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FREEDOM OF RELIGION OR BELIEF AND FREEDOM OF EXPRESSION

By Marie Juul Petersen

Freedom of expression (FoE) is often understood to be in a tense relationship, or even contradictory, with the right to freedom of religion or belief (FoRB). To fully protect FoRB, some argue, we must necessarily curtail the right to free speech. “Defamation of the Messengers (peace be upon them) is unacceptable under any pretext [and] disparagement of the Prophet Muhammad is not freedom of expression,” says the Organisation of Islamic Cooperation (OIC), which for many years has lobbied for an international ban on blasphemy that, among other things, would criminalize satirical cartoons such as the ones published by the French magazine *Charlie Hebdo* or the Danish newspaper *Jyllandsposten* (see e.g. Skorini 2020; Skorini and Petersen 2016).¹

Around the world, there are many others who would agree with the OIC that there is a need for restrictions on expressions that may challenge, shock, and offend other people’s deep-held religious beliefs and convictions. A recent survey of attitudes to freedom of expression carried out in 33 countries shows that in 14 of these countries, more than half the population thinks that free speech should not include offending religion. In Malaysia, Russia, Kenya, Egypt, Turkey, Tunisia, Indonesia and Pakistan, the rate is more than 70 percent of the population (Skaaning and Krishnarajan 2021, 9).

FoE, and its limitations, has always been a contested human rights issue. Discussions on the criminalization of hate speech were central in negotiations around the International Covenant on Civil and Political Rights (ICCPR), initiated back in 1947. The US, Great Britain, and other Western countries argued against the inclusion of a hate speech prohibition in the convention, fearing that this would be a tool for governments to oppress unwanted criticism and opposition. The Soviet Union and its allies, on the other hand, argued that World War II had demonstrated with all clarity that there was a need for an extensive prohibition of hate speech (Danish Free Speech Commission 2020, 122). When the convention was finally adopted in 1966, it included a paragraph stating that “any advocacy of national, racial, or religious hatred

Abstract: This article discusses the relationship between the right to freedom of expression (FoE) and the right to freedom of religion or belief (FoRB). These two human rights are often understood to be in a tense relationship, and some see restrictions on FoE as a necessary precondition for full protection of FoRB. This article argues that the two rights are, however, best understood as inextricably interrelated and intertwined, and that restrictions on FoE will very often lead to restrictions on FoRB.

Keywords: freedom of religion or belief, freedom of expression, blasphemy laws, apostasy laws, hate speech, human rights

that constitutes incitement to discrimination, hostility, or violence shall be prohibited by law.”

In 1962, work was initiated to draft a convention on religious discrimination, in parallel with the work to draft a Convention on the Elimination of Racial Discrimination (CERD). While CERD was finalized in 1965, negotiations on the draft convention on religious discrimination were caught up in fierce disagreements, including on the issue of religious criticism. While the Soviet Union wanted to include the right to criticize religion as a central part of the convention, Egypt, Libya, and other Muslim-majority states found this suggestion deeply problematic on the basis that “criticism of religious beliefs [leads] to religious intolerance,” and that “from the point of view of Islam, criticism of religions [is] not acceptable” (Limon, Ghanea, and Power 2014, 10; Commission on Human Rights 1978, para. 259). In 1981, after almost 20 years of lengthy and difficult negotiations, the *Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief* was presented to the General Assembly—a compromise text which did not include references to freedom of expression and the right to criticize religion, nor to the prohibition of incitement to hatred and violence (see Bielefeldt and Wiener 2021 for a detailed analysis of the Declaration).

The debate on limitations of FoE continued in the early 2000s, prompted by the OIC’s annual “Defamation of Religion” resolutions in the Human Rights Council. While the OIC and its allies saw criminalization of religious defamation as a necessary response to intolerance and discrimination, many Western countries, primarily the US and Northern European countries, voted against the resolution, arguing that human rights should protect people, not their religions. In 2011, there was hope of reconciliation, when the OIC, USA, and Great Britain in an unusual partnership agreed on a joint resolution titled *Combating Intolerance, Negative Stereotyping and Stigmatization of, and Discrimination, Incitement to Violence, and Violence against Persons based on Religion and Belief*, often referred to as Resolution 16/18 (Human Rights Council 2011). Meetings in the

follow-up process to the resolution—the so-called Istanbul Process—have however demonstrated that the conflict over FoE and its limitations is far from resolved. Referring to the Resolution’s paragraph 5(f), which encourages states to adopt measures “to criminalize incitement to *imminent* violence based on religion or belief,” the Western bloc and its allies argue that restrictions must be held at a minimum, emphasizing the term “imminent.” The OIC, on the other hand, downplays the “imminent,” emphasizing instead the resolution’s pledge to “criminalize incitement” (Petersen 2021b, 221f; see also Skorini and Petersen 2016).

This is a difficult and complex debate. We may easily dismiss some arguments for restrictions on FoE as strategic and hypocritical; the OIC, for instance, scorns Europe for not protecting religious minorities against hate speech, but remains conspicuously silent when Saudi Arabia or other powerful member states engage in systematic and even violent oppression of religious minorities, reformers, and atheists within their own territory. At the same time, there is little doubt that many people around the world are targets of deeply offensive, discriminatory, and even hateful speech, often exacerbating experiences of existing marginalization, harassment, and discrimination on the grounds of religion or belief. As demonstrated by Fox (2020, 2016), along with many others, discrimination of religious minorities is on the rise worldwide, and hate speech is often an important component of such discrimination. In India, for example, the country’s Muslim minority is often the target of hate speech; most recently, Muslims were accused of using COVID-19 as a weapon against the Hindu population, with members of the ruling Hindu-nationalist party BJP contributing to spreading such mis-information (Petersen, Thomas, and Hassan 2020). In Europe, religious minorities are also under pressure; research documents that religious affiliation is one of the main motives for online hate speech, for instance (eMore Project 2020, 7).

What, then, is most important? The right to express oneself according to one’s convictions, or

the right to be protected against intolerant and discriminatory speech on the basis of religion or belief? In other words, how (if at all) should we restrict the right to FoE to protect the right to FoRB, including the right to be free from discrimination on the grounds of religion or belief? Seeking to answer this question, the present article provides a brief analysis of the relationship between FoRB and FoE from a human rights perspective, outlining some of the ways in which the two rights are closely related, and demonstrating how legal restrictions on FoE will often result in restrictions on FoRB as well. Against this background, the article argues that in the struggle against intolerance, discrimination and incitement related to religion or belief, the challenge is not so much to “balance” FoRB and FoE, but to ensure the freedom of all individuals to express themselves, including in relation to religion or belief, while at the same time protecting all individuals against incitement to discrimination, hostility or violence and other expressions that violate their fundamental rights and freedoms.

A Human Rights Perspective on the Relationship Between FoE and FoRB
From a human rights perspective, FoE and FoRB are not inherently conflicting rights, but intertwined and interdependent. This does not mean that tensions between the two rights cannot occur in concrete contexts, but it would be dangerously misleading to turn such inevitable tensions into abstract dichotomies, as we note in our statement “Close to our Hearts: Freedom of Religion or Belief as a Human Right” (Bielefeldt et al. 2020).

The close relationship between the two rights manifests itself in different ways. First of all, FoE and FoRB overlap in important respects. Both FoRB and FoE protect the freedom of individuals to have thoughts, opinions, or convictions and to express these. FoE ensures the right of all people to hold opinions and to seek, receive, or impart information or ideas of any

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kind. This includes opinions and ideas related to religion or belief, whether one’s own or that of others. While FoRB covers a wide range of manifestations of religion or belief, expressions of one’s religion or belief constitute a central aspect —whether in the form of teaching one’s religion or belief, disseminating or seeking information about religion or belief, performing prayer, or communicating with other individuals and communities on religious or belief matters, including discussion and criticism of one’s own religion or belief or that of others. Both rights also protect the freedom of individuals *not* to express their thoughts, opinions, or convictions on religion or belief. Every individual is, for example, free to withdraw from unwanted communication, remain disinterested in certain information, keep their opinions or religious convictions to themselves, decline invitations to religious ceremonies, or refrain from participating in religious holidays (Bielefeldt 2015, para. 34).

Second, FoE is an important precondition for countering intolerance and discrimination related to religion or belief. All over the world, individuals and groups are targets of intolerant and discriminatory speech, because of their religion or belief. FoE ensures a wide scope for expressions, including expressions that to some people are deeply offensive, shocking, or intolerant, as long as they do not constitute incitement to discrimination, hostility, or violence (see e.g. ECtHR 1976). At the same time, however, FoE also plays an indispensable role in combating intolerance and discrimination related to religion or belief, ensuring a space for exposing, challenging, and refuting such expressions. An open and inclusive public debate of ideas, opinions, and convictions can be an effective tool against intolerance and discrimination; often more so than restrictions and criminalization of expressions. Public denouncements of hate speech, promotion of tolerance and equality in education, interreligious dialogue, and public awareness-raising campaigns are all examples of the positive

role that the exercise of FoE can play in combating intolerance and discrimination related to religion or belief.

Finally, FoE does not protect advocacy of religious hatred that constitutes incitement to discrimination, hostility, or violence. The possibility to freely express one's thoughts, opinions, and convictions, including those related to religion or belief, is so fundamental to democracy that the threshold for restrictions must be very high, allowing speech that some may find offensive, provocative, or even discriminatory. But that does not mean that all kinds of expressions are allowed. According to international human rights law, expressions that constitute "direct and public incitement to genocide" or "advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility, or violence" should always be prohibited.² This includes expressions of incitement directed at particular religious or belief communities, as well as incitement originating from religious or belief communities.³ Furthermore, States may also restrict expressions for a limited number of other purposes, namely to protect the rights or reputation of others, to protect national security or public order, or to protect public health or morals. All restrictions must be prescribed by law, proportional and necessary to pursue the said purpose (ECtHR 2009, para. 73).⁴

Restrictions on FoE and Their Consequences for FoRB

According to international human rights standards, States must guarantee everybody's fundamental freedom to express themselves, and they are only obliged to prohibit a relatively narrow set of expressions, as outlined above. In practice, however, many states around the world impose overly broad limitations on FoE, often in the form of laws aimed at protecting people against religiously related offense, hate speech or discrimination. Regardless of the intention, many of these laws result in restrictions on FoRB. Limitations on FoE may very well protect some people against offensive or inflammatory speech, prejudice, or discrimination on the grounds of religion or belief, but they very often end up

limiting other people's legitimate right to express their thoughts, opinions, and convictions on religion or belief. This means that broad restrictions on free speech are rarely an adequate way to protect FoRB and the right to be free from discrimination on the grounds of religion or belief. In the following, I briefly discuss three common types of restrictions on FoE and their consequences for FoRB.

Blasphemy Laws

More than 70 countries in the world have blasphemy laws, and the vast majority of these are imprecise and vaguely formulated, allowing for an overly broad application. In many countries, blasphemy laws are used to oppress political opponents, journalists, and other critical voices. Think of the Saudi blogger Raif Badawi, who was recently released from prison. He founded a website dedicated to debating Saudi political affairs, and was sentenced to ten years in prison for "offending Islam" (BBC 2022). In Mauritania, Mohammed Cheikh Mkhaitir was imprisoned for five years after having written a critical article about how Islam, in his perspective, was misused to justify caste discrimination (Human Rights Watch 2019). In Russia, members of the feminist group Pussy Riot were sentenced to two years in prison for "hooliganism motivated by religious hatred" (ECtHR 2018). Religious minorities, atheists, and others whose convictions and/or practices differ from those of the majority are also disproportionately affected by blasphemy charges. In Pakistan, for instance, cases against Christians, Hindus, and Ahmadiya Muslims constitute almost half of all blasphemy cases in the country, even though these minorities only make up less than 5 percent of the population (Saman 2018).

From a human rights perspective, blasphemy laws are deeply problematic and should be abolished. Human rights protect individuals, not abstract ideas or belief systems. Neither are considerations as to individual "religious feelings" or preservation of "societal harmony" legitimate reasons for limiting our fundamental freedoms. A ban on blasphemy might protect some people's beliefs, but it will inevitably restrict the beliefs of others. This includes

atheists and other non-believers, but also many others. In Malaysia, for instance, the Muslim women's rights organization Sisters in Islam was accused of "deviation from Islam" because of the organization's "liberal and pluralist" religious interpretations. In Pakistan, Ahmadiyyas risk blasphemy charges merely for insisting on the right to call themselves Muslim and their places of worship, mosques (USCIRF 2020, 33).

As such, blasphemy laws are not only a violation of FoE; they are also a violation of FoRB. Reports of the UN Special Rapporteur, the Rabat Plan of Action, and various other human rights documents urge States that still have anti-blasphemy or anti-apostasy laws to repeal them, since such laws have a stifling impact on the enjoyment of FoRB as well as on healthy dialogue and debate about religious issues (see e.g. Shaheed 2017).

Laws Against Proselytizing

Several countries in the world prohibit proselytism on the grounds that it may disturb the religious harmony in a society, and many other countries employ varying degrees of restrictions on expressions related to proselytizing and attempts to convert others. Twenty-two countries in the world have laws that prohibit or restrict apostasy, or the act of leaving one's faith (Villa 2022). Proponents of such laws argue that in contexts where competition between religious groups is hostile, or where there is a history of religious violence, proselytizing may contribute to unrest and conflict. Yet as former UN Special Rapporteur on FoRB Heiner Bielefeldt has noted: "Anti-apostasy and anti-proselytism laws also have in common a tendency to prohibit changes away from hegemonic religions, which typically receive privileged treatment. Double standards not only are a problem when applying the respective laws in practice; they frequently define the very essence of those laws" (Bielefeldt 2016, par. 44). By their prohibitions of non-coercive persuasion and the right to change one's mind, such laws will tend to create rather than eliminate unrest and conflict (Shaheed 2019, par. 31).

According to international human rights law, proselytism can be restricted in exceptional cases,

most importantly when coercion is employed. But broad restrictions on proselytism and conversion as such are incompatible with human rights and fundamental freedoms, including access to information. They not only prevent some people from sharing information about their religion or belief (which is in fact an obligation in some religions); they also prevent others from receiving information about religion or belief and from making choices based on this information, including the choice to convert. As such, general restrictions on proselytism will almost inevitably violate not only the right to FoE, but also FoRB. In fact, the right to conversion and the right not to be forced to convert have the status of unconditional protection under international human rights law (see Bielefeldt 2012).

The 1998 case of *Larissi and others vs. Greece* at the European Court of Human Rights is instructive in this regard. Three officers in the Greek air force engaged in proselytism; one among his subordinates and the two others among civilians, encouraging them to join the Pentecostal church. All three were charged with proselytism, which was prohibited in Greece at the time. The officers brought the case to the European Court of Human Rights. The Court emphasized that FoRB encompasses the right to manifest one's religion, including also the right to try to convince others to convert. With regard to the two officers who had been convicted for engaging in proselytism among civilians, the Court found that their right to FoRB had been violated. However, the Court did not find that the right to FoRB had been violated in the case of the officer who had engaged in proselytism among his subordinates. The Court stated that the right to FoRB does not protect proselytism that involves "improper pressure." A superior's proselytizing among his subordinates may be viewed as a form of harassment or pressure, insofar as the hierarchical structures of the army may make it difficult for a subordinate to rebuff his or her superiors or withdraw from a conversation with them. As such, it is legitimate to restrict the right to proselytize in such situations (see ECtHR 1998; Alves 2020, 119f).

Hate Speech Laws

Finally, restrictions on hate speech related to religion or belief constitute a third potential challenge. Around the world, recent years have seen an increase in hate speech legislation. Such laws can be an important tool in the protection of individuals and groups against incitement to hatred and violence, provided that they reflect international human rights standards, criminalizing only a narrow set of expressions (as outlined above) and, in so doing, complying with principles of legality, proportionality, and necessity (see Gagliadone, Gal, Alves, and Martinez [2015] for an overview of human rights standards of relevance to hate speech legislation).

However, underlying some hate speech legislation are problematic analogies between religiously related discrimination and racism or ethnic discrimination. Some argue that religious identity constitutes an immutable foundation of human identity analogous to race and ethnicity. As such, they say, attacks on the basis of a person's religion should be grounds for prohibition in the same way that attacks on the basis of race and ethnicity are prohibited. The OIC, for instance, is increasingly relying on a terminology of racism, rather theological doctrines and religious language, in its quest to criminalize certain forms of religious criticism (see Skorini and Dyrberg 2022).

While there are certainly overlaps between religious discrimination and racism, invoking a direct analogy is problematic. For many people (even if not for all), religious adherence, membership, or identity is a personal choice rather than an innate and unchangeable characteristic. As such, FoRB must necessarily include “the rights to search for meaning by comparing different religions or belief systems, to exchange personal views on questions of religion or belief, and to exercise public criticism in such matters,” as noted in a joint statement by the special rapporteurs on freedom of religion or belief, freedom of expression, and racism.⁵ Equating discrimination on the grounds of religion with discrimination on the grounds of race or ethnicity, would mean that expressions of religious superiority would have to be condemned along the same lines as propaganda

based on ideas of racial or ethnic superiority is. But saying that one race or ethnic group is superior to another is fundamentally different from saying that one religion is superior to another. Claims of superiority are inherent in many religions; for many people the choice to believe in one religion over another is based precisely on their belief that this religion is better than other religions.

Equally problematic from a human rights perspective is the fact that many contemporary hate speech laws are vague and overly broad, targeting expressions that are “likely to stir up hatred” without contextual assessment of the intent of the speaker or the risk of imminent violence. As noted in the Office of the High Commissioner for Human Rights’ Rabat Plan of Action: “the broader the definition of incitement to hatred is in domestic legislation, the more it opens the door for arbitrary application of the laws” (OHCHR 2012, para. 15). Even if such laws are well-intended, their effects can be chilling (Shaheed 2019, par. 33), perhaps in particular for minorities. As Mchangama and Strossen (2020) note in their analysis of the Scottish Hate Crime Bill, there is a risk that such laws will end up pitting the very marginalized groups that they purport to benefit against each other in “a free-speech race to the bottom”:

For instance, members of religious communities (including minorities) with traditional beliefs about gender identity and sexual orientation might well still risk punishment for expressing their moral convictions. But women, members of the LGBTQ community, or transgender persons could plausibly also be punished for critiquing those religious communities because of their traditional views. (Mchangama and Strossen 2020)

Parallel to governments’ introduction of hate speech legislation, social media platforms are increasingly implementing their own hate speech restrictions. There is little doubt that social media platforms such as Facebook, Twitter, and others can be effective tools for spreading hate speech, not only because of their reach and

accessibility, but also because the algorithms upon which they rely seem to encourage extreme expressions over more “moderate” ones. Hate speech on social media is widespread, including also speech targeting religious minorities, religious feminists, atheists, and others. However, while content moderation is surely needed, many of these efforts fail to comply with fundamental principles of human rights. The main concerns include vague definitions of hate speech, untransparent procedures, lack of procedural safeguards, and lack of access to an effective remedy (Article 19:61; see also Kaye 2019). Furthermore, there are indications that religious minorities, along with other minority groups, are at risk of being disproportionately targeted by regulation, whether reflecting bias in the algorithms used to detect hate speech, among staff overseeing content, or among users reporting hate speech. Thus, the very people who are often targets of online hate speech may also find themselves targeted through reporting tools and disproportionately impacted by content removal and other sanctions against their accounts (Shaheed 2019, par. 54).

How to Address Challenges?

As we write in our statement “Close to our Hearts,” and as the above analysis has hopefully demonstrated, FoRB and FoE have much in common and can mutually reinforce each other. From a FoRB perspective, legal restrictions on FoE should be reserved for a very narrow set of circumstances. To harness FoRB as an alleged justification of laws against blasphemy and apostasy, anti-conversion laws, and laws that prohibit proselytism, would mean no less than denying its essential character as a right to freedom. Even deeply offensive and intolerant expressions should be allowed, as long as they do not amount to incitement to hatred, discrimination, or violence. Broad restrictions risk unduly limiting not only FoE, but also FoRB, and we should work towards the abolishment of such laws, and ensuring that laws on hate speech are narrow and precise, in line with the OHCHR’s Rabat Plan of Action.

This does not mean, however, that offensive and intolerant expressions must stand

undisputed. The Rabat Plan of Action’s six-point test provides valuable guidance on these questions, emphasizing the importance of non-legal approaches. As it states, “legislation is only part of a larger toolbox to respond to the challenges of hate speech. Any related legislation should be complemented by initiatives from various sectors of society geared towards a plurality of policies, practices, and measures nurturing social consciousness, tolerance, and understanding change and public discussion. This is with a view to creating and strengthening a culture of peace, tolerance, and mutual respect” (OHCHR 2012).

As the Rabat Plan of Action notes, State and non-state actors can and should employ a range of non-legal responses to prejudice, stigmatization, and discrimination and build an environment where ideas, opinions and convictions—religious and non-religious—can be openly exchanged without fear of violence or hatred (Article 19 2015, 49f). Key in this respect are initiatives to speak out against hate speech and refrain from using expressions which may incite violence, hostility, or discrimination. Early and clear communication can prevent tensions from escalating and open a space for “counter-speech” from other actors. In situations where proponents of hate speech portray themselves as representative of, or acting on behalf of, a specific religious/belief community or tradition, leaders from that community or tradition are well placed not only to refute these claims of representation, but also to challenge their justifications of hatred and offer a persuasive counter-narrative (Article 19 2015, 49).

Dialogue and collaborative action can also play an important role in dismantling stereotypes, prejudices, and misperceptions (Article 19 2015, 65). This includes not only interreligious, but also intra-religious, dialogue and collaboration, as well as dialogue and collaboration between religious and non-religious groups and communities.

Finally, education is essential to ensure respect for diversity. We must encourage educational reforms to ensure obligatory education in human rights, pluralism, and non-

discrimination in formal education. Teaching materials and textbooks should be revised wherever religious interpretations may give rise to the perception of condoning violence or discrimination against particular groups or individuals (Shaheed 2019, par. 22).

Human rights are not meant to ensure a utopian, harmonious society where no one is hurt or offended. But they can contribute to building a democratic, pluralist society where we, in all our diversity, can live peacefully together, even when disagreeing vehemently (Petersen 2021a). ♦

About the Author

Marie Juul Petersen is a senior researcher at the Danish Institute for Human Rights. Her work focuses on the intersections between religion and human rights. Publications include *For Humanity or for the Umma?* (Hurst, 2016), *The Organisation of Islamic Cooperation and Human Rights* (co-edited with Turan Kayaoglu, University of Pennsylvania Press, 2019), and *The International Promotion of Freedom of Religion or Belief. Sketching the Contours of a Common Framework* (co-authored with Katherine Marshall, DIHR, 2020).

Notes

1. Upon the 2020 republication of the Danish cartoons in the French *Charlie Hebdo* magazine, for instance, the Secretary General of the OIC emphasised that “Islamophobic acts [such as the republication] violate the freedom of religion and belief guaranteed by international laws” (OIC 2020).
2. Key documents in this regard are the UN Convention on the Prevention and Punishment of the Crime of Genocide (1948) and the Rome Statute of the International Criminal Court (1998); ICCPR, Article 20 (2); Human Rights Committee, *General Comment no. 22*, CCPR/C/21/Rev 1/Add.4, 1993, and *General Comment no. 34*, CCPR/C/GC/34, 2011; Human Rights Council, *Resolution on combating intolerance, negative stereotyping and stigmatisation of, and discrimination, incitement to violence, and violence against persons based on religion or belief*, A/HRC/RES/16/18, 2011.
3. Some argue that certain expressions should be restricted or suppressed because of anticipated or actual violent reactions against the speaker. This is sometimes referred to as ‘the heckler’s veto’. But expressions that may result in violence against the speaker, no matter how likely it is that violence will erupt, should not be conflated with a speaker’s intentional incitement to violence. See Mchangama (2022) for a discussion of this.
4. The term “prohibit by law” in Article 20 of the ICCPR does not necessarily mean criminalisation; the Human Rights Committee has said it only requires States to “provide appropriate sanctions” in cases of incitement. Civil and administrative penalties (e.g. fines, restitution/compensation, retraction of statement, banning of associations) will in many cases be most appropriate, with criminal sanctions an extreme measure of last resort (Article 19 2018, 11).
5. Joint submission by Heiner Bielefeldt, Special Rapporteur on freedom of religion or belief; Frank La Rue, Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression; and Githu Muigai, Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance, presented at OHCHR expert workshop held in relation to the Rabat Plan of Action (2011).

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