination of Racial Discrimination expressed concern surrounding disparities and discrepancies for integration of the Convention and federal mechanisms to combat racism within Provinces and Territories.¹ The government should implement initiatives to consult with the provinces and review mechanisms to ensure coordination amongst Provinces and Territories in dealing with racism and religious discrimination.
- 5) It has been seven years since the conclusion of Canada's five-year Action Plan to Combat Racism. In light of the continued influx of immigrants and refugees since this time, the Government should consider creating another Action Plan to combat racism and religious discrimination in response to the ever-changing cultural and social context in Canadian society.
- 6) Canada should repeal the requirement of the Attorney General's consent to proceed with prosecutions under Sections 318 and 319(2) of the Criminal Code.
- 7) The federal legislature should broaden the requirements under Section 319(1) of the Criminal Code, and either clearly define or omit reference to a "breach of the peace," which is inherently vague.
- 8) The federal legislature must define "public benefit" in the defences of Sections 318 and 319 of the Criminal Code to only include public safety, order, health, morals, and others' fundamental rights, in order to limit the scope of permitted defences to those enumerated in international law.
- 9) Section 319(7)'s definition of "communicating", in the Criminal Code, should include more explicit reference to online discrimination, which is growing in frequency.
- 10) The government must develop a comprehensive and consistent approach to online forms of discrimination, in light of the 2014 repeal of Section 13 of the Canadian Human Rights Act regulating internet hate speech.
- 11) In order to adequately protect all individuals from arbitrary and discriminatory detention during declared national emergencies, Canada must revise Section 4(b) of the Emergency Act to include foreign nationals.
- 12) To be effective against racial and religious discrimination, Canadian legislation should explicitly note the history of hate speech as part of the underlying foundation of genocide/apartheid, and expressly stipulate the need to counter hate speech and systemic discrimination.

INTRODUCTION

“Scapegoat populism” and hatred toward religious and racial ‘others’ is on the rise globally.² This phenomenon, which currently implicates the spread of “Islamophobia,” as well as anti-migrant, anti-refugee sentiment, is present in many countries in the world, including Canada.³ Such sentiments have resulted in numerous instances of hate speech, violence, persecution, and discriminatory actions that threaten to deepen existing divides and foment conflict. This briefing paper recognizes the rise in anti-Muslim discourse and hateful narratives and employs the framework of international human rights law to demonstrate the need and obligation to counter hatred and intolerance by upholding and promoting a culture of rights. Specifically, this paper identifies Canada’s international legal obligations to address racism and religious intolerance and puts forward recommendations on what the State can do to combat both Islamophobia and anti-refugee sentiment. More broadly, the legal section provides guidance with respect to Canada’s obligations to protect its minority groups and religions.⁴

Islamophobia in Canada Today

The problem of Muslims being perceived as at the very least “other”, or at worst, the “enemy”⁵ appears to be growing.⁶ An alarming number of incidents of prejudice and discrimination have occurred, and continue to occur at increasing rates, across the provinces and territories.⁷ A November 2017 poll showed that 46% of Canadians believe the overall presence of Islam in Canadian public life to be damaging Canada and Canadian societies, while almost two-thirds of Canadians say the influence of Islam in Canada is growing.⁸ The number of police-reported hate crimes targeting Muslim-Canadians more than doubled over a three-year period from 2013–2016 (the most significant increase of any group surveyed).⁹ Statistics Canada reported a 61% increase in police-reported crimes motivated by hate against the Muslim population in 2015, with police forces across the country recording 159 religiously motivated hate crimes against Muslims – up from 99 in 2014, and 45 in 2012.¹⁰ Multiple studies have found evidence that Canadians are more likely to hold biased views of Muslims than any other group in society.¹¹

This phenomenon has only become more complex in today’s globalized world, in which it is not automatically clear from where people come and to which religion they adhere. More than ever before, societies are making the mistake of blurring the overlap of religious and racial discrimination. In the context of Islamophobia, this means that the experience of Arab Muslims in North America – those who are more readily perceived to be Muslim and therefore “other” – is disproportionate to that of Muslims who do not appear to come from the Middle East or South Asia, such as Muslims of European or East Asian descent, who have been less centrally targeted for discrimination and prejudice.¹² Meanwhile, Islamophobia includes discrimination based on perceived religious identity, such that non-Muslims, including Sikhs and Arab Christians, have also been targets of anti-Muslim violence in cases of so-called “mistaken identity”.¹³

These biases against Muslim people seem not only to be present in the public opinion, but also in the policy decisions of our Federal and Provincial governments. For example, in 2011 the Québec legislature sparked a nationwide debate over the passing of Bill 94, which would effectively deny essential government services, public employment, education, and health care to Muslim women who wear the niqab.¹⁴ In the same year, then Minister of Citizenship and Immigration, Jason Kenney, banned the niqab from citizenship ceremonies. In 2014, the federal government passed Bill C–24, which allowed Canada to strip people who were convicted of fraud or national security crimes of citizenship if they were dual citizens, landed immigrants, or eligible for citizenship in another country, instead of pursuing only criminal convictions. Some Canadian citizens expressed a fear that Muslims would be targeted by this law and lose their Canadian citizenship in the name of national security.¹⁵ The following year, the federal government passed the Zero Tolerance for Barbaric Cultural Practices Act, with stated objectives of criminalizing forced marriage, polygamy, and “honour killings”.¹⁶ Despite the breadth of objectives, the rhetoric used in discussing this law was predominantly directed towards Muslims.¹⁷

In 2017, Islamophobia in Canada continued to intensify. By the end of December 2017, 70 anti-Muslim hate crimes had been reported to police, with incidents ranging in nature from online harassment, to verbal threats and abuse, to physical attacks—¹⁸ most infamously, the January 2017 attack on a Québec mosque, in which 6 men were killed and 19 others injured.¹⁹ Prime Minister Justin Trudeau, while not specifically recognizing the Islamophobic nature of the attack, highlighted that the attack targeted innocents who were simply practicing their faith, thereby constituting an attack on religious freedom. He quickly condemned the incident as a terrorist attack, stating in Parliament that “[t]his was a group of innocents targeted for practising their faith. Make no mistake it was a terrorist attack. It was an attack on our most intrinsic and cherished values as Canadians – values of openness, diversity and freedom of religion.”²⁰ Other anti-Muslim incidents occurring this year include a bomb threat against Muslims at Concordia University on March 1, 2017, the vandalizing of the Tawuba mosque in Montreal, and the physical assault of a young Muslim woman in Mississauga, Ontario, among others.²¹

In response to the recent rise in hate crimes, Liberal MP Iqra Khalid tabled parliamentary motion M-103, seeking to have MPs study and find solutions to Islamophobia. This non-binding motion (not a law) passed on March 23, 2017.²² Specifically, the motion calls on the federal government to do three things: recognize the need to “quell the rising public climate of hate and fear;” “condemn Islamophobia and all forms of systemic racism and religious discrimination;” and “request that the Standing Committee on Canadian Heritage undertake a study” of these issues and propose solutions.²³ Weeks after the tabling of M-103, the Ontario legislature unanimously passed an anti-Islamophobia motion tabled by Liberal MPP Nathalie Des Rosiers. The Ontario motion called on the legislature to “stand against all forms of hatred, hostility, prejudice, racism and intolerance, and to rebuke a “growing tide of anti-Muslim rhetoric and sentiments” (for more on these motions, see Analysis section).²⁴ On August 31, 2017, while delivering remarks recognizing the beginning of Eid al-Adha in Saskatoon, Trudeau called for Canadians to stand together “united against racism, hatred and Islamophobia.”²⁵ Unfortunately these efforts continue to be met with opposition – most notably, perhaps, the passage of Bill 62 by the National Assembly of Quebec

on October 18, 2017, banning the wearing of face coverings for people giving or receiving a service from the state, a move suspected of targeting Muslim women who wear the niqab or burqa.²⁶

Terminology

While it is not known who coined the term “Islamophobia”, the first appearance of the word in print is thought to have occurred in 1910 in two French works that discussed what the authors called “Islamophobie” in the context of Western colonization of Africa.²⁷ These early definitions are notable in that they use the word “prejudice”, indicating a view of Islamophobia as being neither the “fear of Islam” nor the critique of its religious tenets, but rather a form of hostility towards Muslims on the basis of their religion.²⁸ Interpretations of later French usages note that the term refers not to degrading and/or erroneous representations of Islam, but to the *motivation* behind the misrepresentations: an inherent bias, or prejudice, in the author’s treatment of Islam.²⁹ In modern usage,³⁰ Islamophobia relies on characterizations of Islam and its adherents as uniquely prone to certain tendencies, such as violence and sexism, and uniquely hostile to others, such as democracy and secular government.³¹

This paper recognizes that the current global phenomenon address here is, in many ways, more than a “fear” or “phobia” of the religion of “Islam”. Rather, the phenomenon tends to manifest as a hatred of Muslim groups and individuals, rather than the religion itself, with effects felt disproportionately by Arab Muslims. Thus, in this paper, the term “Islamophobia” is used to describe discriminatory and hateful views toward people of actual or perceived Muslim faith (perceptions that are often based in prejudices and stereotypes). Some individuals have expressed concern that using the term ‘Islamophobia’ acts to limit free expression, in particular by limiting criticism of Islam or its tenets.³² While recognizing the paramount importance of both freedom of expression and freedom of religion, this paper simultaneously acknowledges and seeks to address the prevalence of stereotypical and prejudiced discourses about Islam, and associated hateful views and acts toward those of actual or perceived Muslim faith. Criticizing Islam or any religion is a legitimate exercise of freedom of expression rights. However, where hateful and stereotypical narratives interfere with the safe exercise of protected rights (for example due to acts of violence and harassment), the government has responsibilities to use rights-respecting means to counter prejudicial discourse.³³

Framing a Response

Canada should ensure that anti-Muslim sentiment does not intensify and become entrenched in public opinion and governmental policies. Rather, Canada should take active steps to counter Islamophobia and support existing efforts to enact measures in Provincial Legislatures and in Parliament to counter Islamophobia. This report aims to contribute to these efforts by reviewing Canada’s obligations under international law and translating them into the domestic context. In so doing, this paper acknowledges that hatred and hate crimes toward those of actual or perceived Muslim faith relate to and are informed

by global narratives and policies, including the so-called “War on Terror” and rhetoric used in its justification, incursions on civil liberties through the banning of forms of religious dress, the Trump administration executive orders banning travel from some Muslim-majority countries, and other inflammatory political rhetoric.³⁴

This paper also employs and acknowledges the intersections between Islamophobia and other forms of discrimination, including discrimination based on gender, gender expression, race, class, sexuality, and disability. Islamophobia is not just interpersonal and should not be viewed as an issue of isolated hate crimes perpetrated by misguided individuals, but a pervasive systemic problem. Projections of Islamophobia are not experienced in the same form by all people of Muslim faith. Therefore, a collective, rather than isolated, response to this issue is needed in order to implement a sustainable response in accordance with Canada’s international obligations.

CANADA'S LEGAL OBLIGATIONS TO ADDRESS ISLAMOPHOBIA

This section outlines international and domestic law that supports the prevention of Islamophobia in Canada. Canada has ratified and acceded to multiple international human rights treaties that create binding obligations on States parties to adequately address racism and religious intolerance. Part I will focus on Canada's international obligations arising from treaties that address racism and religious intolerance. Part II discusses regional and foreign jurisprudence on racism and religious discrimination to assess whether other countries' approaches to these issues can provide guidance for Canadian law and policy makers. Part III will provide a comprehensive discussion of whether the Canadian legal system (both legislative and common law) gives direct and adequate legal effect to its international obligations.³⁵

Part I – Relevant International Law

A) Binding International Instruments

i) International Convention on the Elimination of All Forms of Racial Discrimination (“ICERD”)

The main objective of the International Convention on the Elimination of All Forms of Racial Discrimination (“ICERD,” 1966) is to promote and encourage States parties to work toward the elimination of racial discrimination. Canada signed the ICERD in 1966 and acceded³⁶ in 1970.³⁷ Racial discrimination is defined as “any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing...human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life”.³⁸ The definition of discrimination in Article 1 of the ICERD “does not cover discrimination based on religion alone”.³⁹

Articles 3-7 of the ICERD outline the requirements of States parties to promote the objective of this Convention. These requirements include: active prohibition of racial segregation⁴⁰, condemnation of organizations and propaganda based on superiority of one race or group of persons⁴¹, assurance of equal guarantee of fundamental rights⁴², implementation of effective protection and remedies against acts of racial discrimination⁴³, and adoption of immediate and effective measures within teaching, education, and culture to combat racial discrimination.⁴⁴ Despite insufficiencies in its implementation, Canada's 2005 National Action Plan Against Racism provides an example of a comprehensive strategy for implementation of these obligations. Some aspects of the strategy that could be readily applied to Islamophobia include: initiatives to specifically assist victims of racial and religious discrimination⁴⁵, programs enabling and supporting civil society in the promotion of tolerance and diversity, outreach and support programs specifically for children of minority groups, and dissemination of hate speech laws for the public service and internet service providers.⁴⁶

The ICERD established an independent Committee to receive and consider communications from States parties and individuals – i.e. a mechanism by which individuals and States parties are able to bring forth claims of violations of the ICERD.⁴⁷ To date, Canada has not made a declaration under Article 14 of the ICERD to recognize the competence of the Committee for its purpose, outlined above. This precludes any individual from bringing an individual communication to the Committee for investigation and adjudication on potential violations of rights under the ICERD, by Canada.⁴⁸

In furtherance of its commitment to the principles of the ICERD, Canada should recognize the competence of the Committee and allow individuals to bring individual communications against Canada. While it is possible for the Committee to consider a claim of double discrimination (a claim that includes religion and a grounds of discrimination under Article 1(1)), the Committee’s jurisprudence clearly outlines a distinction between race and religion in determinations of admissibility as “general references to Muslims, do not single out a particular group of persons, contrary to article 1 of the Convention”.⁴⁹ Therefore, in the context of Islamophobia, Canada’s obligations under the ICERD only protect against distinction, exclusion, restriction or preference that stem from the enumerated ground of race. In cases where racial discrimination is associated with religious discrimination (i.e. the individual being discriminated against is, in fact, Muslim), the claimant would likely have grounds for double discrimination, which would fall under the jurisdiction of the Committee. Thus, recognition of the competence of the Committee will allow for individuals in Canada to bring before the Committee claims of discrimination based on Arab ethnicity and its perceived (or actual) correlation with Islam.⁵⁰

It bears noting that in Canada’s official report to the Committee on the Elimination of Racial Discrimination this year, the government omitted identifying Islamophobia as a form of racism, thereby reinforcing harmful narratives and contributing to rendering Islamophobia invisible.⁵¹ Islamophobia should be identified as a form of racism and included in future reports to the Committee.

ii) International Covenant on Civil and Political Rights (“ICCPR”)

The main objective of the International Covenant on Civil and Political Rights (“ICCPR,” 1966) is to promote freedom and dignity for each individual person, through recognition and protection of each person’s civil and political rights in the societies of States parties.⁵² Canada acceded to the ICCPR in 1976.⁵³ The ICCPR requires States parties to ensure that all the rights under the Covenant are respected and promoted for each individual without distinction as to race and religion (among other distinctions).⁵⁴

Many articles in the ICCPR prohibit discrimination based on race and religion, and obligate States parties to promote equal protection of individuals and to ensure enjoyment of the rights under the Covenant. For instance, States parties must ensure that advocacy of racial or religious hatred that incites discrimination is prohibited by law⁵⁵, and that effective provisions against racial and religious discrimination are available in States parties’ domestic law.⁵⁶ Measures must also be taken by States parties to ensure that all citizens have equal rights to participate in public affairs, to vote, and to be protected by the law.⁵⁷ Additionally, if

ethnic and religious minorities exist in a State party, these minorities must be allowed to profess and practice their own religion and to enjoy their own culture and language.⁵⁸ Finally, children must be protected and afforded their rights without discrimination as to race and religion.⁵⁹

Apart from these general obligations, the ICCPR also outlines the scope of freedom of religion and the obligations on States parties to: allow for individuals to choose and manifest their religion or belief⁶⁰, protect individuals from coercion to adopt a religion or belief⁶¹, and ensure that parents or legal guardians have the freedom to provide “religio[us] and moral education [for] their children in conformity with their own convictions”.⁶²

In public emergencies, the ICCPR recognizes the ability of States parties to briefly derogate from obligations under the ICCPR. Yet, any measures taken during emergencies may not discriminate based on race and religion.⁶³ Moreover, States parties may not derogate from respecting and upholding freedom of religion, conscience and thought, rights guaranteed under Article 18 of the ICCPR.⁶⁴ The only acceptable limits on an individual’s freedom of religion and belief are those necessary “to protect public safety, order, health, morals, or the fundamental rights and freedoms of others”.⁶⁵ The scope of these grounds is not defined in the ICCPR.

Aside from provisions that directly relate to religious and racial discrimination, the phenomenon of Islamophobia also threatens other rights under the ICCPR. The right to life under Article 6 is threatened through physical attacks against individuals motivated by hatred for a religion and/or certain racial groups. Further, under Article 17 of the ICCPR, one’s right to privacy and the right to be protected against unlawful attacks on honour and reputation are threatened through intolerance and discrimination. This is especially true of attacks against religious structures and buildings, or individuals attending religious services. Finally, implicit and explicit discrimination can have an impact on one’s right to be involved in public affairs (Article 25). If a State allows intolerance and bias against identifiable groups of individuals to proliferate, this could threaten their opportunity to meaningfully participate in public life by inducing individuals to remain in the comparative ‘safety’ of the private sphere.

iii) International Covenant on Economic, Social and Cultural Rights (“ICESCR”)

The International Covenant on Economic, Social and Cultural Rights (“ICESCR,” 1966) was ratified by Canada in 1976.⁶⁶ The ICESCR briefly addresses religious and racial discrimination, requiring States parties to ensure that their education enables individuals to “participate effectively in a free society”, including the promotion of tolerance and friendship amongst all racial, ethnic, and religious groups.⁶⁷ The ICESCR also echoes the ICCPR in its obligation on States parties to ensure that individuals are able to educate their children in conformity with their own religious and moral convictions.⁶⁸ State obligations under the ICESCR would extend to including educational programs related to promoting tolerance and inclusion, combating prejudice among youth, and allowing a reasonable degree of flexibility within the education system to accommodate different individuals’ religious and belief systems.

iv) Convention on the Rights of the Child (“CRC”)

The Convention on the Rights of the Child (“CRC,” 1989) was ratified by Canada in 1991.⁶⁹ Similar to the ICCPR, the CRC seeks to ensure that children are afforded the right to freedom of religion⁷⁰, as well as the right to profess and practice their own religion.⁷¹ The CRC also requires States parties to ensure that education of children includes adequate preparation for living in a free society, and for recognizing and respecting the fundamental freedoms of individuals.⁷² Finally, the CRC creates an obligation to consider religious background when assessing the desirability of potential solutions for children deprived of their family environment.⁷³ These rights are implicated, at different levels, by the phenomenon of Islamophobia and require Canada to take various affirmative steps to be in compliance with the CRC.⁷⁴

v) Convention on the Elimination of All Forms of Discrimination Against Women (“CEDAW”)

The primary objective of the Convention on the Elimination of All Forms of Discrimination Against Women (“CEDAW,” 1979) is to institutionalize equality for women under international law and to present a plan of action to secure equality for women.⁷⁵ Canada ratified CEDAW on December 10, 1981. CEDAW defines discrimination as “any distinction, exclusion or restriction made on the basis of sex...in the political, economic, social, cultural, civil or any other field”.⁷⁶ The treaty calls on States to take all appropriate measures to secure women’s ability to exercise their fundamental freedoms and human rights on an equal basis with men, including in public and political life and employment.⁷⁷ As noted in the introduction, certain forms of Islamophobic discrimination in Canada—especially those related to dress or gender-specific religious practices—may have a particular impact on women. Where, for example, bans on wearing veils such as those in Quebec limit access to employment or government services for some Muslim women, Canada may be in violation of its obligations under CEDAW. The disproportionate impact of Islamophobic hate crimes on women (e.g. from 2010 to 2015, Muslim populations had the highest percentage (53%) of hate crime victims who were female)⁷⁸ further triggers protections and Canadian obligations under CEDAW.

vi) Genocide Convention and the Responsibility to Protect

The Genocide Convention (1948) calls on all States parties to take practical measures to prevent and punish the egregious crime of genocide.⁷⁹ The actions that constitute genocide are defined in Article II and, most relevant to current expressions of Islamophobia, include both killing members of a group or causing serious bodily harm to members of a group.⁸⁰ Members of a group include racial or religious groups. Under the Genocide Convention, acts punishable by States include genocide, conspiracy to commit genocide, incitement to commit genocide, attempt to commit genocide, and complicity in genocide.⁸¹ These acts all require intent on the part of the alleged perpetrator, which is a high threshold, and difficult to substantiate.⁸²

Initial acts of incitement and hate speech may facilitate growing resentment against an identifiable group and have the potential to culminate in egregious human rights violations such as genocide. By punishing both incitement and conspiracy to commit genocide, States parties recognize the importance of protecting identifiable groups through prevention of both incitement and conspiracy to genocide, along with the crime itself.⁸³ Even though the distance between individual Islamophobic acts and a phenomenon like genocide may seem substantial, it is important to recognize that failing to prevent the rise of prejudicial discourse may lead to the incitement of hatred and violent acts, eventually culminating in the worst forms of group-targeted violence and subjugation. Canada's obligations to prevent and deter genocide of course extend to the well-being of potentially vulnerable minority groups within its borders. The government should therefore pay special attention to any trends indicating the growth of violent and discriminatory movements.

B) Additional Influential International Authority on Racism, Intolerance, and Minority Religions

In addition to treaties, other international instruments and standards instruct and encourage States to take concrete steps to bring an end to all forms of racism and xenophobia, including intolerance of minority religions. Some of these instruments may be helpful in interpreting domestic law, particularly where Canada has supported them, while others clarify international requirements or make observations on human rights situations around the world.⁸⁴ They exemplify widely endorsed guiding principles and best practices, which Canada would do well to adopt. This section summarizes instruments that pertain to a need to counter discriminatory discourses and practices against people of actual or perceived Muslim faith.

In general, a few themes emerge, such as the frequent overlap between discrimination and prejudice on the basis of race, religion, and migrant status, as well as the general notion that stereotyping on the basis of religion contributes to hatred and intolerance. Multiple instruments note that no religion should be equated with terrorism (as has often occurred in the context of Islamophobia⁸⁵). Finally, the experience of prejudice and discrimination on the basis of religion can have a gendered dimension, as can be seen in Canada in the gendered impacts of, for example, restrictions on the niqab, discussed above. These instruments note the importance of ensuring that the rights to freedom of religion and freedom from discrimination are protected for people of all genders. Policy initiatives, including intercultural and human-rights focused education, are championed as key elements that States should include in their approach to combating intolerance.

i) Declarations of the United Nations General Assembly⁸⁶ (UNGA)

a) Universal Declaration of Human Rights ("UDHR")

The Universal Declaration of Human Rights ("UDHR," 1948) provides the general framework of international human rights for individuals of any State. While the UDHR is not a binding treaty, it serves as

an influential document for Member States of the United Nations and has been presented by some scholars as customary international law.⁸⁷ The UDHR particularly emphasizes strong opposition to racial and religious discrimination in all its forms.

For instance, in the Preamble, the UDHR declares that freedom of speech, belief, and freedom from fear are the “highest aspiration of the common people”.⁸⁸ Additionally, a common understanding of these fundamental rights and freedoms is recognized as of “the greatest importance” for the realization of the overall objectives of the UDHR.⁸⁹

In its substantive sections, the UDHR declares the importance of fundamental rights and freedoms without distinction of religion⁹⁰, equal protection of the law without discrimination (racial, religious, or otherwise)⁹¹, and the general right to freedom of thought, conscience and religion.⁹² The UDHR also encourages education that promotes tolerance and understanding among racial or religious groups, and respect for human rights and fundamental freedoms.⁹³

The fundamental principles outlined in the substantive sections of the UDHR, and those specifically addressing the issues of racial and religious discrimination, are incorporated into the binding international human rights instruments discussed above.

b) Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief⁹⁴ (1981 Declaration)

The 1981 Declaration emphasizes the fundamental dignity of all human beings, and the commitment by States to promote and affirm respect for fundamental human rights. In its substantive sections, it declares the right to be free from coercion in choosing one’s religion or beliefs and to have and manifest beliefs individually or in community with others.⁹⁵ It repeats the ICCPR instruction that States may permit limitations on the manifestation of belief only in narrowly defined circumstance, and declares manifestation to include a broad range of practices.⁹⁶ The 1981 Declaration finds discrimination on grounds of religion or belief to be contrary to the UDHR, the International Covenants on Human Rights, and the UN Charter.⁹⁷ It instructs States to take effective measures to end discrimination on the basis of religion in all areas of civil, economic, political, social, and cultural life, including by enacting or rescinding legislation as necessary to protect against discrimination and by taking all appropriate measures to combat intolerance on the grounds of religion or belief.⁹⁸ It also instructs States to ensure these rights in national legislation in a way that all persons can access them in practice, and notes that the Declaration does nothing to restrict any other rights in the UDHR or Covenants.⁹⁹

While Canada has adopted both anti-hate speech and anti-discrimination legislation, it should look to the wording of the 1981 Declaration and take additional steps to strengthen its use of proactive measures to counter hateful discourse and respond to hateful acts.

c) Declaration on the Rights of Persons Belonging to National or Ethnic, Religious, and Linguistic Minorities¹⁰⁰ (1992 Declaration)

The 1992 Declaration focuses on the realization of the principles of the United Nations Charter and other human rights instruments, including the 1981 Declaration. It emphasizes the right of persons belonging to national, ethnic, religious, or linguistic minorities to full participation in cultural, religious, social, economic, and public life.¹⁰¹ It reiterates the rights to freedom from discrimination on the basis of belonging to a national, ethnic, religious, or linguistic minority, and to freedom from disadvantage caused by the exercising (or non-exercising) of rights.¹⁰² It further instructs States to create favourable conditions for members of minority groups to express their religion, except where specific practices violate national law and international standards.¹⁰³ It also establishes that State measures that seek to uphold these rights will not be considered *prima facie* to violate the principle of equality.¹⁰⁴ This stipulation is reminiscent of Section 15(2) of the Canadian Charter of Rights and Freedoms, which allows government to enact specific programs directed at the empowerment of marginalized groups. This constitutional provision suggests that targeted and proactive responses to rising Islamophobia and related intolerance like those recommended in this report would be on firm legal footing in Canada.

Collectively, these Declarations indicate broad support and a general affirmation of state practice with respect to promoting freedom of religion and protecting religious and other minorities from, in particular, hateful discourse and Islamophobic acts.

ii) General Comments of the United Nations Human Rights Committee

a) CCPR General Comment No. 22: Article 18 (Freedom of Thought, Conscience or Religion)¹⁰⁵

The United Nations Human Rights Committee is a body of independent experts that oversees the implementation of the International Covenant on Civil and Political Rights and releases general comments interpreting the ICCPR, among other tasks.¹⁰⁶ CCPR General Comment No. 22 provides guidance to States on their obligations under Article 18 of the ICCPR to protect theistic, non-theistic, and atheistic beliefs.¹⁰⁷ The Comment describes these rights as far-reaching and profound, each equally protected, and, as noted above, non-derogable even in times of emergency.¹⁰⁸ It allows no limitations whatsoever on the freedom to adopt a religion or belief, and limitations on the manifestation of that belief only where proscribed by law and necessary to protect public safety, order, health or morals, or fundamental rights and freedom of others. Moreover, such limitations must be directly related and proportionate to these enumerated concerns.¹⁰⁹ Choice of religion, belief, or nonbelief cannot be limited by the threat of violence or sanction.¹¹⁰ The rights in Article 18 include the right to manifest one's religion or belief through worship, including acts integral to worship, such as the following customs: wearing distinctive clothing or head coverings, specialized diets, use of a particular language, and the choosing of leaders and establishment of religious schools and distribution of religious texts.¹¹¹ The inclusion of distinctive clothing and head coverings points to the problem, under international human rights commitments, of restrictions on

religious dress such as that passed in Quebec related to the wearing of full-face veils while accessing or providing government services.¹¹²

b) *CCPR General Comment No. 11: Article 20 (Prohibition of Propaganda for War and Inciting National, Racial or Religious Hatred)*¹¹³

CCPR General Comment No. 11 explains that States parties are obliged to adopt laws to enforce Article 20 of the ICCPR. It explains that the prohibition includes “any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence, whether such propaganda or advocacy has aims which are internal or external to the State concerned”.¹¹⁴ It further notes that this prohibition is fully compatible with the right to freedom of expression under Article 19, “the exercise of which carries with it special duties and responsibilities.”¹¹⁵

c) *CCPR General Comment No. 28: Article 3 (The Equality of Rights Between Men and Women)*¹¹⁶

CCPR General Comment No. 28 notes that States bear a responsibility to ensure that freedom of thought, conscience and religion is protected in law and practice irrespective of gender.¹¹⁷ It declares that regulations on the clothing women may or must wear in public may be in violation of a number of articles of the ICCPR.¹¹⁸ These provisions, like those in General Comment 22, above, point to the violation of rights posed by restrictions on religious dress for Muslim women in Canada.

iii) General Comments of the United Nations Committee on the Elimination of Racial Discrimination

a) *General Recommendation No. 35 (Combating Racist Hate Speech)*¹¹⁹

CERD General Recommendation No. 35, issued by the United Nations Committee on the Elimination of Racial Discrimination, the implementing body of the Convention on the Elimination of Racial Discrimination, notes the role that racist hate speech can play in leading to mass violations of human rights, including genocide.¹²⁰ Like CCPR General Comment No. 11, it acknowledges and includes the right to free expression, and notes that the rights of the Conventions are to be taken together as a whole.¹²¹ Reflecting the reality of overlapping prejudicial discourses such as those experienced by some Muslims on the basis of religion, race, and national origin or migrant status, it addresses intersecting forms of hate and discrimination that may be experienced by racial and religious minorities. It likewise recognizes the existence of hate speech targeting persons belonging to certain ethnic groups who profess or practice a religion different from the majority.¹²²

General Recommendation #35 calls on States to take positive action to combat all forms of racist hate speech, whether direct or indirect and in whatever form.¹²³ It explains that this action should include

legislative, executive, administrative, budgetary and regulatory instruments, plans, policies, programmes, and regimes.¹²⁴ Specifically, the Recommendation suggests the use of anti-racist, intercultural, and human rights-focused education, as well as balanced historical education that recognizes the contributions of all groups to national identity.¹²⁵ Such education programs should be based on systematic data collection on the emergence of hate speech, something related to the call in M-103 to collect data on hate crimes against Muslims in Canada.¹²⁶ It also notes the connection between the prohibition on hate speech and the enjoyment by all human beings of several other fundamental rights, including the right to equality.¹²⁷ These recommendations can be used to help guide Canada in evaluating, and stepping up, its measures to combat Islamophobia and related intolerance and discrimination.

The Committee exhibits particular concern where racist hate speech comes from a public authority or institution, and calls for the formal rejection of hate speech by high-level public officials. It also emphasizes the importance of media refraining from racist stereotyping and adopting codes of professional ethics respecting human rights standards. However, the Committee also emphasizes that criminal sanctions for hate speech should be used only in serious cases proven beyond a reasonable doubt.¹²⁸

iv) Resolutions passed by the United Nations Human Rights Commission and Human Rights Council¹²⁹

a) Implementation of the Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief (1986)¹³⁰ (Resolution 1986/20)

Resolution 1986/20 expresses deep concern at reliable reports of the failure to implement the 1981 Declaration and appoints a Special Rapporteur to investigate and recommend measures to promote its full implementation.¹³¹ The original mandate for the Special Rapporteur was extended in 2007 and again in 2016.

b) Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief (2007)¹³² (Resolution 6/37)

Resolution 6/37 reaffirms an appeal to governments to counter intolerance and violence based on religion or belief and, like the General Comments above, stresses the importance of education and intercultural dialogue in achieving these goals.

In its substantive provisions, it condemns all forms of intolerance and discrimination based on religion or belief and all violations of freedom of thought, conscience, religion or belief.¹³³ In this way it aligns with the Parliamentary condemnation of intolerance in M-103. It expresses deep concern at a rise in intolerance and violence, including where motivated by Islamophobia, anti-Semitism, and

Christianophobia, as well as social and institutional forms of intolerance and discrimination.¹³⁴ It condemns all instances of incitement to discrimination and violence through religious hatred.¹³⁵ Like the instruments before it, it describes freedom of religion as part of and essential for freedom of thought and conscience.¹³⁶

Resolution 6/37 also urges States, in relation to the right to freedom of religion or belief, to:

- Ensure effective legislative protections and remedies
- Promote tolerance in and through education systems
- Take extra care to protect women and vulnerable people
- Prohibit incitement to violence or discrimination based in religious hatred
- Take measures to protect religious sites
- Review any religion-based registration systems
- Ensure the rights to worship, assembly, and the establishment of charitable organizations
- Ensure no one is denied the right to life, liberty, security of person, freedom from torture, and freedom from arbitrary arrest on account of religious belief
- Ensure no public official may discriminate on the basis of religion, and
- Take all appropriate action to combat hatred, intolerance, intimidation, and violence based in religious intolerance.¹³⁷

It further notes the need to take special care to ensure these rights accord to women as well as men, both within and among religions, and to take steps to strengthen intercultural and global dialogue on addressing religious intolerance.¹³⁸ Of particular relevance to Islamophobia in Canada, it specifically states that no religion should be equated with terrorism and that this may negatively impact the right to freedom of religion.¹³⁹

c) Freedom of Religion or Belief (2016)¹⁴⁰ (Resolution 31/16)

Adopted in 2016, Resolution 31/16 reiterates the right to freedom of religion and belief as laid out in previous resolutions.¹⁴¹ It highlights the interdependency of the right to freedom of expression and the right to freedom of religion or belief, and emphasizes the important roles these rights can play in combating intolerance.¹⁴² The Resolution describes a series of obstacles to the free enjoyment of the right to freedom of religion or belief, including discrimination, intolerance, violence, religious extremism, and religious hatred.¹⁴³ This provides a clear indication that instances of discrimination or violence against Muslims in Canada may violate rights to freedom of religion. Like Resolution 6/37, this instrument stresses that no religion ought to be equated with terrorism, and condemns acts of terror targeting anyone, including those belonging to minority religions.¹⁴⁴ Finally, it urges States to increase their efforts to promote freedom of thought, conscience, religion or belief through the measures laid out in previous resolutions.¹⁴⁵

v) Reports of the Special Rapporteur on Freedom of Religion and Belief

a) *Perspective and Vision for the Mandate of the New Special Rapporteur*¹⁴⁶

The new Special Rapporteur on Freedom of Religion and Belief, Mr. Ahmed Shaheed, published a report in 2017 with relevant points regarding countering discrimination and prejudicial discourses against Muslims in Canada. First, the Rapporteur describes the use of an “operational approach” to securing universal enjoyment of the right to freedom of religion or belief. This approach combines conventional legal approaches to rights implementation with other State actions, including policy, activities, and programs designed to ensure rights are enjoyed in practice.¹⁴⁷ He notes the particular importance of multi-pronged actions in light of concerning violations of the right to freedom of religion and belief around the world (such as justifying scrutiny of religious groups on national security grounds, and increasing societal intolerance of minority religions); these violations reflect trends occurring both in Canada and around the world.¹⁴⁸ The Rapporteur calls on Parliaments to play a key role in combating intolerance, and recommends establishing independent national human rights institutions to help guide dialogue between people of different faiths.¹⁴⁹

b) *Two Closely Related Rights: Freedom of Religion or Belief and Freedom of Expression*

The Rapporteur also gave guidance on the close relationship between freedom of expression and freedom of religion or belief in a 2016 report. He addresses the common perception of these rights being in conflict, noting that some view the former as a “green light”, and the latter as a “stop sign.”¹⁵⁰ The Rapporteur clarifies that freedom of religion is a human right held by people who possess and manifest belief (or nonbelief), which does not protect beliefs themselves from critique. He also notes that freedom of expression is an essential component of freedom of religion.¹⁵¹ Both rights require full protection for the inner thoughts and beliefs of individuals, but may allow, in limited circumstances, limitations on their outer expression. The Rapporteur emphasizes that States bear the responsibility of creating a climate and space where interfaith and intercultural dialogue can occur. He also reiterates the State responsibility to work with stakeholders to develop policies that combat stereotyping and discrimination of persons of any particular religious background, and to clearly condemn any incitement to discrimination or violence that draws on religious hatred.¹⁵² Noting that any criminalization of incitement to violence should be clearly defined and in line with international law,¹⁵³ the Rapporteur suggests drawing on the *Rabat Plan of Action* (discussed below) to find appropriate solutions to protect both rights together.

c) *Report of the Special Rapporteur on Contemporary Forms of Racism, Racial Discrimination, Xenophobia and Related Intolerance: Report on Mission to Canada, 2004*¹⁵⁴

The Special Rapporteur on Contemporary Forms of Racism, Racial Discrimination, Xenophobia and Related Intolerance, Mr. Mutuma Ruteere, visited Canada in 2003 at the invitation of the government to assess the overall situation in Canada on racism and related intolerance. He noted that Canada is a

strongly multicultural society and proud of this fact, supporting multiculturalism through many government initiatives and projects.¹⁵⁵

However, he also noted that Canada is not free from discrimination against ethnic, racial, cultural, and religious groups. He expressed particular concern about discrimination against indigenous people and communities and noted experiences of discrimination also reported by members of African and Caribbean communities.¹⁵⁶

In relation to Muslims and Arabs in Canada, the Rapporteur noted the alleged commission of hate crimes and instances of racial profiling, also pointing out that some media had contributed to creating a negative image of Arabs and Muslims.¹⁵⁷ The report describes accounts from Arab and Muslim communities explaining that unemployment is a problem, including for highly qualified community members, and expressing the belief that this contributes to a negative image of Muslims and Arabs in Canada. Particular challenges are faced by Muslim women, including "...bullying, negative attitude, racial slurs, rejection from employers because they wear the hijab, or [being] forced to give up wearing it."¹⁵⁸ The Rapporteur further notes that Status of Women Canada has provided some technical and financial support to Muslim women to address media-related concerns.¹⁵⁹

The Rapporteur recommended "an intellectual strategy to back up the legal strategy", in particular to better understand and create awareness of the roots of racism and discrimination and achieve a more democratic, egalitarian and interactive form of multiculturalism.¹⁶⁰

*d) Report of the Special Rapporteur in the Field of Cultural Rights: Facing up to the Avalanche of Hate, the impact of fundamentalism and extremism on cultural rights, 2017*¹⁶¹

The Special Rapporteur in the field of cultural rights, Karima Bennouna, issued a report in January of 2017 expressing deep concern at "rising tides of fundamentalism and extremism."¹⁶² The report speaks to contemporary forms of extremism that are especially damaging to cultural rights, based in "myths of a homogeneous nation, claims of ethnic or racial superiority or purity, and populist ultranationalism directed against liberal and pluralistic democracy."¹⁶³

Concern over this form of extremism and its impact on religious and ethnic minorities, as well as migrant and refugee populations in Canada, lies at the heart of the present report. For countries to best counter the growth of discourses based in hateful rhetoric, the Special Rapporteur emphasizes the importance of using human rights instruments and concepts to counter both fundamentalism and extremism. While some governments have responded to concern about extreme discourses by limiting rights and freedoms, the Special Rapporteur rebuts this false dichotomy, emphasizing that the most effective responses to discourses that ignore and disparage human rights are based in the strengthening of human rights.¹⁶⁴ As she says, "[t]here is no clash of civilizations. Increasingly, however, there is a clash within each civilization between those who champion human equality and universal human rights and those who do not,

sometimes due to fundamentalist or extremist ideology.”¹⁶⁵ Of particular relevance to Canada, the report declares that States must protect all people from coercive acts perpetrated by extremist groups, and directs States to turn to human rights defenders and their long-standing work developing methods to combat extreme discourses, to inform their efforts.¹⁶⁶ This would include, of course, both Islamophobic extremists, as well as violent fundamentalists of any color.

e) World Conferences and Expert Meetings: Rabat Plan of Action

The Rabat Plan of Action arose from a series of expert workshops organized by Navi Pillay, former UN High Commissioner for Human Rights.¹⁶⁷ The outcome document from these workshops provides additional guidance to States on their legislative and policy responsibilities related to the prohibition of incitement to national, racial or religious hatred. The document emphasizes the importance of freedom of expression. It also notes the serious problem of discrimination and violence experienced by individuals and groups due to their perceived ethnicity or religion. Like many of the instruments discussed in this section, the Rabat document suggests that the rights to freedom from discrimination and freedom of expression are interdependent rather than contradictory. It notes that to manifest religion requires freedom of expression, and that freedom of expression, in turn, requires respect for a diversity of opinions and beliefs, including religious beliefs.¹⁶⁸ The document expresses concern at the lack of prosecutions for actual cases of incitement, as well as vague laws around incitement being used to criminalize minorities and their speech.¹⁶⁹

The Rabat document issues recommendations to States on how best to approach legislation, jurisprudence, and policy addressing the prohibition on incitement to hatred. The document explains that the ICCPR *permits* restrictions on hate speech for certain purposes, but *obliges* States to prohibit incitement to discrimination, hostility, or violence.¹⁷⁰

Under legislative changes, it recommends the repeal of blasphemy laws and the adoption of comprehensive anti-discrimination legislation including both preventative and prohibitive measures.¹⁷¹ For laws prohibiting incitement to discrimination, hostility, and violence, it gives more detailed guidance, noting that criminal sanctions on speech should be clearly defined exceptions to rights to free expression.¹⁷² The Rabat Plan suggests using a three-part test for criminal sanctions, weighing the legality, proportionality, and necessity of criminal speech restrictions to ensure they are in line with international obligations.

The Plan also provides guidance for judicial systems. Some recommendations, including ensuring an independent judiciary, demonstrate areas where Canada is already meeting expectations. The Plan notes, however, that access to justice issues may arise for vulnerable groups who may be the subject of hateful incitements. The document emphasizes that due to vulnerability and distrust of courts or law enforcement among some minority groups, access to effective remedies (whether civil or criminal) for hateful speech may be limited.¹⁷³ As part of assessing its anti-discrimination regime, Canada should

consider the level of substantive access Muslim communities have to legal remedies (whether civil or criminal) when they experience discrimination, violence, or hateful harassment. Another key element to Rabat's jurisprudential recommendations is a six-part test to determine the severity of hateful speech. These recommendations advocate for an analysis of context, the speaker, the intent, the content and form, the extent of the speech (referring to reach and audience), and the likelihood it will be acted on through incidents of discrimination, hostility, or violence, by anyone, against the targeted group.¹⁷⁴ The test also notes, however, that there is no requirement that incitement be acted on. Rather it encourages courts to look for a reasonable probability that the speech would be acted on.¹⁷⁵

The Rabat Plan also recommends that States adopt or enhance several policy-based approaches to countering hatred based on nationality, ethnicity, religion, or belief. These include strengthening broad-based efforts against negative stereotyping, providing training for teachers and increasing education directed at human rights values, promoting intercultural and gender-sensitive dialogue, educating all actors in law enforcement and justice systems on the prohibition on incitement, and systematically collecting data on all incidents related to hate-based offences.¹⁷⁶ The Plan also recommends considering the creation of equality bodies to promote social dialogue and consider complaints pertaining to the incitement to hatred.¹⁷⁷ Further, it notes the importance of the State adopting a framework that promotes pluralism and diversity of the media, as well as open access to media for all communities.¹⁷⁸ It also recommends that States take steps to strengthen and support international mechanisms aimed at combating hatred.¹⁷⁹

Part II – Influential Regional and Foreign Law

The development of Canadian law has been assisted by reference to foreign legal systems. For instance, Canada's recent changes to the criminal laws on prostitution have been modelled from the experiences of Sweden, Norway, and Iceland (the "Nordic Model").¹⁸⁰ Further, under Chief Justice Beverley McLachlin, the Supreme Court of Canada has cited English cases in six percent of Canadian judgments, American cases in approximately three and a half percent of Canadian judgments, and other jurisdictions by about one and a half percent.¹⁸¹ While Canada is evidently not obligated to follow foreign jurisprudence, the international context has clearly informed some developments in Canadian law. Thus a survey of foreign law and best practices of other nations is useful as a guideline for how Canada may address Islamophobia in light of freedom of expression concerns.

A) European Court of Human Rights

The European Court of Human Rights ("ECtHR") is a supra-national court established in 1958 with jurisdiction over claims arising out of the European Convention on Human Rights ("the Convention").¹⁸² Drafted in 1950 by the Council of Europe, a group of 47 European States, the Convention is an international treaty to protect human rights and fundamental freedoms in Europe.¹⁸³ It came into force on September 3, 1953.¹⁸⁴ Both state and individuals may submit an application to the Court on alleged

breaches of the Convention.¹⁸⁵ The ECtHR's jurisprudence is binding on member States¹⁸⁶ and is thus integral to the development of human rights law in Europe.

Religious freedom is considered to be one of the foundations of democratic society and is a substantive right under the Convention.¹⁸⁷ Article 9 provides that everyone has the right to freedom of religion, including the freedom to manifest his or her religion or belief "either alone or in community with others and in public or private" subject only to limitations "as prescribed by law", and as "necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others".¹⁸⁸ The qualifying term "necessary in a democratic society" means that the limitation must address a "pressing social need" and is not merely a preference, or of limited utility.¹⁸⁹ In order to justify State-imposed limitations on the freedom of religion and the legitimate ends enumerated in Article 9, State authorities must prove that "no other means" exist that interfere less seriously with the freedom of religion.¹⁹⁰

In implementing and interpreting the Convention, the ECtHR has recognized and enshrined freedom of thought, conscience, and religion in its jurisprudence. But while foundational, the ECtHR recognizes that religious freedom is not absolute. As part of a commitment to a pluralistic society of religious and non-religious people, a general purpose of Article 9, the European Court holds that members of religious communities must tolerate and accept the denial of others of their religious beliefs and even the propagation of other doctrines hostile to their faith.¹⁹¹ Thus, it is not proper for States to censor public expressions if the matters are of general public interest, presented in the context of a public debate, and if the statements cannot be objectively seen to incite violence.¹⁹² The protection of the right to religious freedom is therefore balanced with freedom of expression interests.

While tolerance of different beliefs is mandated in Europe, the State continues to have an obligation to protect the rights of individuals to manifest these beliefs, subject to limitations prescribed by law and necessary in a democratic society in pursuit of other legitimate aims.¹⁹³ For instance, the State is strictly prohibited from infringing on a person's public expression of his or her religious beliefs on the sole grounds of "protecting national security", as "national security" is not part of the legitimate aims enumerated in Article 9 of the Convention.¹⁹⁴ Moreover, the exercise of freedom of expression may not be used to lead to the destruction of rights and freedoms granted by the Convention, in this case, freedom of religion. For example, in *I.A. v. Turkey*, Turkey was found to have been justified in fining a publishing house for publishing a novel that criticised religion in general and Islam in particular, as the novel's comments presented "an abusive attack on the Prophet of Islam" such that "believers [might] legitimately feel themselves to be the object of unwarranted and offensive attacks."¹⁹⁵ Given the history of violent religious conflict in Turkey, the ECtHR afforded Turkey a margin of appreciation to curtail freedom of expression in order to achieve a legitimate aim of maintaining public order.¹⁹⁶ The court held that expression may be justly curtailed if the state's history illustrates that censorship is necessary to protect the right of people to freely manifest their religious beliefs in the public sphere. In another case,¹⁹⁷ the Court held that no breach of freedom of religion exists when no causal link can be reasonably

established between a published article warning about the dangers of a religion and the article's prohibitive effects on individual manifestation of that religion.

Under ECtHR jurisprudence, the State is also obligated to protect the peaceful manifestation of religious communities' beliefs. For example, in *Begheluri v Georgia*, Georgian police were found to have acted discriminately and in contrast to the Convention's protections of religious freedom when they refused to stop an assault against a peaceful meeting of Jehovah's Witnesses. Preventing violence against religious groups is thus one component of European member state obligations under the Convention.

B) European Commission Against Religious Intolerance (ECRI)

The ECRI is a Council of Europe human rights body comprised of a panel of experts that monitors and addresses racism, xenophobia, antisemitism, intolerance, and racial discrimination.¹⁹⁸ The body prepares reports and issues recommendations to ECRI members. While non-binding on member States, the declarations made by the ECRI represent approaches endorsed by the Council of Europe.

On 17 March 2005, the ECRI adopted the *ECRI Declaration on the Use of Racist, Anti-Semitic, and Xenophobic Elements in Political Discourse*. In this declaration, the ECRI calls on European political parties or national parliaments to legislate penalization of political leaders who promote racism or who support groups that promote racism.¹⁹⁹ The ECRI further encourages European political parties to enact self-regulatory measures and develop a responsible attitude towards racism.²⁰⁰ The Commission was especially concerned that racist and xenophobic political discourse conveying prejudices and stereotypes about Islam were becoming more prevalent, destabilizing the peace, infringing disproportionately on affected groups' enjoyment of right and disrupting social cohesion in Europe.²⁰¹ The ECRI notes with concern that this inflammatory political discourse encourages racist and xenophobic undertones of debates regarding immigration and asylum, and suggests that political parties and national legislatures are ethically obligated to condemn and prevent racist political discourse.²⁰²

The ECRI referenced this Declaration on December 2012 when it released a statement concerning racist and xenophobic political activities in Greece following the Greek economic crisis. The ECRI suggests that political parties may be justly dissolved – notwithstanding the right of individuals to freely associate in political parties – when the political parties advocate the use of violence and hate crimes against immigrants, political opponents, and ethnic minorities.²⁰³ The ECRI also suggests that individual rights to free association into political parties may be justly curtailed to enforce dissolution of the political party when the rights of others to live free from discrimination and racialized violence is in peril as a result of the exercise of these political rights.

C) Foreign Jurisdictions: Case Law on Discrimination, Hate Crimes, and Incitement to Hatred

While maintaining their sovereign independence, Canadian courts have nevertheless considered

jurisprudence from the Supreme Court of the United States (SCOTUS) as well as other national courts when making their own determinations.²⁰⁴ A brief look at foreign caselaw is helpful in elucidating global standards and trends of other progressive courts that have grappled with these issues.

i) United States

The United States does not have formal laws on hate speech, in part reflecting its strong commitment to freedom of all speech as expressed in the First Amendment to its constitution. It does, however, have anti-discrimination legislation, which has been applied to the situation of Muslim women who wear a hijab. *EEOC v Abercrombie & Fitch* (2015)²⁰⁵ illustrates the scope of U.S. anti-discrimination laws as they pertain to employment and religious dress. This case involved a decision by Abercrombie not to hire Samantha Elauf, a Muslim woman who wore a hijab, due to the concern that her hijab would violate the store's policy on employee dress. SCOTUS rejected an argument by Abercrombie that had been successful at the 10th Circuit Appeals Court, which would have placed the burden on a prospective employee to make a religious accommodation claim, and instead clarified that Title VII of the *Civil Rights Act* of 1964 places an affirmative obligation on employers not to discriminate in hiring because of an individual's religious observance or practice. SCOTUS further clarified that Title VII provisions prohibiting discrimination in employment decisions based on the need to accommodate a religious practice applied regardless of whether the employee had informed the potential employer of his/her need for an accommodation. This jurisprudence illustrates how anti-discrimination laws are violated by restrictions on the religious dress of Muslim women and may be helpful to Canada in ensuring that similar discrimination is not permitted under federal or provincial law.

ii) United Kingdom

The United Kingdom has provisions within its Crime and Disorder Act that create racially or religiously aggravated forms of offences.²⁰⁶ UK courts have found that racially or religiously abusive statements can be sufficient to meet this threshold. The case of *DPP v Woods* involved an accused verbally assaulting a nightclub employee who had refused the accused admission to the nightclub.²⁰⁷ In this case, the court had opportunity to interpret section 28(1)(a) and (b) of the *Crime and Disorder Act* 1998.²⁰⁸ It held that racially or religiously abusive statements made in the context of a crime were sufficient to meet the section 28 definition. Specifically, the court found that it did not matter if the accused had additional reasons for the racially abusive statements. In *R v Rogers*, the accused had, in the course of an argument, shouted at a group of young Spanish women to "get back to your own country", calling them "bloody foreigners".²⁰⁹ The House of Lords expanded farther on the meaning of section 28(4) of the *Crime and Disorder Act*, finding that it included verbally abusive language directed at a person's national origin or migrant status.

iii) France

As a civil law country, case law in France carries less significance than it does in Canada, the UK, and the United States. However, there have been interesting developments pertaining to hate speech law in recent years. To the extent that the Napoleonic code in Quebec mirrors the French civil code, these developments could be instructive within the Canadian context.

Like many European nations, France has an established practice of limiting freedom of expression where certain expressions constitute hate speech or Holocaust denial, and has applied these to cases involving anti-Muslim rhetoric.²¹⁰ The penal code of France prohibits expression that incites hatred, harm, or discrimination against anyone for their real or perceived ethnicity, race, nationality, religion, sex, sexual orientation, or (dis)ability.²¹¹ Marine Le Pen, leader of the French National Front party, has been charged twice for comments made about Muslims during her campaign activities in 2010²¹² – specifically, comments comparing Muslims praying in the streets to the Nazi occupation of France during the second World War. In addition to being stripped of her legislative immunity by the European Court of Human Rights in 2013²¹³, Le Pen was charged under the *Penal Code of France* but acquitted in 2015, having successfully argued that her comments pertained only to specific Muslim individuals, and not Muslims as a whole.²¹⁴ More recently, French mayor Robert Menard has been charged under the same law for comments about “the great replacement”, referring to a view that parts of France exist where Christian residents are being replaced by Muslim ones.²¹⁵

These examples of international legislation and jurisprudence show that countries and multinational institutions around the world recognize the existence of hatred and discrimination as a problem for their societies. Many prominent national governments and regional institutions have followed the requirements and recommendations of international human rights law and passed both anti-discrimination and anti-hate laws. Even the United States, with its strong approach to defence of speech, has found sentencing laws allowing for the consideration of hateful speech to be constitutional.²¹⁶ Canada may also look to the U.K. where, in keeping with international standards requiring prohibition of incitement to discrimination or violence, hateful speech is considered an aggravating factor in the context of assault and has been extended to include hateful speech based on migrant status. Meanwhile, France has prosecuted public figures who allegedly engaged in incitement to hatred. While France and other jurisdictions are not immune to passing discriminatory legislation (such as those attempting to ban or regulate the dress of Muslim women), their willingness to enforce incitement laws against prominent figures suggests a strong commitment to the prohibition on incitement. Jurisprudence from the ECtHR is likewise instructive on the need to balance the mutually dependent rights of freedom of expression and freedom of religion, allowing limitations on the manifestation of beliefs only under narrow circumstances. The ECRI, meanwhile, provides an example of a human rights body perhaps similar to the national ones recommended in the Rabat Plan of Action, able to proactively observe and respond to concerning trends toward intolerance or hatred – and is one that Canada could consider emulating at the domestic level.

Part III – Canadian federal legislation and common law jurisprudence addressing racial and religious discrimination

The following section focuses on Canadian legislation and jurisprudence to ascertain whether the domestic legal order adequately safeguards Muslims from discrimination and prejudice and upholds Canada's international obligations to prevent religious and racial discrimination as a whole.

A) Domestic Legislation

i) Canada's Criminal Code and the Crimes Against Humanity and War Crimes Act

Section 318 of the Criminal Code prohibits advocacy and promotion of genocide against an identifiable group, while Section 319 of the Criminal Code of Canada states that it is a criminal offence to either incite or wilfully promote hatred against an identifiable group. In Sections 318 and 319, an identifiable group includes "any section of the public distinguished by...race, religion".²¹⁷ Under Section 319 (1), incitement is punishable if it is likely to lead to a "breach of the peace" and if it occurs in a "public place".²¹⁸ Under Section 319(2), an offence for wilful promotion of hatred is confined to statements made "other than in private conversation".²¹⁹ These two offences in Section 319 are distinct from one another.²²⁰ Exceptions to Section 319(2) include: statements that are true, statements made in good faith that are based on a religious subject or belief in a religious text, statements relevant to any subject of public interest or public benefit that were reasonably believed to be true, and a good faith intention to point out and remove those matters that are likely to produce hatred toward an identifiable group.²²¹

Section 430(4.1) makes it an offence to commit mischief concerning a building or structure used for religious worship. In order to constitute an offence under this section, the mischief must be motivated by "bias, prejudice or hate based on religion [or] race".²²²

These provisions of the Criminal Code assist in implementing Canada's international legal obligations under Article 6 of ICERD and Article 20(2) of the ICCPR. Further, by creating a criminal offense for incitement or promotion of hatred against an identifiable group, and by protecting religious buildings and structures from hateful acts, Canada takes significant steps toward preventing actions that may promote and incite widespread discrimination against identifiable groups. These provisions, along with the Crimes Against Humanity and War Crimes Act (which criminalizes genocide *per se*), protect vulnerable groups against the most extreme forms of discrimination and likely fulfil Canada's obligations under the Genocide Convention.

However, prosecutions under these sections of the Criminal Code are rare, even amidst the growing trend of hate crimes in Canada.²²³ This infrequency likely results from the omission of any definition of "hate crime" in the Criminal Code and the high threshold for prosecution embedded in these provisions.

Moreover, motivations for other potential hate crimes (such as general mischief or assault), apart from Section 430 (4.1), are only taken into account in sentencing.²²⁴

Offences under these sections may be difficult to substantiate as they require proof that the accused acted intentionally out of hatred. The Criminal Code also requires consent from the Attorney General of Canada in order to proceed with charges for communicating statements that incite or wilfully promote hatred against an identifiable group²²⁵, and for promotion or advocacy of genocide.²²⁶ The process for obtaining consent is tedious, and it is not clear why these provisions fall under this requirement, or why an offence under Section 319(1) is exempt from the requirement of consent.²²⁷ It has been suggested that the determination of the Attorney General centres on whether the alleged crime is in the “public interest”.²²⁸ This still allows, however, for the possibility that all the elements of the crime could be met and consent still not given by the Attorney General, resulting in discriminatory actions being tolerated. This requirement for prosecution also has proven to be a barrier, and is especially problematic in relation to online forms of discrimination, which is an increasingly popular avenue for communication.²²⁹ Further exacerbating this problem, the definition of “communicating” in 319(7) is outdated and does not refer explicitly to online forms of communication, and Section 13, which referred to online discrimination, was repealed in 2014. Despite attempts by the Department of Justice to consult on the issue of online hate crimes²³⁰, no comprehensive approach has been adopted to cater specifically to this unique and developing avenue for discrimination and prejudice and to replace the repealed provision in this Act.

Finally, the requirement that incitement of hatred lead to a breach of the peace is a high threshold under Section 319(1), and significantly more narrow than what Article 20(2) of the ICCPR requires of States parties’ legislation. Similarly, the defence of “public interest” under Section 319(3)(c) is inherently vague. Thus, while a legislative framework is currently in place, access to these provisions for protection against all forms of religious and racial discrimination could be improved and the provisions themselves strengthened.

ii) The Canadian Multiculturalism Act (“CMA”)

The CMA supplements Section 27 of the Canadian Charter of Rights and Freedoms (“the Charter”, which provides for a constitutional right to the “preservation and enhancement” of multiculturalism in Canada.²³¹ The preamble of the CMA recognizes the necessity and importance of equal protection of the law for all citizens, the right to religion, and the diversity of race and religion, for Canadian society. It also recognizes Canada’s international obligations under the ICCPR and the ICERD.²³²

The substantive sections of the CMA outline Canada’s multicultural policy. This policy includes recognizing and promoting the idea that “multiculturalism reflects the cultural and racial diversity of Canadian society” and that each individual citizen has the right to preserve their cultural and racial heritage.²³³ Further policy includes: promoting programs in federal institutions that enhance respect for diversity in Canadian society²³⁴, enhancing the development of communities that share a common origin²³⁵, and

fostering appreciation for the diverse cultures of Canadian society²³⁶. Finally, the CMA mandates the Minister of Canadian Heritage to promote implementation of this policy in Canada²³⁷ and to provide annual reports to Parliament (Section 8). The Canadian Government has also exercised its discretion to enter into agreements with all ten provinces to implement the multiculturalism policy in Canada under Section 6(2).

While the principles expressed in the CMA promote diversity in Canada and assist in upholding Canada's international obligations under the ICESCR, the ICCPR, and the ICERD, the language and obligations throughout the Act are inherently vague. Although some provinces publish their annual reports for the public, the Ministry of Canadian Heritage, having obtained control over implementation of this Act in 2015, has failed to disseminate the federal reports to the public.²³⁸ The information contained in these reports describes how the Canadian government continues to implement and promote the CMA, provides guidance for provincial governments, and strongly relates to Canada's obligations under Article 13 of the ICESCR to promote the principles of tolerance and friendship amongst all racial, ethnic and religious groups. It is thus an important tool for all Canadians. Further, dissemination enables individuals to "participate effectively in a free society" (Article 13(1)) and to hold the government accountable for gaps in their implementation of the Act. Therefore, while dissemination is not explicitly required by the Act, in order to better uphold Canada's international obligations and to foster an environment that opposes intolerance and discrimination, public annual updates on implementation of the Act would be beneficial for all Canadians.

Finally, despite insufficiencies in its implementation, Canada's 2005 National Action Plan Against Racism provides an example of a comprehensive strategy for implementation of these obligations.²³⁹ An updated Action Plan Against Racism would provide a helpful supplement to the spirit and goal of the Canadian Multiculturalism Act. Further, in response to the changing cultural climate of Canada through an influx of immigrants and refugees, the Canadian government must update their approach to account for current and developing issues relating to their obligations under the ICERD.

iii) Foreign Policy and National Security Legislation

For foreign nationals, the Immigration Refugee Protection Act ("IRPA") explicitly prohibits the return of a "Convention refugee", which is defined as a person who has a well-founded fear of persecution for enumerated grounds in IRPA. The grounds for persecution include both race and religion.²⁴⁰ The IRPA also protects Convention refugees from being returned to their country of origin for reasons of race and religion.²⁴¹

Similarly, the Extradition Act provides that the Minister of Justice ("MoJ") shall refuse the request for extradition, if the request is for the purposes of prosecuting or punishing the individual on racial or religious grounds.²⁴² The use of the word "shall" in the provision does not provide for discretion to be exercised by the MoJ and, instead, mandates the refusal by the MoJ in the circumstances provided by the

Act.²⁴³

These provisions seek to protect foreign nationals from religious and racial discrimination both domestically and abroad. Through this legislation, Canada upholds many of its international obligations, especially those under Articles 7, 18, and 26 of the ICCPR, and Articles 3-7 of the ICERD. Even so, in 2013 the Human Rights Committee issued a ruling under the ICCPR Optional Protocol stating that Canada violated the ICCPR by attempting to return an individual to Pakistan where he faced a real risk of religious persecution.²⁴⁴ Thus, there again exists a gap between implementation and law, which Canada is obligated to narrow in order to protect vulnerable individuals and be in line with its international obligations.

Finally, for permanent residents and citizens of Canada, the Emergencies Act strictly prohibits, in all circumstances, detention, imprisonment, or internment for reasons of race or religion.²⁴⁵ While this provision assists in giving direct effect to Article 4(1) of the ICCPR, it still leaves a gap regarding foreign nationals and does not provide them adequate protection in times of emergency. The ICCPR Committee, on several occasions, has reminded States parties of their obligations to non-citizens under Article 2(1) of the ICCPR.²⁴⁶ In order to adequately protect all individuals from arbitrary and discriminatory detention, Canada should revise Section 4(b) of the Emergency Act to include foreign nationals.

iv) Canadian Human Rights Act (“CHRA”) and the Charter of Rights and Freedoms (“the Charter”)

The Charter protects freedom of religion, freedom of conscience, the right to equality, and freedom from discrimination based on race and religion.²⁴⁷ Specifically, the Charter holds individuals equal before the law without discrimination, and promotes legislative action to combat existing discrimination.²⁴⁸ While discriminatory government action can be constrained by Section 15 of the Charter, individual acts of discrimination (most frequently hate speech) are regulated through federal and provincial human rights legislation.²⁴⁹

Under Section 3(1) of the CHRA, race and religion are prohibited grounds of discrimination.²⁵⁰ The types of discrimination addressed include harassment, employment, the denial of commercial premises or residential accommodation, publication of discriminatory notices, and the denial of goods, services, facilities, and/or accommodation.²⁵¹

Given Canada’s constitutional division of powers between the federal and provincial government, applicable human rights legislation depends on which level of government regulates a specific area.²⁵² In its most recent review of Canada, the ICERD Committee expressed concern over disparities between provinces and territories in implementation of the ICERD.²⁵³ While the Committee was not overly specific, it is likely that much of its concern stemmed from potential for discrepancies within Canadian human rights legislation in different internal jurisdictions. This is significant since the Provincial government

regulates many areas of potential racial and religious discrimination including: civil and property rights (92(13)), municipalities (92(8)), and education (93).²⁵⁴ Consultation with Provinces and Territories for consistency in upholding human rights should be conducted by the federal government as a way to promote universal national standards.

Both the CHRA and the Charter are enforced through the courts and administrative bodies. It is mainly through these two legislative mechanisms that Canadian case law balances religious and racial discrimination against other rights in Canadian society. The following discussion addresses these common law developments in order to analyze and assess the protection afforded to religious and racial groups in both the CHRA and the Charter.

B) Canadian case law, balancing rights, and hate speech

i) Overall Approach

The main constitutional rights and freedoms engaged by allegations of discrimination on religious or racial grounds are freedom of expression, freedom of religion and the right to equality.²⁵⁵ The approach to balancing each of these rights has been discussed, at length, by the Supreme Court of Canada (“SCC”). When direct conflict between rights occur, the SCC states that these rights should be reconciled through accommodation if possible; however, if a conflict cannot be avoided, they are to be adjudicated on a case-by-case basis.²⁵⁶ The SCC also outlines that the balancing of Charter rights with other rights and values must also take into account Canada’s international obligations.²⁵⁷

ii) Freedom of expression and hate speech

Freedom of expression most commonly conflicts with prohibitions of discrimination in provincial human rights codes. While the SCC has recognized freedom of expression as central to Canada’s democracy, “the right to freedom of expression is not absolute and limitations imposed by human rights codes, including the prohibition of hate speech, may be justified under s. 1 of the Charter”.²⁵⁸ In response, the Supreme Court of Canada (“SCC”) has developed an approach to balancing freedom of expression with other rights, in line with Canada’s international obligations and Section 15 of the Charter.²⁵⁹

Where the term “hatred” is used in human rights legislation, the SCC’s test for whether hate speech has occurred is “whether a reasonable person, aware of the context and circumstance, would view the expression as likely to expose a person or persons to detestation and vilification on the basis of a prohibited ground of discrimination”.²⁶⁰ Hate speech is depicted as antithetical to debate and discourse by making it difficult for members of the discriminated group to respond.²⁶¹

Consequently, speech that would incite harm against others will, more often than not, fail under the Section 1 analysis. The SCC has also affirmed the constitutionality of legislation that fails to include a truth

defence to hateful communication (mainly relevant for human rights codes). This further emphasizes the potential harm recognized by the SCC in this type of speech, for both Canadian society as a whole, and for individual members of vulnerable and identifiable groups.²⁶²

The *Whatcott* case demonstrates the SCC's balancing of competing rights in the context of freedom of expression and hate speech in regards to human rights legislation. In this case, the SCC found the prohibition of hate speech to be a justifiable infringement on freedom of expression. It applied the *Oakes* test to find that the legislative objective of tackling systemic discrimination against identified groups is pressing and substantial, and that the legislation in question (absent certain words) was rationally connected to this objective and was proportional in its effects. The Court noted that hate speech goes beyond distress for targeted groups by laying "the groundwork for later, broad attacks on vulnerable groups ... [that] can range from discrimination, to ostracism, segregation, deportation, violence and, in the most extreme cases, to genocide."²⁶³ The SCC's consideration that hate speech can lead to segregation and genocide aligns with the international legal approach towards hate speech balancing determinations.²⁶⁴ Therefore, cases of hate speech in the context of Islamophobia could be assessed for their contribution to the emergence of potential genocidal or apartheid-like acts.

However, the court in *Whatcott* struck down the portion of the human rights legislation that prohibited expression that "ridicules, belittles or otherwise affronts the dignity of" the targeted groups as an unjustifiable violation of freedom of expression, stating that it was not rationally connected to the legislative objective of combating systemic discrimination against identified groups. The Court reasoned that "[w]hile ridicule, taken to the extreme, can conceivably lead to exposure to hatred... 'ridicule' in its ordinary sense would not typically have the potential to lead to the discrimination that the legislature seeks to address."²⁶⁵ Thus, satire or otherwise derogatory remarks aimed at Muslims or other identified groups may not rise to the level of hatred that exposes a person to detestation and vilification on the basis of a prohibited ground of discrimination. It is unclear, however, where the line is drawn between detestation/vilification and ridicule, and whether there is a practical distinction between these concepts. This finding is in contrast to the ECtHR's decision in *Otto-Preminger Institute v Austria, 1994*, where the Court upheld the Austrian government's censorship of a film that provocatively portrayed objects of religious veneration and noted that the film violated the spirit of tolerance that characterizes democracies, potentially leading to a breach of the peace due to the integral nature of the sentiments being offended.

Overall, the limits of freedom of expression are often balanced by Canadian courts with the democratic values of dialogue and discourse. In this context, courts have emphasized the importance of distinguishing between speech that incites harm against others and that which facilitates dialogue and is more accurately depicted as disagreement or discomfort with the views of others.²⁶⁶ The latter is meant to be upheld by the constitutional protection of freedom of expression while the former has been determined to contravene democratic values and the rights of the recipient (or group of recipients) of hate speech. Canada could benefit from extending its prohibition of speech that incites harm against

others to the United Kingdom's approach in *R v Rogers*, where shouting verbally abusive language directed at a person's national origin or migrant status was found to constitute racially and religiously motivated speech and aggravate a criminal offence. This protective expansion would particularly be relevant to Islamophobia due to the intersections of race (i.e. being perceived as of Arab origin), migrant status, and religion faced by targets of Islamophobic speech. Likewise, rather than dismiss expression that "ridicules, belittles or otherwise affronts the dignity of" targeted groups, Canadian courts could consider adopting a modified version of the ECtHR's approach in *Otto-Preminger Institute v Austria, 1994* in examining the religious sentiment that is being offended by such expression, whether it is integral to the targeted group in question (i.e. Muslims or any other religious group) rather than the majority, and whether such expression violates the spirit of peaceful tolerance in a democracy.

Canada can, in keeping with international standards requiring prohibition of incitement to discrimination or violence, consider hateful speech an aggravating factor in the context of assault and extend hateful speech to include migrant status. It could also adopt the approach of U.S. jurisprudence, which considers hateful speech in sentencing determinations.

iii) Rights to equality

Section 15 of the Charter prevents governments from making distinctions that perpetuate disadvantage and prejudice, enabling them to combat discrimination through affirmative action.²⁶⁷ The SCC has developed a two-part test to determine whether discrimination, under Section 15 of the Charter, has occurred. The first part of the test asks whether "the law create[s] a disadvantage based on an enumerated or analogous ground", while the second question asks whether "the distinction create[s] a disadvantage by perpetuating prejudice or stereotyping".²⁶⁸ The development and application of this test still varies throughout jurisprudence, making it less clear how this provision operates to address allegations of discrimination based on race and religion in the case of Islamophobia and other such forms of discrimination.

In *Alberta v. Hutterian Brethren of Wilson Colony*, where religious objectors challenged the universal photo requirement of Alberta's driver's licenses, the SCC distinguished actions that arise from "demeaning stereotypes" from those that are "a neutral and rationally defensible policy choice".²⁶⁹ This suggests that the public interest may provide a defence to conduct that otherwise may be viewed as discriminatory in nature. However, given that international law finds limitations on rights related to racial and religious discrimination justifiable only for public safety, order, health, morals, and others' fundamental rights, "neutral and rationally defensible" policy choices geared towards the "public interest" likely do not reach the level of these limitations.²⁷⁰

Moreover, *Alberta v Hutterian Brethren of Wilson Colony* does not define the term "public interest" or what constitutes a "neutral and rationally defensible policy choice". This leads to issues regarding how far these terms could be extended to include discriminatory conduct based on policies that are Islamophobic

in their effect but appear neutral on their face. An example of such a discriminatory policy that may arguably appear neutral is the policy requiring one to remove face coverings during the citizenship oath. This policy effectively required a Muslim woman to remove her niqab in the *Ishaq* case, forcing her to choose between her deeply held religious beliefs and receiving citizenship status, despite meeting all the citizenship requirements.²⁷¹ Narrowing the terms “public interest” and “neutral and rationally defensible policy choice” in judicial interpretation to public safety, order, health, morals, and others’ fundamental rights would help to limit the application of potentially discriminatory policies, and bring Canada closer in line with the exceptions allowed for in international law.

iv) Freedom of religion

Finally, freedom of religion is potentially engaged in situations where the government seeks to limit or prohibit certain expressions of religion and conscience. At times, these prohibitions can be carried out in a discriminatory manner, leading to claims under both Section 2(a) and Section 15 of the Charter.²⁷²

Freedom of religion and conscience is recognized, by the SCC, as fundamental to Canadian society. In *R v NS*, the court balanced the right of a Muslim victim of alleged sexual assault to wear her niqab during her testimony in contention with the accused’s right to a fair trial. The defense argued that the accused’s right to a fair trial was implicated by the fact that her niqab should be removed in order to judge her credibility by viewing her facial expressions and demeanor. In balancing both rights, the SCC outlined that “the need to accommodate and balance sincerely held religious beliefs against other interests is deeply entrenched in Canadian law” and “to depart from it would send the law down a new road, with unknown twists and turns”.²⁷³

The approach prescribed by the court in this case for engaging with freedom of religion is “to respect the individual’s belief and accommodate it if at all possible”.²⁷⁴ In this case the court weighed the competing rights, noting the sincerity of the victim’s religious beliefs and the societal impacts on sexual assault victims at the intersections of marginalized religious groups, race, and genders being unable to access justice or discouraged from reporting sexual assault. This was seen to justify the partial impairment on the accused’s right to the examination of the victim’s demeanor (which could still be assessed through her body language, speech, and eyes). This judgment gives further strength to freedom of religion when balancing with competing rights in a manner that is in line with the international obligations to allow freedom in manifesting one’s religion and choosing religious garb, as regulations on the religious clothing women may or must wear in public may be in violation of articles 26 (in this case non-discrimination in access to the justice system) and 18 (freedom of religion or belief) of the ICCPR.²⁷⁵

Another case demonstrating the SCC’s approach to accommodation, *Multani v. Marguerite-Bourgeois* involved a Quebec public school board’s prohibition on a student wearing a kirpan (a small metal sword mandated to be worn in Sikhism) to school, refusing his request to wear the kirpan in a sheath under his clothing, as part of the school board’s broader prohibition on weapons.²⁷⁶ The SCC ruled that the school

board's prohibition was a state action prescribed by law that violated the student's section 2(a) rights, and that it could not be justified under section 1 because it failed the "minimal impairment" portion of the *Oakes* test.²⁷⁷ It reasoned that other items in schools could also be used as weapons but were not prohibited such as pens, scissors, and baseball bats (after noting earlier that the kirpan was not a weapon in the Sikh religion); that there had never been a single violent incident involving kirpans in any Canadian schools; that there was little risk that the student (who had no behavioural problems and no history of violence) would use the kirpan like a weapon at school; and that there was also little risk that other students would take the kirpan from him to use as a weapon since it would be worn under the restrictions imposed by the Quebec Superior Court.²⁷⁸

In its minimal impairment analysis, the Court also distinguished the school environment from commercial airplanes and courtrooms, as previous cases have allowed an absolute prohibition on kirpans for reasons of safety due to the transitory nature of aircraft and the possibly hostile nature of the courtroom.²⁷⁹ In *Multani*, similar to a past 1990 Ontario Human Rights Commission decision on kirpans in Ontario schools, the Court framed the school context as an environment with an ongoing relationship between staff and students, where students can be monitored and each student's circumstances can be examined for accommodation.²⁸⁰

The Court also noted that banning kirpans by framing them as weaponry, and the argument that allowing kirpans would lead to other students bringing in other weapons to school due to feelings of unfairness or to protect themselves against the kirpan, do "not take into account Canadian values based on multiculturalism."²⁸¹ It stated that instead of banning the kirpan by framing it as weaponry, schools should educate other students that the kirpan is a religious symbol of a non-violent nature, and instill in them the value of religious tolerance which is "at the very foundation of our democracy."²⁸²

It is also important to note that, although the Court stated that it did not need to go into the "effects" portion of the proportionality analysis because the infringement was already found to be unjustified prior to this step, it did acknowledge the effects of the prohibition in relation to multiculturalism: "... An absolute prohibition would stifle the promotion of values such as multiculturalism, diversity, and the development of an educational culture respectful of the rights of others."²⁸³ The approach taken by the SCC in this context is in line with Canada's obligations under Article 13(1) of the ICESCR to promote tolerance and diversity of differences within society, and could inform Canada's approach to religious accommodation in the context of other religions' clothing and symbols, such as the niqab in the context of the Quebec ban.

RECOMMENDATIONS

In response to Canada's international obligations and the discussion above, this briefing paper recommends the following:

In relation to international human rights bodies:

- 1) In order to promote religious and racial tolerance, Canada should effectively inform citizens of their right to submit petitions to the Human Rights Committee following the exhaustion of domestic remedies. The government should also properly disseminate decisions of the Human Rights Committee, making them accessible for all individuals within Canada.
- 2) Canada should make a declaration recognizing the Convention for the Elimination of Racial Discrimination ("CERD") Committee as competent to receive individual communications for potential State violations of their obligations under this Convention. It should mention and include instances of Islamophobia and anti-Muslim sentiment in future reports to the Committee.

For domestic legislation and policy:

- 1) In line with the recommendations of the Special Rapporteur on Racism, Canada should take proactive steps to ensure members of Muslim communities, and other minorities, have equal access to the services of law enforcement and the justice system, in practice. Specifically,
 - a) the government should assess the level of trust, safety, and access that members of Muslim communities have with law enforcement and the justice system, and take steps to improve this relationship as necessary;
 - b) law enforcement personnel should receive specific training on anti-discrimination obligations and hate speech laws; and
 - c) the government should institute systems to monitor whether law enforcement personnel are engaging in discriminatory practices against Muslim communities, such as profiling.
- 2) In developing its approach to combating Islamophobia and related intolerance, Canada should keep in mind the advice of the Special Rapporteur on cultural rights and draw on the longstanding work of anti-racist, migrant rights, intercultural, and interfaith groups and human rights defenders. Canada should also, in developing laws and programs, consult with groups most affected by hatred on the basis of religion, race, and migrant status. This should include consultations with women and other marginalized members of affected communities.
- 3) The federal government should consult provincial governments to ensure that educational policies adequately promote religious and racial tolerance, especially toward minority groups

within their respective regions.

- 4) In its most recent review of Canada, the Committee on the Elimination of Racial Discrimination expressed concern surrounding disparities and discrepancies for integration of the Convention and federal mechanisms to combat racism within Provinces and Territories.²⁸⁴ The government should implement initiatives to consult with the provinces and review mechanisms to ensure coordination amongst Provinces and Territories in dealing with racism and religious discrimination.
- 5) It has been seven years since the conclusion of Canada's five-year Action Plan to Combat Racism. In light of the continued influx of immigrants and refugees since this time, the Government should consider creating another Action Plan to combat racism and religious discrimination in response to the ever-changing cultural and social context in Canadian society.
- 6) Canada should repeal the requirement of the Attorney General's consent to proceed with prosecutions under Sections 318 and 319(2) of the Criminal Code.
- 7) The federal legislature should broaden the requirements under Section 319(1) of the Criminal Code, and either clearly define or omit reference to a "breach of the peace," which is inherently vague.
- 8) The federal legislature must define "public benefit" in the defences of Sections 318 and 319 of the Criminal Code to only include public safety, order, health, morals, and others' fundamental rights, in order to limit the scope of permitted defences to those enumerated in international law.
- 9) Section 319(7)'s definition of "communicating", in the Criminal Code, should include more explicit reference to online discrimination, which is growing in frequency.
- 10) The government must develop a comprehensive and consistent approach to online forms of discrimination, in light of the 2014 repeal of Section 13 of the Canadian Human Rights Act regulating internet hate speech.
- 11) In order to adequately protect all individuals from arbitrary and discriminatory detention during declared national emergencies, Canada must revise Section 4(b) of the Emergency Act to include foreign nationals.
- 12) To be effective against racial and religious discrimination, Canadian legislation should explicitly note the history of hate speech as part of the underlying foundation of genocide/apartheid, and expressly stipulate the need to counter hate speech and systemic discrimination.

¹ Committee on the Elimination of Racial Discrimination (CERD), *Concluding Observations of the Committee on the Elimination of Racial Discrimination*, 80th Sess, CERD/C/CAN/CO/19-20 (4 April 2012), para 9.

² See for example: “Flouting International Law, Racism Pervades All Countries, Third Committee Hears at Start of Debate”, United Nations (3 November 2014), online: <<https://www.un.org/press/en/2014/gashc4115.doc.htm>>; Clare Foran, “Donald Trump and the Rise of Anti-Muslim Violence”, *The Atlantic* (22 September 2016), online: <<https://www.theatlantic.com/politics/archive/2016/09/trump-muslims-islamophobia-hate-crime/500840/>>.

³ See, for examples of news articles documenting recent incidents in Canada: Tessellate Institute Report on Islamophobia in Ontario Public Schools: <http://tessellateinstitute.com/wp-content/uploads/2016/11/Examining-Islamophobia-in-Ontario-Public-Schools-1.pdf>; Global News Article, “Hate Crimes Against Muslim Canadians has More than Doubled in Three Years”: <http://globalnews.ca/news/2634032/hate-crimes-against-muslim-canadians-more-than-doubled-in-3-years/>; Global News Article, “Islamophobia Hotline in Alberta Sees Significant Jump in Calls”: <http://globalnews.ca/news/3225020/islamophobia-hotline-in-alberta-sees-significant-jump-in-calls/>; Globe and Mail Article, “Quebec City Mosque Shooting a Wake Up Call for Canada”: <http://www.theglobeandmail.com/news/british-columbia/quebec-city-mosque-shooting-a-wake-up-call-for-canada-bc-lawyer-says/article33854370/>; Toronto Star Article, “Quebec Mosque Shooting ‘Harsh Reminder’ for Canadians that Islamophobia Exists: BC Legal Group”: <https://www.thestar.com/news/canada/2017/02/01/canadians-need-to-openly-talk-about-islamophobia-legal-advocacy-groups-say.html>.

See also, for examples of populist rhetoric based on ‘othering’ being recognized and explored by academic and other writers: Gabriella Lazaridis, Giovanna Campani & Annie Benveniste (eds) *The Rise of the Far Right in Europe* (London: Pgrave Macmillan, 2016); Christina Schori Liang (ed), *Europe for the Europeans: The Foreign and Security Policy of the Populist Radical Right* (Abingdon: Ashgate Publishing, 2007); Ulrike M Vieten & Scott Poynting, “Contemporary Far-Right Racist Populism in Europe” (2016) 37:6 *Journal of Intercultural Studies* 533.

See also, for evidence of political actors in Canada (as well as Poland, England, the United States) engaging in examples of appealing to fear and hatred: CBC Article, “Kellie Leitch defends ‘anti-Canadian values’ survey question”: <http://www.cbc.ca/news/politics/leitch-responds-survey-question-1.3746470>; Washington Post Article, “How a Muslim Veil is Dominating Canada’s Election Race”: https://www.washingtonpost.com/news/worldviews/wp/2015/10/05/how-a-muslim-veil-is-dominating-canadas-election-race/?utm_term=.aa2ab7719f31.

⁴ These obviously include and extend beyond Muslim communities to aboriginal, Jewish, African-Canadian and other diverse communities.

⁵ Throughout history, instances of interaction between the Christian West and Muslims were often precipitated by Western conquest of Muslim territories. Notable flashpoints – such as the Crusades, the Barbary Wars, Napoleon’s occupation of Egypt, the expulsion of Arabs from Palestine in 1948, the Gulf Wars, the War on Terror, and the invasion of Iraq in 2003 – are thought to have fostered prejudice against Muslims and to ultimately entrench Muslims as “enemy” in the minds of Westerners.

⁶ See Sehrish Amjad, “Canada must call Islamophobia what it is – racism”, *Ottawa Citizen* (30 August 2017), online: <<http://ottawacitizen.com/opinion/columnists/amjad-canada-must-call-islamophobia-what-it-is-racism>>.

⁷ *Ibid*; see also “Anti-Islamophobia Motion Offers a Chance to Take a Stand Against Hatred. Why Quibble Over Semantics?” CBC News article, online: <<http://www.cbc.ca/news/opinion/m103-stand-against-hatred-1.3988771>>.

⁸ “Faith and Religion in Public Life: Canadians deeply divided over the role of faith in the public square”, Angus Reid Institute (16 November 2017), online: <http://angusreid.org/faith-public-square/>. A 2011 poll also showed that 56% of Canadians believe Western societies are in “irreconcilable conflict” with Muslim societies. Randy Boswell, “Western, Muslim societies ‘irreconcilable’: poll”, *National Post* (11 September 2011), online: <<http://nationalpost.com/news/canada/western-muslim-societies-irreconcilable-poll>>.

⁹ Anna Mehler Paperny, “Hate Crimes Against Muslim-Canadians More than Doubled in 3 Years”, *Global News* article (13 April 2016), online: <http://globalnews.ca/news/2634032/hate-crimes-against-muslim-canadians-more-than-doubled-in-3-years/>

¹⁰ *Ibid*; “Police-reported hate crime in Canada, 2015”, *Statistics Canada* (14 June 2017), online: <<https://www.statcan.gc.ca/pub/85-002-x/2017001/article/14832-eng.htm>>.

¹¹ See, for example: “Muslims and Indigenous People Face the Most Discrimination in Canada, According to Canadians” (29 December 2016), online: <<http://abacusdata.ca/muslims-and-indigenous-people-face-the-most-discrimination-in-canada-according-to-canadians/>>. According to this survey, 79% of Canadians said there was “some” or “a lot” of discrimination towards Muslims in Canada (67% said the same thing about discrimination towards indigenous people). See also, for example, a 2016 Forum Poll, which surveyed a random sampling of 1304 Canadian adults, and found that 28% held unfavourable feelings towards Muslims. See “Muslims the Target of Most Racial Bias”, *Forum Poll*, online:

<http://poll.forumresearch.com/post/2646/muslims-the-target-of-most-racial-bias/>.

¹² Amjad, *supra* note 6. Statistics Canada notes that “according to the 2011 National Household Survey, 88% of the Muslim population were also members of visible minority groups such as Arab or West Asian or South Asian, and [could] also be targeted by hate crimes motivated by race or ethnicity”, Statistics Canada, *supra* note 10.

¹³ *Ibid.*

¹⁴ Bill 94, *An Act to Establish Guidelines Governing Accommodation Requests Within the Administration and Certain Institutions*, 1st Sess, 39th Leg, Québec, 2011. For a sampling of media and academic commentary, see: “Quebec Will Require Bare Face for Service”, CBC News article (24 March 2010), online: <http://www.cbc.ca/news/canada/montreal/quebec-will-require-bare-face-for-service-1.913095>; “Quebec Niqab Bill Would Make Muslim Women Unveil”, Toronto Star Article (25 March 2010), online: https://www.thestar.com/news/canada/2010/03/25/quebec_niqab_bill_would_make_muslim_women_unveil.html; Meena Sharify-Funk, “Governing the Face Veil: Quebec’s Bill 94 and the Transnational Politics of Women’s Identity” 43 *International Journal of Canadian Studies* (2011).

¹⁵ Bill C-24, *An Act to Amend the Citizenship Act and to make Consequential Amendments to Other Acts*, 2nd Sess, 41st Parl, 2014. Note: in 2016, the government introduced Bill C-6 to repeal these provisions, however, the introduction of the law sent a dangerous message that not all citizens were as trusted or as safe as others; for media commentary, see: “Bill C-24 and the Politics of Citizenship”, CBC News article, online: <http://www.cbc.ca/news/canada/manitoba/bill-c-24-and-the-politics-of-citizenship-1.3260618>; “Bill C-24 Would Undermine Rights to Citizenship”, Toronto Star article, online: https://www.thestar.com/opinion/commentary/2014/06/16/bill_c24_would_undermine_rights_to_citizenship.html.

¹⁶ Bill S-7, *Zero Tolerance for Barbaric Cultural Practices Act*, 2nd Sess, 41st Parl, 2015.

¹⁷ See Cader and Kassamali, “Islamophobia in Canada”. This law was also viewed as an indication of the government’s willingness to make identity politics a key component of their campaign for the federal election that year; see, for example, “Conservatives Pledge Funds, Tip Line to Combat ‘Barbaric Cultural Practices’”, CBC News article (2 October 2015), online: <http://www.cbc.ca/news/politics/canada-election-2015-barbaric-cultural-practices-law-1.3254118>; see also “Barbaric Cultural Practices Bill to Criminalize Forced Marriage, Tackle Honour Killings Passes Final Vote”, National Post Article (17 June 2015), online: <http://news.nationalpost.com/news/canada/canadian-politics/barbaric-cultural-practices-bill-to-criminalize-forced-marriage-tackle-honour-killings-set-for-final-vote>.

¹⁸ As reported by the National Council of Canadian Muslims, online: <https://www.nccm.ca/map/#>.

¹⁹ *Ibid.* See also Ashifa Kassam, “Québec City mosque attack: man charged with six counts of murder”, *The Guardian* (31 January 2017), online: <https://www.theguardian.com/world/2017/jan/30/quebec-city-mosque-shooting-alexandre-bissonnette-murder-charge>.

²⁰ See National Post, “Quebec City Mosque Attack Victims Shot in the Back as they Prayed” (30 January 2017), online: <http://news.nationalpost.com/news/canada/shooting-at-centre-culturel-islamique-de-quebec>. For a sample of media coverage of the Quebec Mosque shooting, see: The Globe and Mail “The Quebec Mosque Shooting: What We Know So Far” (10 February 2017), online: <http://www.theglobeandmail.com/news/national/quebec-city-mosque-shooting-what-we-know-so-far/article33826078/>; The Star, “Thousands Across the Country Mourn Six Killed in Quebec City Mosque Rampage (30 January 2017), online: <https://www.thestar.com/news/canada/2017/01/30/six-dead-two-arrested-after-shooting-at-quebec-city-mosque.html>; CBC News “Only One Suspect in Deadly Quebec Mosque Shooting” (29 January 2017), online: <http://www.cbc.ca/news/canada/montreal/quebec-city-mosque-gun-shots-1.3957686>.

²¹ As reported by the National Council of Canadian Muslims, online: <https://www.nccm.ca/map/#>.

²² “House of Commons passes anti-Islamophobia motion”, *CBC News* (23 March 2017), online: <http://www.cbc.ca/news/politics/m-103-islamophobia-motion-vote-1.4038016>.

²³ See “Anti-Islamophobia motion offers a chance to take a stand against hatred. Why quibble over semantics? Opinion”, *CBC News* (19 February 2017), online: <http://www.cbc.ca/news/opinion/m103-stand-against-hatred-1.3988771>.

²⁴ See “Ontario Legislature Unanimously Passes Anti-Islamophobia Motion”, *CBC News* (23 February 2017), online: <http://www.cbc.ca/news/canada/toronto/ontario-anti-islamophobia-vote-1.3996785>.

²⁵ Bill Graveland, “Trudeau urges Canadians to fight Islamophobia in Eid remarks”, *The Globe and Mail* (1 September 2017), online: <https://www.theglobeandmail.com/news/politics/trudeau-urges-canadians-to-fight-islamophobia-in-eid-remarks/article36144958/>.

²⁶ Scott Neuman, “Quebec Enacts ‘Religious Neutrality Law’ To Curb Full-Face Veils In Public”, *NPR* (19 October 2017), online: <https://www.npr.org/sections/thetwo-way/2017/10/19/558697455/quebec-enacts-religious-neutrality-law-that-curbs-full-face-veils-in-public>.

²⁷ In the first example, an article entitled “L’état Actuel de l’Islam dans l’Afrique Occidentale Française,” Africanist Maurice Delafosse describes “Islamophobie” as “a principle of indigenous administration”; the opposite of “granting preference to Muslims.” The second occurrence comes in the pages of a doctoral dissertation by Allen Quellien, an official in the French foreign ministry. In Quellien’s view, “[p]rejudice against Islam has always been widespread among the people of Western and

Christian civilization and still is". See Bridge Initiative Team, "Islamophobia: The Right Word for a Real Problem: A Research Project on Islamophobia" (26 April 2015), online: <http://bridge.georgetown.edu/islamophobia-the-right-word-for-a-real-problem/>. [BIT, "Islamophobia: The Right Word"]. See also Abdoolarim Vakil, "Is the Islam in Islamophobia the Islam in Anti-Islam; or when is it Islamophobia Time?" in S. Sayyid and Abdoolkarim Vakil, eds., *Thinking Through Islamophobia*, (New York: Columbia University Press, 2010), at 38; and Fernando Bravo Lopez, "Towards a Definition of Islamophobia: Approximations of the Earliest Twentieth Century," 34 *Journal of Ethnic and Racial Studies* 4 (2011), at 563. For more on origins of the term "Islamophobia", see also Robin Richardson, "Islamophobia or Anti-Muslim Racism – or What? – Concepts and Terms Revisited" (University of Birmingham, 2009), online: <http://theamericanmuslim.org/tam.php/features/articles/islamophobia-or-anti-muslim-racism-or-what/0019239>.

²⁸ See Fernando Bravo Lopez, *supra* note 27.

²⁹ For example, the French painter Étienne Dinet and his Algerian colleague, Sliman Ben Ibrahim, used the term <<Islamophobie>> regularly, first in their 1918 biography of the Prophet Muhammad, and again in their 1921 text, *L'Orient vu L'Occident*. In that work, Islamophobie is used to describe the intentional misrepresentation of Islam "in the hope of bringing Islam down once and for all." See Sliman ben Ibrahim Baâmer & Étienne Dinet, *L'Orient vu de l'Occident* (H. Piazza, 1925) at 176–183. See also BIT, "Islamophobia: The Right Word".

³⁰ One of the first instances of the English term "Islamophobia" is thought to be Edward Said's use of the word in an academic journal, *Race and Class*, in 1985. However, as the scope of this work was limited to an academic audience, the term did not make its way into mainstream publications until a decade later when, in 1995, the *Boston Globe* published a story with the headline "Islamophobia in Europe Fuels Tensions, Isolation". The following years saw the term's first usage in British government, with the creation of the "Runnymede Trust Commission on British Muslims and Islamophobia" in 1996, and the publication of the influential white paper, *Islamophobia: A Challenge for Us All* in 1997. For further discussion, see Bridge Initiative Team, "Islamophobia: The Right Word for a Real Problem: A Research Project on Islamophobia", (2015), online: <http://bridge.georgetown.edu/islamophobia-the-right-word-for-a-real-problem/>

³¹ See Fathima Cader and Sumayya Kassamali, "Islamophobia in Canada: A Primer" (1 Feb 2012), online:

<http://islam.ru/en/content/story/islamophobia-canada-primer>. [Cader and Kassamali, "Islamophobia in Canada"]

³² Some scholars and members of the public prefer alternative terms, such as "anti-Muslim sentiment" and "anti-Muslim prejudice", to describe the discrimination experienced by Muslims, arguing that prejudice and discrimination is more than a "fear of Islam" as the etymological components of "Islamophobia" would suggest. Similar qualms have been raised in the past with regards to terms such as "anti-Semitism" and "homophobia". However, the etymological concerns have been largely left behind by academics and the general public who use such terms freely to identify prejudice and discrimination. Similarly, the word Islamophobia is already used widely in public discourse, and is arguably the most concise and recognizable term currently used to describe the prejudice and discrimination experienced by Muslims.

³³ The Canadian Civil Liberties Association and the group Canadian Journalists for Free Expression have addressed the alleged conflict between condemnations of Islamophobia and free expression, in the context of discussing M-103, a Parliamentary motion (discussed below) that included a condemnation of racism and religious discrimination and called on government to adopt measures to reduce or eliminate racism and religious discrimination including Islamophobia. See "CCLA Responds to Questions on M-103", Canadian Civil Liberties Association (17 February 2017), online: <https://ccla.org/ccla-responds-questions-m-103/> and; Kevin Metcalf, "6 Times M-103 Opponents Were Inconsistent on Free Expression", Canadian Journalists for Free Expression (20 March 2017), online:

http://www.cjfe.org/6_times_m_103_opponents_were_inconsistent_on_free_expression.

³⁴ In doing so, we borrow from the theoretical framework of critical race theory, which views racism as embedded in society and permeating political, economic, social, and legal spheres of life. It aims to deconstruct and dismantle racist institutions and narratives as part of a project of working toward a more equitable and just society. See Naved Bakali, *Islamophobia: Understanding Anti-Muslim Racism through the Lived Experiences of Muslim Youth* (Rotterdam: Sense Publishers, 2016) at 18–22.

³⁵ Raynell Andreychuk & Sheila Finestone, "Implementing Canada's Human Rights Obligations: Report of the Standing Senate Committee on Human Rights", (December 2001), online: <https://sencanada.ca/content/sen/committee/371/huma/rep/rep02dec01-e.htm>. Department of Justice Government of Canada, "International Human Rights Treaty Adherence Process in Canada", (3 February 2012), online: <http://www.justice.gc.ca/eng/abt-apd/icg-gci/ihr-didp/ta-pa.html> (Canada is widely regarded as a dualist State, which requires that "international treaty law must be incorporated into Canadian domestic law through legislation in order to have direct legal effect".)

³⁶ "Accession" is the act whereby a state accepts the offer or the opportunity to become a party to a treaty already negotiated and signed by other States. It has the same legal effect as ratification, and usually occurs after the treaty has entered into force. Typically a state must sign a Convention or Protocol in order to then ratify it; if they did not sign when the treaty was

open for signature, then they can accede to it. For more see “What is the difference between signing, ratification and accession of UN treaties?”, Dag Hammarskjöld Library (29 November 2016), online: <<http://ask.un.org/faq/14594>>.

³⁷ Government of Canada; Canadian Heritage, “Human rights treaties”, (23 March 2016), online:

<<http://canada.pch.gc.ca/eng/1448633333982#a1>>. [“Human rights treaties”]

³⁸ *International Convention on the Elimination of All Forms of Racial Discrimination*, 7 March 1966, 660 UNTS 195 [“ICERD”], article 1(1).

³⁹ *P.S.N. v. Denmark*, CERD/C/71/D/37/2006 [“CERD/C/71/D/36/2006”], para 6.3.

⁴⁰ ICERD, Article 3.

⁴¹ *Ibid*, Article 4.

⁴² *Ibid*, Article 5.

⁴³ *Ibid*, Article 6.

⁴⁴ *Ibid*, Article 7.

⁴⁵ One notable goal in this regard was to evaluate the feasibility and options of providing individuals from minority groups with financial support to challenge legislation and policies to reduce systemic racism and to promote equality rights. See Canada’s National Action Plan Against Racism, online: <<http://publications.gc.ca/collections/Collection/CH34-7-2005E.pdf>>, page 25.

⁴⁶ For an evaluation of Canada’s National Action Plan Against Racism, see: Immigration Government of Canada, “Evaluation of Canada’s Action Plan Against Racism”, (26 April 2011), online:

<<http://www.cic.gc.ca/english/resources/evaluation/CAPAR/evaluation.asp>>. Full Action Plan at:

<http://publications.gc.ca/collections/Collection/CH34-7-2005E.pdf>;

⁴⁷ *Ibid*, Article 8.

⁴⁸ ICERD, Article 14(1).

⁴⁹ *Ibid*; CERD/C/71/D/36/2006, para 6.4.

⁵⁰ See “Factual Overview” Part A.

⁵¹ Sehrish Amjad, “Canada must call Islamophobia what it is – racism,” Ottawa Citizen, 30 August 2017, online:

<<http://ottawacitizen.com/opinion/columnists/amjad-canada-must-call-islamophobia-what-it-is-racism>>.

⁵² *International Covenant on Civil and Political Rights*, 19 December 1966, 999 UNTS 171 [“ICCPR”], preamble.

⁵³ Human rights treaties, *supra* note 37.

⁵⁴ ICCPR, Article 2(1).

⁵⁵ ICCPR, Article 20(2).

⁵⁶ *Ibid*, Article 26.

⁵⁷ *Ibid*, Article 25.

⁵⁸ *Ibid*, Article 27.

⁵⁹ *Ibid*, Article 24(1).

⁶⁰ *Ibid*, Article 18(1).

⁶¹ *Ibid*, Article 18(2).

⁶² *Ibid*, Article 18(4).

⁶³ *Ibid*, Article 4(1).

⁶⁴ *Ibid*, Article 4(2).

⁶⁵ *Ibid*, Article 18(3).

⁶⁶ Human rights treaties, *supra* note 37.

⁶⁷ *International Covenant on Economic, Social, and Cultural Rights*, 16 December 1966, 993 UNTS 3, article 13(1) [“ICESC”].

⁶⁸ ICESC, Article 13(3).

⁶⁹ Human rights treaties, *supra* note 37.

⁷⁰ *Convention on Rights of the Child*, 20 November 1989, 1577 UNTS 3, Article 14.

⁷¹ *Ibid*, Article 30.

⁷² *Ibid*, Article 29(1)(d).

⁷³ *Ibid*, Article 20(3).

⁷⁴ CRC/C/CAN/CO/3-4; especially paras 33, 56 and 74.

⁷⁵ *Convention on the Elimination of All Forms of Discrimination Against Women*, 18 December 1979, 1249 UNTS 13 [“CEDAW”].

⁷⁶ *Ibid*, Article I.

⁷⁷ CEDAW, Articles 3, 7, 11.

⁷⁸ Statistics Canada, *supra* note 10.

⁷⁹ *Convention on the Prevention and Punishment of the Crime of Genocide*, 9 December 1948, 78 UNTS 277, Article I.

⁸⁰ *Ibid*, Article II, (a) and (b).

⁸¹ *Ibid*, Article III.

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- ⁸² See: *Application of the Convention on the Prevention and Punishment of Genocide (Croatia v. Serbia)* February 3, 2015, ICJ General List No. 118 <<http://www.icj-cij.org/docket/files/118/18422.pdf>> accessed 1 April 2017.
- ⁸³ 2005 World Summit Outcome Document, A/RES/60/1, paras 138-140. This approach is confirmed in the 2005 World Summit, where the UN Member States affirmed a responsibility to protect individuals from genocide both domestically and abroad.
- ⁸⁴ Daniel Thürer, "Soft Law" in *Max Plank Encyclopedia of International Public Law*, (Online Edition, Last Updated March 2009), paras 26, 30.
- ⁸⁵ Uzma Jamil, "Discrimination Experienced by Muslims in Ontario", *Ontario Human Rights Commission*, online: <<http://www.ohrc.on.ca/en/creed-freedom-religion-and-human-rights-special-issue-diversity-magazine-volume-93-summer-2012/discrimination-experienced-muslims-ontario>>; W Paul Smith, "Terrorism Fears Don't Justify Islamophobia", *Human Rights Watch*, online: <<https://www.hrw.org/news/2017/03/14/terrorism-fears-dont-justify-islamophobia>>.
- ⁸⁶ The General Assembly comprises all 193 members of the United Nations and is its chief decision-making, policy, and deliberative organ. It occupies an important role in the codification of international law and standard-setting. See "Functions and Powers of the General Assembly", *United Nations*, online: <<https://www.un.org/en/ga/about/background.shtml>>.
- ⁸⁷ For more on this discussion see: "The Sources of Human Rights Law: Custom, Jus Cogens, and General Principles" by Bruno Simma and Philip Alston, *Australian Year Book of International Law*, pages 82-108; and "The Status of the Universal Declaration of Human Rights in National and International Law III: The Status and Future of Customary International Law of Human Rights" by Hurt Hannum, *Georgia Journal of International and Comparative Law*, pages 317-351.
- ⁸⁸ *Universal Declaration of Human Rights*, GA Res 217A (III), UNGAOR, 3rd Sess, Supp No 13, UN Doc A/810 (1948) 71, ["UNDR"], preamble, para 2.
- ⁸⁹ *Ibid*, preamble, para 7.
- ⁹⁰ UNDR, Article 2.
- ⁹¹ *Ibid*, Article 7.
- ⁹² *Ibid*, Article 18.
- ⁹³ *Ibid*, Article 26(2).
- ⁹⁴ *Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief*, A/RES/36/55, 25 November 1981 ["Declaration on Intolerance and Discrimination"].
- ⁹⁵ *Ibid*, Article 1.
- ⁹⁶ Article 6 declares that the right to freedom of religion includes, in relation to the practice of religion or belief: the right to use, build, and maintain places of worship, to maintain charitable institutions, to write and issue publications, to teach, to solicit voluntary contributions, to train and choose leaders, to observe holidays and days of rest, to obtain and use materials related to religious rites and customs, and to communicate with individuals and communities at both national and international levels.
- ⁹⁷ *Ibid*, Article 3.
- ⁹⁸ *Declaration on Intolerance and Discrimination*, Article 4(1-2).
- ⁹⁹ *Ibid*, Articles 7-8.
- ¹⁰⁰ *Declaration on the Rights of Persons belonging to National or Ethnic, Religious and Linguistic Minorities*, A/RES/47/135, 18 December 1992.
- ¹⁰¹ *Ibid*, Article 2.
- ¹⁰² *Ibid*, Article 2.
- ¹⁰³ *Ibid*, Article 4(2).
- ¹⁰⁴ *Ibid*, Article 8(4).
- ¹⁰⁵ UN Human Rights Committee (HRC), *CCPR General Comment No. 22: Article 18 (Freedom of Thought, Conscience or Religion)*, 30 July 1993, CCPR/C/21/Rev.1/Add.4 ["Freedom of Thought, Conscience or Religion"].
- ¹⁰⁶ The United Nations Human Rights Committee also gives guidance on the submission of reports, and deal with wider human rights issues. States who have acceded to the ICCPR, including Canada, must report to the Committee on request (typically every four years). See "Human Rights Committee", *United Nations*, online: <<http://www.ohchr.org/EN/HRBodies/CCPR/Pages/CCPRIndex.aspx>>. See also "Human Rights Treaty Bodies: General Comments", *United Nations*, online: <<http://www.ohchr.org/EN/HRBodies/Pages/TBGeneralComments.aspx>>.
- ¹⁰⁷ *Ibid*, Article 2.
- ¹⁰⁸ *Freedom of Thought, Conscience or Religion*, Article 1.
- ¹⁰⁹ *Ibid*, Articles 3, 8.
- ¹¹⁰ *Ibid*, Article 5.
- ¹¹¹ *Ibid*, Article 4.
- ¹¹² Bill 62, *An Act to Foster Adherence to State Religious Neutrality and, in Particular, to Provide a Framework for Religious Accommodation Requests in Certain Bodies*, 1st Sess, 41st Leg, Quebec, 2017. A number of human rights organizations and commentators have criticised this Bill and similar attempts at veil bans as a violation of religious freedom and a potential trigger

for increased harassment of Muslim women. See for example: Sania Malik, “Another manifestation of Islamophobia in Quebec”, *The Concordian* (31 October 2017), online: <<http://theconcordian.com/2017/10/another-manifestation-islamophobia-quebec/>>; Mihad Fahmy, “Quebec’s Bill on Religious Neutrality is Anything But”, *National Council of Canadian Muslims* (13 November 2016), online: <<https://www.nccm.ca/quebecs-bill-religious-neutrality/>>; “Quebec Bill 62 Infringes on Freedom of Religion”, *Canadian Civil Liberties Association* (15 November 2016), online: <<https://ccla.org/quebec-bill-62-infringes-on-freedom-of-religion/>>; Hillary Margolis, “Intolerance Unveiled in Quebec: Bill Would Bar Those Wearing Face Coverings from Receiving Government Services”, *Human Rights Watch* (25 October 2016), online: <<https://www.hrw.org/news/2016/10/25/intolerance-unveiled-quebec>>; Claudia Lahaie and Melanie Adrian, “Far From Protecting Women, a Secular Charter would Increase Discrimination”, *Globe and Mail* (3 April 2014), online: <<http://www.theglobeandmail.com/opinion/far-from-protecting-women-a-secular-charter-would-increase-discrimination/article17790401/>>.

¹¹³ UN Human Rights Committee (HRC), *CCPR General Comment No. 11: Article 20 (Prohibition of Propaganda for War and Inciting National, Racial or Religious Hatred)*, 29 July 1983 [“Prohibition of Propaganda for War”].

¹¹⁴ *Ibid*, paras 1-2.

¹¹⁵ *Ibid*, para 2.

¹¹⁶ UN Human Rights Committee (HRC), *CCPR General Comment No. 28: Article 3 (The Equality of Rights Between Women and Men)*, 29 March 2000, HRI/GEN/1/Rev.9 (Vol. I) [The Equality of Rights Between Women and Men].

¹¹⁷ *Ibid*, para 21.

¹¹⁸ These include Articles 26 (non-discrimination), 12 (liberty of movement), 17 (right to privacy without arbitrary or unlawful interference), 18 (freedom of religion or belief), 19 (freedom of expression), and 27 (freedom to participate in the cultural life of a community): see *Ibid*, para 13.

¹¹⁹ UN Committee on the Elimination of Racial Discrimination (CERD), *General Recommendation No. 35 (Combating Racist Hate Speech)*, 26 September 2013, CERD/C/GC/35 [“CERD No. 35”].

¹²⁰ *Ibid*, para 3.

¹²¹ *Ibid*, para 4. See also paras 24-29, 45.

¹²² See for example, *ibid*, para 6: “...In the light of the principle of intersectionality, and bearing in mind that “criticism of religious leaders or commentary on religious doctrine or tenets of faith” should not be prohibited or punished, the Committee’s attention has also been engaged by hate speech targeting persons belonging to certain ethnic groups who profess or practice a religion different from the majority, including expressions of Islamophobia, anti-Semitism and other similar manifestations of hatred against ethno-religious groups, as well as extreme manifestations of hatred such as incitement to genocide and to terrorism. Stereotyping and stigmatization of members of protected groups has also been the subject of expressions of concern and recommendations adopted by the Committee.”

¹²³ For example: oral, written, online, or through the use of visual symbols.

¹²⁴ CERD No. 35, paras 10, 30-44. See also Official Records of the General Assembly, Sixty-fourth Session, Supplement No. 18 (A/64/18), annex VIII, para. 13.

¹²⁵ *Ibid*, paras 31-35.

¹²⁶ *Ibid*, para 38.

¹²⁷ *Ibid*, para 8.

¹²⁸ The Committee suggests that criminal sanctions should be used in the following circumstances, as determined in conjunction with contextual factors: “(a) All dissemination of ideas based on racial or ethnic superiority or hatred, by whatever means; (b) Incitement to hatred, contempt or discrimination against members of a group on grounds of their race, colour, descent, or national or ethnic origin; (c) Threats or incitement to violence against persons or groups on the grounds in (b) above; (d) Expression of insults, ridicule or slander of persons or groups or justification of hatred, contempt or discrimination on the grounds in (b) above, when it clearly amounts to incitement to hatred or discrimination; (e) Participation in organizations and activities which promote and incite racial discrimination.” It suggests using contextual factors to help determine the severity of the hate speech, including the content and form of the speech, the economic social, and political climate, the position or status of the speaker, the reach of the speech, and its objectives.

¹²⁹ The United Nations Human Rights Commission was created in 1946 to “weave the international legal fabric that protects our fundamental human rights and freedoms”. The Commission was later replaced by the Human Rights Council, established in 2006 by General Assembly Resolution 60/251. See “United Nations Commission on Human Rights”, United Nations, online: <<http://www.ohchr.org/EN/HRBodies/CHR/Pages/CommissionOnHumanRights.aspx>> and “United Nations Human Rights Council”, United Nations, online: <<http://www.ohchr.org/EN/HRBodies/HRC/Pages/AboutCouncil.aspx>>.

¹³⁰ *Implementation of the Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief*, UN Commission on Human Rights Res 1986/20, 42nd Sess, UN Doc E/CN.4/RES/1986/20 [“UN Doc

E/CN.4/RES/1986/20”].

¹³¹ UN Doc E/CN.4/RES/1986/20, Article 2.

¹³² *Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief*, HRC Res 6/37, HRC, 34th Sess, UN Doc A/HRC/RES/6/37 (2007) [“HRC Res 6/37”].

¹³³ *Ibid*, Article 1.

¹³⁴ *Ibid*, Article 2.

¹³⁵ *Ibid*, Article 6.

¹³⁶ *Ibid*, Article 8.

¹³⁷ *Ibid*, Article 9.

¹³⁸ *Ibid*, Article 12.

¹³⁹ *Ibid*, Article 13.

¹⁴⁰ *Freedom of Religion or Belief*, HRC Res 31/16, HRC, 31st Sess, UN Doc A/HRC/RES/31/16 (2016) [HRC Res 31/16].

¹⁴¹ *Ibid*, Article 1.

¹⁴² *Ibid*, Article 2.

¹⁴³ *Ibid*, Article 3.

¹⁴⁴ *Ibid*, Articles 4-5.

¹⁴⁵ *Ibid*, Article 9.

¹⁴⁶ *Report of the Special Rapporteur on Freedom of Religion or Belief (Focus: Perspective and vision for the mandate of the new Special Rapporteur)*, HRC, 34th Sess, A/HRC/34/50 (2017) [“Special Rapporteur 2017 Report”].

¹⁴⁷ *Ibid*, para 5.

¹⁴⁸ *Ibid*, para 16.

¹⁴⁹ *Ibid*, para 19.

¹⁵⁰ *Ibid*, para 5.

¹⁵¹ *Ibid*, paras 6, 12-16, 70.

¹⁵² *Ibid*, paras 80-83.

¹⁵³ *Ibid*, para 86.

¹⁵⁴ *Report of the Special Rapporteur on Contemporary Forms of Racism, Racial Discrimination, Xenophobia and Related Intolerance (Addendum: Mission to Canada)*, Commission on Human Rights, 60th Sess, E/CN.4/2004/18/Add.2 (2004) [“Special Rapporteur on Contemporary Forms of Racism”].

¹⁵⁵ *Ibid*, page 2.

¹⁵⁶ *Ibid*, page 3.

¹⁵⁷ *Ibid*, page 18.

¹⁵⁸ *Ibid*, page 19.

¹⁵⁹ *Ibid*, page 18-19.

¹⁶⁰ *Ibid*, page 3.

¹⁶¹ *Report of the Special Rapporteur in the Field of Cultural Rights*, Human Rights Council, 34th Sess, A/HRC/34/56 [“Report of the Special Rapporteur in the Field of Cultural Rights”].

¹⁶² *Ibid*, para 1. The report uses the term fundamentalism where discourses claim to be based in religion, and extremism where they do not: “[f]undamentalisms have emerged out of all of the world’s major religious traditions, including Buddhism, Christianity, Hinduism, Islam and Judaism, and others. Given the religious claims of their proponents, they are especially difficult and dangerous to contest. In each case, they represent a minority phenomenon distinct from the broader religious tradition itself, although drawing selectively from it. No religion is inherently fundamentalist nor should fundamentalist views be imputed to all adherents of any religion”; and para 9: “The Special Rapporteur employs the term ‘extremism’ alongside ‘fundamentalism’ because it plays a significant role in United Nations debates and includes movements not drawing from religion. However, the question of definition should always be carefully considered and applied in accordance with relevant international human rights norms. The concept is relational and assumes a scale, with such views situated at the farthest end thereof.”

¹⁶³ *Ibid*, para 13. For more discussion on the manifestations of far-right discourses in North America, including the impact of the United States 2016 Presidential elections, see paras 81-83. For example: “Far right movements using racism and xenophobia as rallying cries have proliferated across Europe and North America. They single out ‘others’ and their cultures for scorn, with immigrants, refugees, Muslims, Jews and Roma and cultural sites associated with them among the most ubiquitous targets.”

¹⁶⁴ *Ibid*, paras 19-20. See also para 30: “Hence, the human rights struggle against each manifestation of fundamentalism or extremism, rather than being in competition or in tension with the struggle against other manifestations, is complementary. One form of fundamentalism or extremism is not a justification for another. Each is a reinforcing reminder of the global humanist crisis that lies before us. We must break out of this vicious circle that will leave youth globally facing a political

landscape offering only a bleak choice of competing extremists.”

¹⁶⁵ *Ibid*, paras 31, 35-39.

¹⁶⁶ *Ibid*, para 27(b).

¹⁶⁷ The four workshops were held in Vienna, Nairobi, Bangkok, and Santiago de Chile in 2011. They were focused on the implementation of the prohibition on incitement to hatred and how to achieve this while also recognizing and upholding rights to free expression. The workshops had a particular focus on religious hatred, where issues of expression and incitement to hatred had been frequently discussed. The outcome document was developed and agreed to at a final workshop in Rabat, Morocco in 2012. See *Annual Report of the United Nations High Commissioner for Human Rights (Appendix: Rabat Plan of Action)*, Human Rights Council, 22nd Sess, A/HRC/22/17/Add.4 [*Rabat Plan of Action*].

¹⁶⁸ *Ibid*, paras 9-10.

¹⁶⁹ *Ibid*, para 11.

¹⁷⁰ *Ibid*, para 14. The ICCPR permits restrictions on hate speech for the purposes of respect for the rights of others, public order, and sometimes national security under articles eighteen and nineteen. It prohibits incitement in Article 20(2). Prohibitions on incitement are also found under CERD, Article 4. The Rabat Plan of Action uses the *Camden Principles*, developed by ARTICLE XI, a non-governmental organization that seeks to uphold free expression, to define the concepts of hatred and hostility. Camden Principle 12.1(i) defines hatred or hostility as “...intense and irrational emotions of opprobrium, enmity and detestation towards the target group.”. See “The Camden Principles on Freedom of Expression and Equality”, *Article 19*, online: <<https://www.article19.org/data/files/pdfs/standards/the-camden-principles-on-freedom-of-expression-and-equality.pdf>>.

¹⁷¹ *Rabat Plan of Action*, para 14.

¹⁷² *Ibid*, para 21.

¹⁷³ *Ibid*, paras 28, 32-33.

¹⁷⁴ *Ibid*, para 29.

¹⁷⁵ *Ibid*, para 29.

¹⁷⁶ *Ibid*, paras 35-38, 42-45, 47.

¹⁷⁷ *Ibid*, para 46.

¹⁷⁸ *Ibid*, para 48.

¹⁷⁹ *Ibid*, para 49.

¹⁸⁰ Department of Justice, “Technical Paper: Bill C-36, Protection of Communities and Exploited Persons Act,” accessed at <http://www.justice.gc.ca/eng/rp-pr/other-autre/protect/p1.html>. Bill C-36, the Protection of Communities and Exploited Persons Act, which received Royal Assent on November 6, 2014 criminalized the purchase of sexual services following research that illustrated that the Nordic model met the Canadian Parliament’s intent to punish those who engage in sexual exploitation.

¹⁸¹ See: Peter McCormick, “American Citations and the McLachlin Court: An Empirical Study” (2009) 47:1 Osgoode Hall Law, 83-129.

¹⁸² Council of Europe, *Protocol 11 to the European Convention for the Protection of Human Rights and Fundamental Freedoms, Restructuring the Control Machinery Established Thereby*, 11 May 1994, ETS 155, Article 32 [“Protocol 11”]. Since November 1998, the ECtHR functions on a permanent basis. *Ibid*, Article 19.

¹⁸³ Council of Europe, *European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14*, 4 November 1950, ETS 5. [“European Convention of Human Rights”].

¹⁸⁴ *Ibid*.

¹⁸⁵ *Protocol 11*, Articles 33-34.

¹⁸⁶ *Ibid*, Article 46.

¹⁸⁷ *Metropolitan Church of Bessarabia and Others v Moldova*, no. 45701/99, para 115-116, ECHR 2001-XXII. [“Metropolitan Church of Bessarabia and Others”].

¹⁸⁸ *European Convention of Human Rights*, *supra* note 183, Article 9.

¹⁸⁹ *Syvato-Mykhailivska Parafiya v Ukraine*, no. 77703/01, 14 June 2007.

¹⁹⁰ *Biblical Centre of the Chuvash Republic v Russia*, para 58.

¹⁹¹ *Otto-Preminger-Insitut v Austria.*, 20 September 1994, Series A, no. 295-A.

¹⁹² *Gunduz v Turkey*, no. 59997/00, 9 November 2004.

¹⁹³ *Metropolitan Church of Bessarabia and Others.*

¹⁹⁴ *Nolan and K v Russia*, no. 2512/04, 12 February 2009, para 73.

¹⁹⁵ *J.A. v. Turkey*, no. 42571/98, ECHR 2005-VIII.

¹⁹⁶ See also *Otto-Preminger Institut v Austria.*

¹⁹⁷ *Keller v. Germany*, no. 36283/97, 4 March 1998.

¹⁹⁸ Council of Europe, *Resolution Res(2002)8 on the state of the European Commission against Racism and Intolerance*, 13 June 2002.

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- ¹⁹⁹ European Commission against Racism and Intolerance [ECRI], *ECRI Declaration on the Use of Racist, Anti-Semitic, and Xenophobic Elements in Political Discourse*, (17 March 2005), online: <<https://www.coe.int/t/dghl/monitoring/ecri/activities/14-Public Presentation Paris 2005/Presentation2005 Paris Declaration en.asp>>.
- ²⁰⁰ *Ibid.*
- ²⁰¹ *Ibid.*
- ²⁰² *Ibid.*
- ²⁰³ ECRI, Statement by the European Commission against Racism and Intolerance concerning racist and xenophobic political activities in Greece, 10 December 2012.
- ²⁰⁴ *UFCW Local 1518 v KMart Canada Ltd*, [1999] 2 SCR 1083.
- ²⁰⁵ *Equal Employment Opportunity Commission v Abercrombie & Fitch Stores, Inc.*, 575 US (2015), available online: <https://www.supremecourt.gov/opinions/14pdf/14-86_p86b.pdf>.
- ²⁰⁶ Crime and Disorder Act 1998 (UK) c 37, s 28.
- ²⁰⁷ *DPP v Woods* (2002) EWHC 85.
- ²⁰⁸ Crime and Disorder Act 1998 (UK) c 37, s 28.
- ²⁰⁹ *R v Rogers* (2007) 2 WLR 280.
- ²¹⁰ See for example the *Gayssot Act*, which criminalizes the denial of the findings of the Nuremberg trials: <https://www.article19.org/pages/en/hate-speech-more.html>.
- ²¹¹ Loi no. 72-545 du 1er juillet 1972, JO, 1ier juillet 1972, 6803, online: <https://www.legifrance.gouv.fr/jo_pdf.do?numJO=0&dateJO=19720702&numTexte=&pageDebut=06803&pageFin=06804>.
- ²¹² “France: Marine Le Pen goes on trial Over Muslim Remarks”, *BBC* (20 October 2015), online: <<http://www.bbc.com/news/world-europe-34580169>>.
- ²¹³ “France’s Marine Le Pen Loses Immunity as MEP”, *BBC* (2 July 2013) online: <<http://www.bbc.com/news/world-europe-23142984>>.
- ²¹⁴ Aurelien Breeden, “French Court Acquits Marine Le Pen of Hate Speech”, *New York Times* (15 December 2015), online: <<https://www.nytimes.com/2015/12/16/world/europe/french-court-acquits-marine-le-pen-of-hate-speech.html>>.
- ²¹⁵ “Robert Menard, Far-Right French Mayor, ‘to be tried on hate charges’”, *BBC* (22 December 2016) online: <<http://www.thelocal.fr/20161222/french-mayor-to-face-trial-for-saying-high-number-of-muslim-pupils-is-a-problem>>.
- ²¹⁶ See, e.g., *Wisconsin v. Mitchell*, 508 U.S. 47 (1993), online: <<https://supreme.justia.com/cases/federal/us/508/476/case.html>>.
- ²¹⁷ *Criminal Code of Canada*, RSC 1985, c C-46 [“Criminal Code”], ss 318(4) and 319 (1).
- ²¹⁸ *Ibid.*, s 319(1).
- ²¹⁹ *Ibid.*, s 318(2).
- ²²⁰ *Mugesera v. Minister of Citizenship and Immigration*, 2005 SCC 40, para 100.
- ²²¹ *Criminal Code*, *supra* note 217, at s 319(3)(d).
- ²²² *Ibid.*, s 430(4.1).
- ²²³ Jennifer Yang, “Why hate crimes are hard to prosecute” *The Star* (27 February 2017), online: <<https://www.thestar.com/news/gta/2017/02/27/why-hate-crimes-are-hard-to-prosecute.html>>.
- ²²⁴ *Ibid.*
- ²²⁵ *Criminal Code*, ss 318 and 319 (2).
- ²²⁶ *Ibid.*, ss 318(4) and s 319(6).
- ²²⁷ See: Department of Justice Government of Canada, “Chapter 16 - FPS Deskbook - PPSC”, (12 March 2004), online: <http://www.ppsc-sppc.gc.ca/eng/pub/fpsd-sfpg/fps-sfp/fpd/ch16.html#section16_3>.
- ²²⁸ See: Josh Dehaas, “What counts as a ‘hate crime’ in Canada?” *CTV News* (1 March 2017), online: <<http://www.ctvnews.ca/canada/what-counts-as-a-hate-crime-in-canada-1.3307395>>.
- ²²⁹ See: Justin Walker, “Current Publications: Law, justice and rights: Canadian Anti-hate Laws and Freedom of Expression”, (27 March 2013), online: <<http://www.lop.parl.gc.ca/Content/LOP/ResearchPublications/2010-31-e.htm>>, para 5.1.4.2.
- ²³⁰ Immigration Government of Canada, “Evaluation of Canada’s Action Plan Against Racism”, (26 April 2011), online: <<http://www.cic.gc.ca/english/resources/evaluation/CAPAR/evaluation.asp>>.
- ²³¹ *Canadian Charter of Rights and Freedoms*, Part 1 of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), c 11, s 27. [“Charter”]
- ²³² *Canadian Multiculturalism Act*, RSC 1985, c 24 (4th Supp) [“CMA”], preamble.
- ²³³ *Ibid.*, s 3(1)(a).
- ²³⁴ *Ibid.*, ss 3(2)(b)-(c).
- ²³⁵ *Ibid.*, s 3(1)(d).

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- ²³⁶ *Ibid*, s 3(1)(h).
- ²³⁷ *Ibid*, ss 4-6.
- ²³⁸ The 2014-2015 annual report was the most recent to be published – see: <http://www.cic.gc.ca/english/pdf/pub/multi-ar-en-2015.pdf>
- ²³⁹ For an evaluation of Canada’s National Action Plan Against Racism, see: Immigration Government of Canada, “Evaluation of Canada’s Action Plan Against Racism”, (26 April 2011), online: <<http://www.cic.gc.ca/english/resources/evaluation/CAPAR/evaluation.asp>>. Full Action Plan at: <http://publications.gc.ca/collections/Collection/CH34-7-2005E.pdf>.
- ²⁴⁰ *Immigration Refugee and Protection Act*, SC 2001, c 27, s 96.
- ²⁴¹ *Ibid*, s 115(1).
- ²⁴² *Extradition Act*, SC 1999, c 18, s 44(1).
- ²⁴³ *Interpretation Act*, RSC 1985, c I-21, s 11.
- ²⁴⁴ *Choudhary v. Canada*, CCPR/C/109/D/1898/2009.
- ²⁴⁵ *Emergencies Act*, RSC 1985, c 22 (4th Supp), s 4(b).
- ²⁴⁶ *Mehrez Ben Abde Hamida v. Canada*, CCPR/C/98/D/1544/2007, para 8.2.
- ²⁴⁷ Charter, *supra* not 231, at ss 2(a) and 15.
- ²⁴⁸ *Ibid*, s 15(1).
- ²⁴⁹ Department of Justice Government of Canada, “Rights and freedoms in Canada - About Canada’s System of Justice”, (7 September 2016), online: <<http://www.justice.gc.ca/eng/csjsjc/just/06.html>>. This resource provides for detailed summary of the application principles of the Charter.
- ²⁵⁰ *Canada Human Rights Act*, RSC 1985, c H-6, Section 3(1).
- ²⁵¹ *Ibid*, ss 5-14.
- ²⁵² Under the *Constitution Act, 1867* (UK), 30 & 31 Vict, c 3, reprinted in RSC 1985, App II, No 5 [“Constitution Act, 1867”], ss 91 and 92.
- ²⁵³ Concluding Observations of the Committee on the Elimination of Racial Discrimination for Canada, CERD/C/CAN/CO/19-20, para 9.
- ²⁵⁴ *Constitution Act, 1867*, *supra* note 252.
- ²⁵⁵ Charter, ss 2(a), 2(b), 15.
- ²⁵⁶ *R v. N.S.* 2012 SCC 72, [2012] 3 SCR 726 [“*R v. N.S.*”], para 52.
- ²⁵⁷ *Saskatchewan (Human Rights Commission) v. Whatcott*, 2013 SCC 11, [2013] 1 SCR 467 [“*Whatcott*”], para 67.
- ²⁵⁸ *Ibid*, para 64.
- ²⁵⁹ *Ibid*, paras 64-68.
- ²⁶⁰ *Ibid*, para 59.
- ²⁶¹ *Ibid*, para 117.
- ²⁶² *Ibid*, para 141.
- ²⁶³ *Whatcott*, para 74.
- ²⁶⁴ UN Committee on the Elimination of Racial Discrimination (CERD), *General Recommendation No. 35 (Combating Racist Hate Speech)*, 26 September 2013, CERD/C/GC/35, paras 3-4,
- ²⁶⁵ *Ibid*, paras 91-92.
- ²⁶⁶ *TWU v. Law Society of British Columbia*, 2016 BCCA 423, para 188.
- ²⁶⁷ *R v. Kapp*, 2008 SCC 41, [2008] 2 SCR 483, para 25.
- ²⁶⁸ *Ibid*, para 17.
- ²⁶⁹ *Alberta v. Hutterian Brethren of Wilson Colony*, 2009 SCC 37, [2009] 2 SCR 567.
- ²⁷⁰ *Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief*, A/RES/36/55, 25 November 1981, Article 1(3);] ICCPR, article 18(3).
- ²⁷¹ *Ishaq v Canada* (Citizenship and Immigration), 2015 FC 156. Notably, this case did not address matters of constitutionality because it found the policy requiring a woman to remove niqab during her citizenship oath was already unlawful based on other legislation and regulations.
- ²⁷² See *Multani v. Marguerite-Bourgeois, Comm. Scolaire*, 2006 SCC 6, [2006] 1 SCR 256.
- ²⁷³ *R v. N.S.*, *supra* note 256, at para 54.
- ²⁷⁴ *Ibid*.
- ²⁷⁵ ICCPR, art 18; *Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief*, A/RES/36/55, 25 November 1981., Art 1(3); CCPR General Comment No. 28: Article 3.
- ²⁷⁶ *Multani*, *supra* note 272.
- ²⁷⁷ *Ibid*, paras 1, 77.

²⁷⁸ *Ibid*, paras 57-59.

²⁷⁹ *Ibid*, paras 62-65. See also *Hothi v R*, [1985] 3 WWR.256, aff'd [1986] 3 WW. 671 (kirpan ban in courtroom found to be constitutional in the case of an accused charged with assault); *Nijjar v. Canada 3000 Airlines Ltd.* (1999), 36 C.H.R.R. D/76 (civil case for complaint under *Canada Human Rights Act*, kirpan ban on commercial aircraft was allowed for a particular type of kirpan).

²⁸⁰ *Ibid*, para 65. See also *Pandori v. Peel Bd. of Education* (1990), 12 CHRR D/364, aff'd (1991), 3 OR (3d) 531 (*sub nom. Peel Board of Education v. Ontario Human Rights Commission*), finding a ban on kirpans in schools unconstitutional in Ontario.

²⁸¹ *Multani*, *supra* note 272, para 71.

²⁸² *Ibid*, para 76.

²⁸³ *Ibid*, para 76.

²⁸⁴ Committee on the Elimination of Racial Discrimination (CERD), *Concluding Observations of the Committee on the Elimination of Racial Discrimination*, 80th Sess, CERD/C/CAN/CO/19-20 (4 April 2012), para 9.