Religious Proselytism in Global Perspective: A Critical Examination of International and Regional Human Rights Law

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ABSTRACT

The topic of religious proselytism is rich with opportunity for research and reflection as it involves the complex interaction between various legal, social, cultural and religious issues and interests. As a matter of international human rights law, the topic of religious proselytism has been an important part of the debate regarding the freedom of religion since the drafting of the Universal Declaration of Human Rights. This project critically examines the ways in which religious proselytism is represented in various international and regional human rights instruments and organizational structures. The purpose of this examination is to identify the various issues involved in addressing religious proselytism, and to construct a global conception of religious proselytism as a matter of human rights. Although there is variance in the global conceptions regarding religious proselytism, there are some significant points of overlap. It is these points of overlap that enable a deeper understanding of the issues related to religious proselytism and for managing the ways in which the issues should be reflected in the relevant human rights standards.

La question du prosélytisme religieux recèle un rich potentiel pour la recherche car elle implique l'interaction complexe entre diverses questions et sujets juridiques, sociaux, culturels et religieux. Du point de vue du droit international des droits humains, la question du prosélytisme religieux fait partie intégrante du débat sur la liberté de religion depuis la rédaction de la Déclaration universelle des droits de l'homme. Ce projet se donne pour but d'envisager de manière critique les manières dont le prosélytisme est représenté à travers différents instruments et institutions régionaux et internationaux en matière de droits humains. Le but de cette analyse est de metre à jour les dilemmes en jeu dans la prise en compte du prosélytisme, et de construire une conception globale du prosélytisme religieux du point de vue des droits humains. Bien que les conceptions globales sur cette question variant, il existe des points communs importants. Ce sont ces points communs qui permettent une compréhension plus profonde des questions relatives au prosélytisme religieux et à la manière dont ces questions sont prises en comptes par les standards en matière de droits humains.

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INTRODUCTION

Religious freedom and freedom of expression are highly valued throughout most of the world today. They are both considered to be fundamental human rights, which undoubtedly must be protected in a free society. It is remarkable that the clarity of the protections offered by the freedoms of religion and expression fades away when they are joined together in the single act of religious proselytism. Even in the definition of proselytism used in common dictionaries there is evidence of uneasiness with religious proselytism. Webster's Dictionary defines 'proselytize' as: "1) To induce someone to convert to one's faith; 2) To recruit someone to join someone's party, institution or cause."[1] The difficulty with religious proselytism seems to be due to the fact that it involves conflict between religious beliefs – religious proselytism is: "…expressive conduct undertaken with the purpose of trying to change the religious beliefs, affiliation, or identity of another."[2] The fear is that somehow the freedom of the targeted person to have his or her own religious beliefs will be compromised in the process. This results in the common notion of religious proselytism being painted with negative terms such as 'inducing' – connoting a coercive or forced displacement of religious beliefs against a person's will – rather than 'recruiting', which is used for membership in less personal institutions. As will be seen in the sources examined in this thesis, a similar discomfort with religious proselytism exists throughout international and regional human rights law.

It is important to consider why there is such unease with religious proselytism. The discomfort that accompanies religious proselytism is at least in part an impulse to protect the target of proselytic activity, but there are also many other interests at play that must be considered. The discomfort is likely born partly out of a desire to protect society

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[1] *Merriam-Webster Dictionary*, *sub verbo* "proselytize", online: <http://www.merriam-webster.com >. It should be noted that the negative connotation is not shared by all dictionaries – some provide a more neutral definition, such as the *Oxford English Dictionary*, which defines 'proselytize' as: 1) "To make, or seek to make, proselytes or converts"; and 2) "To convert or attempt to convert from one opinion, religion, or party, etc., to another" (*Oxford English Dictionary*, 3d ed, *sub verbo* "proselytize", online: <http://www.oed.com/>). It is interesting to note both the inconsistency in common definitions of proselytism as well as the negative conception that creeps into some of those definitions. Ultimately, for this thesis the definition of 'proselytism' is not important – it is not a technical legal term or term of art. Rather, what is important for understanding the conception of proselytism, as a matter of human rights, is to consider how it functions in various human rights legal settings.

[2] Tad Stahnke, "Proselytism and the Freedom to Change Religion in International Human Rights Law" (1999) BYU L Rev 251 at 255. To avoid confusion, this project is not limited to examining particular instances of individuals involved in proselytism, but will also look at the general context in which acts of religious proselytism occur.

by preventing the conflict that might escalate between religious groups because of proselytism. It is also important to consider the other side of the proselytic equation, and to see that the motivation for disseminating religious belief is born from the individual's conviction of the truth of their religious belief and out of a sense of religious obligation. What is most interesting about religious proselytism, and why it is an important human rights topic, is that it stands at a crossroads where various legal, cultural and social interests and issues meet, often times causing friction. The ways in which religious proselytism is dealt with provides a window into some deep theoretical questions regarding the nature of religious freedom and human rights, the role of the state in managing religious conflict, and the relationship between law and religion more generally.

Religious proselytism emerges as a difficult phenomenon to analyze legally, because it engages many different rights, interests and social forces.[3] For example, it engages the freedom of someone to spread their religion as well as an individual's right to be free from being coerced to change their religion. There are also non-religious rights involved, especially including the freedom of expression. Religious proselytism engages more controversial 'rights' such as the right to 'freedom from' religion or the right to have your religious feelings protected. There is also a distinctly non-individual, or group, set of interests involved: the interests in particular groups to either expand (via proselytizing) or to preserve themselves (not being proselytized). Another group of interests engaged by the issue of religious proselytism are those of society as a whole and the state in particular. For example, the state may claim to have an interest in protecting minority religions, protecting the cultural history of the country from being modernized, or preventing clashes between different religious groups that try to proselytize each other. More contentious would be the interests of the state in protecting state ideology or protecting against practices that offend social or cultural propriety.

[3] For an excellent elaboration of the various rights and interests engaged in the issue of religious proselytism, such as the rights of the proselytizer, the rights of the person being proselytized and the interests of the state, see Stahnke, *supra* note 2.

Considering the variety of interests involved, it is not surprising that there is inconsistency in the perception of and legal practice regarding religious proselytism.[4] No single interest can be considered a 'trump' and every situation must be analyzed individually. The way in which the many interests are harmonized depends on various legal, theoretical, and cultural presuppositions about human rights and the relationships between religion, law and society. Hence, an analysis of proselytism does not engage only positive legal issues, but also broader social and theoretical questions. The subject of proselytism must be analyzed in light of the various cultural and social forces at work (such as in terms of colonialism, globalization or modernization) in addition to the legal rights and interests mentioned earlier. Because of these layers of complexity, the regulation of religious proselytism requires a delicate balancing of the various interests involved. To achieve this in the context of international human rights requires the development of a comprehensive conception of religious proselytism with a global perspective.

Religious proselytism has been examined by several different legal academics in different ways. Tad Stahnke discussed religious proselytism in a brilliant and thorough essay on the topic: "Proselytism and the Freedom to Change Religion in International Human Rights Law".[5] Stahnke focused his analysis on the standard emerging from the UN and the European Court of Human Rights, and sought to develop a more complete definition of what is meant by 'proper' versus 'improper' religious proselytism.[6] Natan Lerner also composed an analysis of the issue of religious proselytism in international human rights.[7] Lerner's goal was to provide a descriptive synthesis of the human rights

[4] Some academics argue that there is no resolve to the conflict of interests in the issue of proselytism within our current conceptual framework of international human rights, which indicates that we must revise our theory of rights. For a discussion of this issue see Peter Danchin, "Of Prophets and Proselytes" (2008) 49:2 Harv Int'l LJ 252. Although this subject is interesting, it is not the focus of this project.

[5] Stahnke, *supra* note 2. Stahnke's analysis is limited in several important ways. For example, his analysis of international sources is limited to select documents of the United Nations (notably excluding the 1981 Declaration, *infra* note 85) the European Court of Human Rights and minimal references to the Inter-American Court of Human Rights.

[6] Stahnke, *supra* note 2 at 326. The strength of Stahnke's model is that he takes quite a holistic view of the circumstances when determining whether a proselytic act is improper.

[7] Natan Lerner, "Proselytism, Change of Religion, and International Human Rights" (1998) 12 Emory Int'l L Rev 477 [Lerner, "Proselytism"]. Lerner does a particularly excellent and thorough review of the issue of proselytism in the UN regime.

laws on the issue of religious conversion,[8] and to examine the extent and limitations of the rights to change religions and to convince someone to change religions.[9] In many ways the current project is complementary to the work of Stahnke and Lerner.[10] The scope of this project is wider than either Stahnke or Lerner in that it is a comparison and critical evaluation of a more comprehensive scope of international and regional human rights regimes pertaining to the issue of religious proselytism.[11] In addition, this project focuses less on inquiring into the application of the international human rights standard of religious proselytism, and more on providing a comparison and critical evaluation of the various international and regional instruments pertaining to the creation of the standard.

Given the broad range of issues relating to religious proselytism, an investigation into the matter must be done in several stages. It is not possible to cover all of the issues related to religious proselytism in a single volume – and it will not be attempted here. This project will critically assess how religious proselytism is conceptualized globally as a matter of human rights by examining how various international and regional human rights bodies relate to religious proselytism. This project will identify commonly held issues, concerns and approaches in the various human rights instruments that are relevant for understanding religious proselytism in an attempt to see what a global conception of religious proselytism might look like. Rather than approaching the text with a preconceived notion of the relevant issues and concerns this project seeks to discern how the various international human rights instruments, their unique historical, cultural and legal experiences, directly inform the conception of religious proselytism as a matter of human rights. The hope is that through the analysis employed in this project – by

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[8] *Ibid* at 483.

[9] *Ibid* at 488. The limit to Lerner's article is similar to that of Stahnke: Lerner is looking to understand the proselytism standard in international human rights (i.e. primarily the UN), and then to develop a more comprehensive way of applying the standard with the intention of promoting religious tolerance and pluralism (*ibid* at 483).

[10] Since the articles by Stahnke, *supra* note 2 (1999), and Lerner, *supra* note (1998), were published over 10 years ago, parts of my research can be seen in part as an update or supplement to their work. Lerner does a particularly fine and thorough job of tracing the issue of religious proselytism in the UN, but his essay is limited insofar as some of the most relevant UN materials to the issue of proselytism (i.e. recent reports of the Special Rapporteur on Freedom of Religion or Belief) were produced after its publication.

[11] The analysis of Stahnke, *supra* note 2 is limited to the international human rights perspective with little consideration of the regional human rights documentation. The analysis of Lerner is almost exclusively of the UN documentation, providing only passing reference to the Inter-American, African and Islamic human rights regimes ("Proselytism", *supra* note 7 at 543-544). The only international case considered in depth by Lerner was the *Kokkinakis* case (*infra* note 185) (at 547-556).

critically engaging the texts, jurisprudence and relevant contextual frameworks of the various international human rights sources – there will emerge a set of principles relevant to developing a unified and global approach to religious proselytism.

This project will involve a three-part analysis. The first part will be an examination of the various instruments of the United Nations human rights regime. The discussion of the United Nations human rights regime will reveal many of the issues at the heart of the legal conception of religious proselytism. In seeking to resolve these conflicting issues the mechanisms of the United Nations have developed a distinct standard and approach to religious proselytism. As a global forum for human rights, the United Nations regime reflects many of the global issues regarding religious proselytism, and provides the background for reflecting on these issues in the other human rights sources. The second and third parts of the project will involve the examination of several regional human rights regimes and the approach taken by each of them regarding religious proselytism. The goal of analyzing the regional human rights regimes is to develop a more nuanced articulation of the issues and concepts pertaining to religious proselytism. The regional analysis is divided into two sections: first, the European and the Inter-American human rights regimes; secondly, the African, Islamic and Asian human rights regimes. These broad categories are based on several considerations, including the age, development and organizational structures of the regimes, as well as on the different theoretical approaches of the regimes. Each regional regime will be discussed in turn in the form of a critical evaluation of the regime. Throughout the project comparisons will be drawn between the different human rights regimes in an effort to identify patterns of issues, strengths and weaknesses of the various approaches.

The sources to be evaluated in this project were chosen based on several factors. First, in order to achieve the goals of the project it is necessary to gain the broadest global perspective possible to see various perspectives on the issues related to religious proselytism. The United Nations documentation provides a very broad global perspective, but it does not always accurately represent all of the relevant views pertaining to an issue, as in the UN there is often an attitude of compromise taken with topics of broad application (like religious freedom and proselytism). Looking at regional bodies that deal with issues of religious human rights expands and deepens the various

views on religious proselytism that emerge from the UN documents. Selecting the institutions to be considered is not an easy task. To look only at the traditional regional bodies – those with binding multilateral human rights treaties and associated human rights bodies – would leave large portions of the world unaccounted for (e.g. the whole of Asia) and result in a homogenous view of the issues. In order to engage a more global and diverse perspective it is necessary to consider a wider scope of sources. On the other hand, taking too broad of a scope would result in a deluge of sources, which would make the project unmanageable. It is important to strike a balance between breadth and specificity, to ensure a variety of views representing a more global perspective while keeping the size of the project reasonable. To achieve this balance, this project focuses on multilateral inter-governmental organizations with some conception of human rights, even if there is no binding human rights treaty or enforcement mechanism. Although much could be learned from an analysis of domestic laws and constitutions it would be far too great an undertaking to include in this study.

Examining religious proselytism in this way has some clear limitations. The most prominent limitation is that certain regions simply do not have cases dealing directly with religious proselytism. Another limitation is that several of the regional organizations lack development with regard to the finer aspects of religious freedom, which includes the issues related to religious proselytism. These limitations result from the youth, ineffectiveness or absence of mechanisms to interpret and apply of the human rights norms that are developing in these different regions. This leads to a lack of jurisprudence directly related to the issues relating to proselytism. It is common for regional institutions to be underdeveloped regarding the finer aspects of religious freedom, even if they have enforcement mechanisms in place, since some of them are preoccupied by more egregious violations of human rights.

The limitations of this analysis do not nullify its importance. Many of the institutions, mechanisms and norms developing in the various regions reveal and engage critical issues that relate directly to religious proselytism. The issues that are dealt with openly regarding religious proselytism in the developed institutions (such as the UN and Europe) find expression in the other less developed regional institutions. The value of the current project is to identify these issues and open them up for discussion. By doing this I

hope to provide a more complete understanding of religious proselytism and the theoretical, normative and social issues at its core. Although many questions will remain unanswered at the end of this project, several principles will emerge that are relevant to the continued development of the issue of religious proselytism. This current project should therefore be seen as the first step towards developing a more comprehensive approach to religious proselytism in human rights that embraces a global view of the issues involved in its effective and satisfactory management.

Part 1: United Nations Human Rights Regime

1.1 Introduction

The United Nations is the largest forum for the development of international law. Hence, it is the best place to start when examining the issue of proselytism in human rights. The greatest difficulty encountered when approaching the UN documents on human rights (or any topic, for that matter) is the voluminosity of the available material. This is particularly the case when examining the issue of proselytism, as this topic touches upon many different rights and social interests. This poses the real possibility that an analysis of the UN documents regarding proselytism will become fragmented and unfocussed. The intention of this study is not to provide an exhaustive summary of the United Nations instruments and the documents of the various official actors and events that touch on the issue of proselytism. Rather, the goal is to look at the sources providing the chief contribution to the discussion surrounding the issue of proselytism, in order to develop an understanding of how proselytism is conceived of and dealt with in the United Nations. By approaching the topic in this way I hope to focus the discussion and prevent it from ballooning.

I will start by looking at two of the main general human rights instruments emerging from the United Nations that deal with the freedom of religion – the Universal Declaration of Human Rights [UDHR], and the International Covenant on Civil and Political Rights [ICCPR] – to uncover how they relate to the issue of proselytism.[12] I will

[12] I intentionally do not discuss the International Covenant on Economic, Social and Cultural Rights [ICESCR], because that treaty does not discuss freedom of religion or the notion of proselytism in any significant way. Although the ICESCR may be relevant for some issues pertaining to religion, it does not contribute anything significant to the issue of proselytism.

then look at a more recent instrument that is devoted exclusively to the issue of freedom of religion and religious discrimination – the 1981 Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief [1981 Declaration] – to discuss how it adds to the understanding of proselytism emerging from the UDHR and the ICCPR. The final portion of the analysis of the United Nations will focus on how the instruments have been interpreted and applied – as can be found in the documents emerging from the Human Rights Committee and the Special Rapporteur on freedom of religion or belief. Although the UDHR, ICCPR and 1981 Declaration are traditional sources of international law, they only provide the raw materials for dealing with the issue of proselytism – they do not deal with proselytism directly. As such, the final part of this analysis is probably the most important, because it provides a synthesis of the 'primary' sources of law and applies them to the issue of proselytism.

1.2 Setting the Stage: Centrality of the Freedom to Change Religions – Universal Declaration of Human Rights[13]

1.2.1 Content of the UDHR regarding proselytism

The logical starting place is at the beginning of the modern human rights movement, which was inaugurated by the UDHR.[14] As will be seen, the notion of proselytism is not directly represented in the text of the UDHR. The issue of proselytism did factor into the discussion during the drafting of the UDHR under the guise of whether the right to change religions should be protected. The discussion involved vastly opposing views on the matter and revealed the themes and issues forming the basis of the contemporary conception of proselytism in the UN.

The UDHR provides protection for the two basic rights necessary to support acts of proselytizing, in a general sense, by guaranteeing freedom of religion and freedom of

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[13] *Universal Declaration of Human Rights*, GA Res 217 (III), UNGAOR, 3d Sess, Supp No 13, UN Doc A/810, (1948) [UDHR].

[14] The 'beginning' of international human rights is a matter open for debate. For an interesting discussion of the beginning of the human rights movement, see Michael K Addo, *The Legal Nature of International Human Rights* (Boston: Martinus Nijhoff, 2010), especially chapter 2 "The Evolution of Human Rights in International Law", where Addo challenges the traditional view that 'human rights' began with the UN Charter. For a discussion on the traditional view, see especially pages 139-142 (*ibid*). However, even Addo recognized that "[t]he UN system marked an important value change within the international community in which the idea of human rights was given an entirely new representation…" (*ibid* at 151). For the purposes of this project, the debate regarding the beginning of human rights is irrelevant. I start with the UDHR because it is one of the most broad and important human rights documents that stands at the beginning of the present global discourse on human rights.

expression. The most significant article in the UDHR for dealing with issues of proselytism is Article 18, which provides the general guarantee for the freedom of religion, which says:

> Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief, and freedom, either alone or in community with others and in public or private, to manifest his religion or belief in teaching, practice, worship and observance.

The significance of the language used here only becomes evident as we compare the text of the UDHR to other UN instruments (which will be done later). One part of the above text that is significant for proselytism is the explicit inclusion of the freedom to change religions. Although the freedom to change religions does not logically necessitate the freedom to propagate religious teachings, it does strongly imply it. In order for an individual to have the ability to change religions requires other options from which the individual may choose. The freedom to disseminate a religion (proselytism) is thus a necessary component of the right to change one's religion. Admittedly, this argument on its own does not demonstrate that the UDHR includes proselytism as a necessary part of the freedom of religion. However, it does provide the groundwork consistent with arriving at such a conclusion. Indeed, the importance of the freedom to change religions becomes clear when looking at the *travaux préparatoires* of the various UN instruments, which I will examine in due course.

There are other articles in the UDHR of some relevance to the issue of proselytism. For example, Article 19 provides for the freedom of opinion and expression and the right to "receive and impart information and ideas". This right has been considered in conjunction with the freedom of religion, specifically the freedom to 'teach' a religion, to imply that disseminating religious beliefs (proselytism) is a practice protected by the United Nations human rights regime.[15] The UDHR also provides for protection of privacy (Article 12) and the equal protection of the law (Articles 2 and 7), which are of less significance, but some scholars believe that they contribute to dealing

[15] See, for example, the comments made by the Human Rights Committee members when considering the laws of Uzbekistan in light of the ICCPR: UN Human Rights Committee, 98th Sess, 2694th Mtg, UN Doc CCPR/C/SR.2694 (2010) at para 22 [HRC Uzbekistan report (2010)]. Also, see the comments of the Special Rapporteur on the freedom of religion and belief: *Report of the Special Rapporteur of the Commission on Human Rights on freedom of religion or belief, Asma Jahangir*, UNGA, 60th Sess, Agenda Item 71(b), UN Doc A/60/399 (2005) at para 61 [SRFRB GA report (2005)].

with the issue of proselytism.[16] The limitations to the rights in the UDHR are outlined in Article 29, which allows for limitations on any right so long as the purpose of the limitation is to secure "respect for the rights and freedoms of others" and for the purposes of "morality, public order and the general welfare in a democratic society." The UDHR is different from most international human rights guarantees of freedom of religion and freedom of expression in that there are no specific limitations to those rights. This is especially the case with regard to the freedom of expression, which usually includes significant restrictions. However, the general limitation in Article 29 provides a similar form to the limitations that are usually placed in direct relation to the rights guaranteed.

The UDHR contains the essential components to deal with issues of proselytism, seemingly allowing acts of proselytism with reasonable limitations. However, the terms of the UDHR are not developed sufficiently to provide a definitive notion of the issue of proselytism. Some of the basic structures of rights that undergird the practice of religious proselytism are contained in the UDHR. It is important to look at the drafting of the UDHR to gain a better understanding of how these structures relate to proselytism.

1.2.2 Drafting of the UDHR and its *travaux préparatoires*

Malcolm D Evans provides an excellent overview of the drafting process of the freedom of religion clause in the UDHR.[17] For the purposes of my analysis, it is not necessary to look in detail at all of the suggested amendments or the reasons argued for and against those amendments, as these issues will be addressed in greater detail regarding the other later UN instruments. However, there are a couple of important moments in the UDHR drafting process worth mentioning. First, there was a significant amount of disagreement between the drafters as to how to deal with manifestations of religion and the freedom to change religions. There were several suggested amendments to provide greater restrictions to the actions of religious groups, the most notable coming from Russia, Sweden and Saudi Arabia.[18] Evans observed, "At base, there was an irreconcilable conflict between the Muslim States which were not prepared to accept the

[16] Regarding privacy, see Lerner, "Proselytism", *supra* note 7 at 484. Regarding discrimination and equal protection, see Stahnke, *supra* note 2 at 266-268.
[17] See Malcolm D Evans, *Religious Liberty and International Law in Europe*, (Cambridge: Cambridge University Press, 1997) at 183-193 [M Evans, *Religious Liberty*].
[18] *Ibid* at 185-187.

claim that all individuals were entitled to change their religious beliefs and others for whom this was an essential prerequisite."[19]

The issue of proselytism was brought into the drafting of the UDHR under the category of the freedom to change one's religion. This is an important theme that, as we will see later, carried through to affect the drafting of other UN documents discussing freedom of religion, such as the ICCPR and the 1981 Declaration. The most relevant aspect of the discussion of the drafting of the UDHR is found in an amendment proposed by Saudi Arabia to remove from Article 18 the phrase "this right includes freedom to change his religion". It was noted in the minutes of the meeting that:

> Explaining the reasons behind his amendment (A/C.3/247), Mr. Baroody (Saudi Arabia's representative) pointed out that throughout history missionaries had often abused their rights by becoming the forerunners of a political intervention, and there were many instances where peoples had been drawn into murderous conflict by the missionaries' efforts to convert them.[20]

Although the language used is with regard to changing one's religion, the issue being addressed by Saudi Arabia in suggesting the removal of such a right is based on conflicts surrounding acts of proselytization, focusing particularly on issues of political power and colonialism. India, among others, declared open opposition to Saudi Arabia's suggestion on the basis that it would compromise a central component to the freedom of religion.[21] Ultimately, the freedom to change religions was retained.

The concern expressed by Saudi Arabia during the drafting of the UDHR was echoed by Egypt's representative at the time the UDHR was adopted. In objection to the drafting committee's decision to retain the explicit freedom to change one's religion, the Egyptian representative said:

> Religious beliefs could not be cast aside lightly… His delegation feared that by proclaiming man's freedom to change his religion or belief the declaration would be encouraging, even though it might not he intentional, the machinations of certain missions, well known in the Orient, which relentlessly pursued their efforts to convert to their own beliefs the masses of the population of the Orient.[22]

What is expressed here seems to be a desire to prevent the conversion of a people group away from their traditional religion – in the case of Egypt, this would be a conversion away from Islam and likely to Christianity.

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[19] *Ibid* at 188.
[20] UNC3OR, 3rd Sess, 127th Mtg, UN Doc A/C.3/SR.127 (1948) at 391.
[21] *Ibid* at 408.
[22] UNGAOR, 3rd Sess, 183rd Mtg, Agenda Item 119, UN Doc A/PV.183 (1948) at 913.

The issue of proselytism lurked behind the discussion for several countries, and not only in the context of changing one's religion. For example, the representative of Greece expressed concerns regarding the right to manifest one's religion or belief, believing that this would encourage "unfair" practices of proselytism and would result in unfair competition between religions:

> He wondered, however, whether the phrase "freedom…to manifest his religion or belief" might not lead to unfair practices of proselytizing… In fact, free lodgings, material assistance and a number of other advantages were offered to persons who agreed to belong to one religion or another… While, admittedly, every person should be free to accept or reject the religious propaganda to which he was subjected, he felt that an end should be put to such unfair competition in the sphere of religion.[23]

Another example is Belgium's criticism of Sweden's suggested amendment to the UDHR, which included a limitation to the freedom of religion to not "…interfere unduly with the personal liberty of anybody else".[24] Mr. Dehousse, the representative of Belgium, essentially argued that proselytism is a matter inherent to all religions:

> In professing or propagating a faith one could, to a certain extent, interfere with the freedom of others by seeking to impose an unfamiliar idea upon them. But prose1ytism was not limited to any one faith or re1igious group. If it was an evil, it was essentially an evil from which all sides had to suffer.[25]

The drafting committee voted on whether to include the wording "this right includes freedom to change his religion", at the request of Saudi Arabia. The result was 27 to 5 for inclusion, with 12 abstentions; all 5 states voting to exclude the phrase were Muslim states.[26] The drafting committee then voted on the whole of Article 18 (then referred to as Article 16), with the result of 33 to 3 in favour of adopting it as drafted, with 3 abstentions.[27] It is interesting that some of the Muslim states changed their vote, and in the end voted in favour of a wording that included freedom to change religions. Evans argued that "…the prevalent view was that the text as presented was a compromise that should not be picked over and it was on that basis that it was adopted…."[28] The fact that the UDHR was a non-binding declaration was also likely a factor, as well as the fact that it was intentionally worded to be vague and general. Evans also argued that,

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[23] UN Doc A/C.3/SR.127 (1948), *supra* note 20 at 393-394.
[24] See comments of Mr. Dehousee, *ibid* at 395.
[25] *Ibid* at 395.
[26] UNC3OR, 3rd Sess, 128th Mtg, UN Doc A/C.3/SR.128 (1948) at 406. Saudi Arabia requested vote on a roll call basis.
[27] *Ibid* at 406.
[28] M Evans, *Religious Liberty*, *supra* note 17 at 191.

> Public morality, the rights of others and the dignity of believers themselves were seen as competing interests that could not be reconciled and were best left in a state of unresolved tension, with the Draft Declaration as a whole providing some support for most points of view.[29]

1.2.3 Summary

The general theoretical view that emerges from the drafting and adoption of the UDRH is that there is agreed a general sense of what is required in terms of freedom of religion, but the particulars of what this freedom means are divergent. The international agreement on the UDHR was not intended to be an absolute statement of positive binding law, but was intended to be a statement of general principle.[30] The vagueness of the general principles, especially in terms of their effect on practices of proselytism, can be seen in some of the statements of countries voting to approve Article 18 in full.[31] So, even the terms of the agreement reached are not clear. The fact that the freedom to change religions was included in the UDHR cannot be taken to indicate agreement amongst the international community that proselytism should be allowed without limitation.

The view of proselytism emerging from the drafting of the UDHR is limited and relatively negative. Those who opposed the right to change religions did so out of fear of what they viewed as the likely effects of proselytic activity: conflict between religions, threats to local religious groups, 'unethical' or improper acts of proselytism and the importation of political ideology into religious and cultural issues (the relation between colonialism and proselytism). However, those who supported the freedom to change religions did so based on the view that these concerns were misguided, and that freedom to change religions was essential to the guarantee of freedom of religion more generally. Even though the right to change religions was included as a part of the freedom of religion, the attitude of the international community regarding proselytism remained divided.

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[29] *Ibid* at 189.

[30] For a brief comparison for the differences in legal intentions between the UDHR and ICCPR, see Vratislav Pechota, "The Development of the Covenant on Civil and Political Rights" in Louis Henkin, ed, *The International Bill of Rights* (New York: Columbia University Press, 1981) 32 at 35.

[31] For example, Mr. Contoumas, the representative from Greece, said that he had voted in favour "…on the understanding that it did not authorize unfair practices of proselytism" (UN Doc A/C.3/SR.128 (1948), *supra* note 26 at 406).

As mentioned earlier, the themes and issues raised in the UDHR form the basis of the UN conception of proselytism and the freedom of religion. These issues are reflected throughout the other UN human rights instruments, continually developing throughout the growth of the system of human rights in the UN.

1.3 Politicizing Religion: Colonialism, Religious Competition and Cultural Preservation – the International Covenant on Civil and Political Rights[32]

1.3.1 Introduction to ICCPR and developments to the conception of religious proselytism

The International Covenant on Civil and Political Rights is the most widely ascribed to human rights legal instrument in the world, having 167 state parties as of February 2012.[33] The ICCPR is important for the issue of proselytism because it is the first binding instrument developed in the UN dealing with religious freedom.

There are several parts of the ICCPR that have some relevance to the issue of proselytism. All of articles 2, 17, 18, 19, 20(2), 26, and 27 could be argued to be relevant in some way. As was mentioned earlier, some scholars have argued that the protection of privacy (Article 17) has some peripheral relevance for the issue of proselytism.[34] Article 27, which protects the right of religious minority groups to practice their religion, has a more interesting place in the discussion regarding proselytism. There has been concern that proselytism leads to the destruction of cultural identities and minority communities.[35] This often results in negative attitudes towards proselytism, which is rooted in the perception of proselytism as a form of colonialism or cultural/religious bullying. Interestingly, these ill feelings are usually directed towards minority religions (often of Christian origin) that engage in proselytism towards society's majority religions. Oddly, the impulse to preserve cultural communities has been used more to suppress religious

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[32] *International Covenant on Civil and Political Rights*, 19 December 1966, 999 UNTS 171, Can TS 1976 No 74, 6 ILM 368 [ICCPR].

[33] See treaty information online: UNTS webpage <http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-4&chapter=4&lang=en>.

[34] Manfred Nowak, in his book *U.N. Covenant on Civil and Political Rights: CCPR Commentary*, 2d revised ed (Arlington: NP Engel, 2005), suggested that the connection between privacy and freedom of religion is based on the freedom to choose a religion free from government coercion (at 314-315). Although this touches on a subject related to proselytism, it does not contribute much to the discussion, as restrictions on state action are dealt with more comprehensively under the principles of coercion in Article 18(2) of the ICCPR, as will be discussed later.

[35] For an interesting discussion of these concerns, especially how they relate to indigenous populations, see Stahnke, *supra* note 2 at 300-305.

minorities than to protect them.[36] Even though religious minorities and cultural preservation are involved in the conflict emerging from proselytism, Article 27 of the ICCPR has not been engaged in any significant way in the international legal discussion regarding religious proselytism.[37] There certainly was no discussion during the drafting of Article 27 that related it to the issue of proselytism. Since the minority religions facing restriction of their rights are usually those engaged in acts of proselytism, the focus in the human rights discussion has been mostly on the freedom of religion with some discussion of the non-discrimination and freedom of expression provisions in the human rights instruments.

Articles 2 and 26 are general prohibitions on discrimination. These non-discrimination articles are relevant to proselytism in offering protection for those religions that engage in acts of proselytism. For example, when proselytism is criminalized it disproportionately affects those individuals with the religious belief that they must proselytize. The Special Rapporteur on freedom of religion or belief has discussed these issues of discrimination in the context of proselytism on several occasions, and focused its critique on the ways in which anti-proselytism laws might be used as tools of discrimination and intolerance, especially against religious minorities.[38] Another potential issue of discrimination relating to proselytism is where the provision of government services is biased towards those of a certain religion. Although this situation

[36] These issues will be discussed in greater detail when looking at the work of the Special Rapporteur on Freedom of Religion or Belief, in section 1.5.3 below.

[37] The only mention in the UN human rights materials where the practice of proselytism was challenged in order to protect a minority religion was with regard to the actions of missionaries in Brazil proselytizing the small Afro-Brazilian populations – see *Report of the Special Rapporteur on Contemporary Forms of Racism, Discrimination, Xenophobia and Related Intolerance, Doudou Diene, on his mission to Brazil*, UN Commission on Human Rights, 62nd Sess, Agenda Item 6, UN Doc E/CN.4/2006/16/Add.3 (2006). The protection of minority religions and cultural groups has become a more prevalent theme in international human rights law. Although there are important theoretical connections between the protection of religious minorities and cultures (for their own sake) and the restriction of religious proselytism, this connection has not been developed within the context of the UN. To enter into discussion of the ways in which this Special Rapporteur's comment fits into the UN conception of religious proselytism would be artificial. The issue of religious proselytism has been dealt with extensively through the reports and activities of the Human Rights Committee and the Special Rapporteur on Freedom and Religious Belief, which is discussed in more detail in the section 1.5, below.

[38] There is more discussion on this in section 1.5, below. See also SRFRB GA report (2005), *supra* note 15 at para 65; and *Report submitted by the Special Rapporteur on freedom of religion or belief, Asma Jahangir, Mission to Sri Lanka*, UN Commission on Human Rights, 62nd Sess, Agenda Item 11(e), UN Doc E/CN.4/2006/5/Add.3 (2005) at para 78.

is clearly a matter of discrimination, the UN bodies have dealt with it primarily as an issue of coercion by the state – i.e. the state engaging in a form of 'proselytism'.[39]

Article 19 is also relevant to proselytism. Article 19 guarantees the right to freedom of opinions and expression. As was mentioned earlier, the right to freedom of expression has been used in conjunction with freedom of religion to argue that proselytism should be freely practicable.[40] There has been some discussion regarding the rights of religious organizations to distribute literature on their religion, such as can be found in acts of proselytizing, and that this is guaranteed by Article 19.[41] However, the discussions regarding the drafting of Article 19 did not engage any of the issues related to proselytism. Rather, the discussions surrounding Article 19 focused on the freedom of the press and on the principle of 'hate speech', which were contentious in their own right. The connection between expression and proselytism was not made until later.

Article 20(2) of the ICCPR is relevant to proselytism because it provides a limitation to the rights of free expression (Article 19) and religion (Article 18). Article 20(2) says: "Any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law." This restriction provides "…important safeguards against infringement of the rights of religious minorities and of other religious groups…and against acts of violence or persecution directed towards those groups."[42] As such, acts of proselytism that constitute incitement to discrimination, hostility or violence cannot be permitted. As with many of the other articles of some relevance, the drafting of Article 20(2) did not discuss its relation to the issue of proselytism.

By far the most relevant right in the ICCPR to the subject of religious proselytism is Article 18, which is the right to freedom of religion and belief:

> 1. Everyone shall have the right to freedom of thought, conscience and religion. This right shall include freedom to have or to adopt a religion or belief of his choice, and freedom,

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[39] This has been dealt with particularly by the Human Rights Committee, which is discussed in section 1.5.2, below. See *General Comment No 22: The right to freedom of thought, conscience and religion*, UN Human Rights Committee, 48th Sess, UN Doc CCPR/C/21/Rev.1/Add.4 (1993) at para 5 [HRC General Comment 22]; also see *Report of the Special Rapporteur on freedom of religion or belief, Asma Jahangir,* UN Human Rights Council, 6th Sess, Agenda Item 3, UN Doc A/HRC/6/5 (2007) at para 9.

[40] For example, see Lerner, "Proselytism", *supra* note 7 at 525 where he argues: "Proselytism, with some limits, is considered a legitimate means of using freedom of expression to propagate one's faith."

[41] See SRFRB GA report (2005), *supra* note 15 at para 61.

[42] HRC General Comment 22, *supra* note 39 at para 9.

> either individually or in community with others and in public or private, to manifest his religion or belief in worship, observance, practice and teaching.
>
> 2. No one shall be subject to coercion which would impair his freedom to have or to adopt a religion or belief of his choice.
>
> 3. Freedom to manifest one's religion or beliefs may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others.

The issues relating to proselytism permeate throughout the whole of ICCPR Article 18, and came out strongly during its drafting (discussed in the next section). In discussing Article 18 as a whole, Manfred Nowak describes it as controversial in nature:

> The problem with freedom of religion lies not least in a contradiction inherent in many religions and beliefs themselves. They frequently imagine themselves to be in sole possession of the 'absolute truth' and thus tend not to respect the freedom of those of a different faith, feeling instead called upon to 'convert' them. For this reason, far-reaching freedom of religion can lead to its misuse by influential religious societies and thus to suppression of the freedom of religion of others.[43]

So, if it is in the very nature of most religions to be convinced that their views are the absolute truth then they are by some measure proselytic. In this view religions are necessarily in competition with each other. If pressed, this view is over simplistic because it fails to consider either religions that do not make claims of the exclusivity of truth (as is the case with pluralistic religions, such as Hinduism, Buddhism or Shintoism) or religions that do not have a proselytic impulse (as is often perceived to be the case with Judaism). On the other hand, even these 'pluralistic' religions are not always purely pluralistic – they often have periods in their histories of active proselytism or there are current aspects to the religion with proselytic tendencies.[44] So, the situation proves to be quite complex. However, the pervasiveness of the fact that almost all religions allow converts, and many also allow or encourage their adherents to share their beliefs with others, demonstrates the pertinence of Nowak's comment. Proselytism is quintessentially related (albeit usually in a secondary manner) to the nature of religious belief.

Providing a further connection between Article 18 and proselytism, Nowak argues that all of the 'fundamental' human rights, including the right to freedom of religion, are based on the Enlightenment conviction of the supremacy of rationalism, and that:

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[43] Nowak, *supra* note 34 at 310.

[44] See Matthew K Richards, Are L Svendsen & Rainer O Bless, "Voluntary Codes of Conduct for Religious Persuasion: Effective Tools for Balancing Human Rights and Resolving Conflicts?" (2011) 6:2 Religion and Human Rights 151 at 152-156 (especially 153), where the authors suggest that there are proselytic aspects of the Muslim and Buddhist religions.

> …the individual's spiritual existence requires special protection by the State, that is, the belief in spiritual ideas as such, the communication of spiritual subject matter to others, and the freedom to defend these beliefs and ideas in public either individually or in community with others and to act according to these….[45]

Article 18 is "controversial" for Nowak because, although it claims to be a universal (and nearly absolute) freedom requiring government protection, it is rooted in the common religious attitude of exclusivity of truth and the desire to convert others. This is contentious because it asks for the special protection of something that by nature challenges the protected beliefs of others. The protection of religion is not merely negative (to be protected *from* interference), as most rights are, but also protects the public dimensions of religion – this public protection of religious freedom is recognition of the proselytic impulse identified by Nowak. Hence, proselytism is preserved at the core of the freedom of religion protected in Article 18 as sort of a dynamic tension between the private and public spheres.

The public/private divide in the protection of freedom of religion, and the tension that exists in this divide (as noted by Nowak), is quite important to understanding the operation of the freedom of religion and how it relates to proselytism. Many commentators divide Article 18(1), which is the core of the guaranteed right, into two parts: the first is the phrase "freedom to have or adopt a religion or belief of his choice", which is referred to as the *forum internum*; the second is the phrase "freedom, either alone or in community with others and in public or private, to manifest his religion or belief in teaching, practice, worship and observance", which is referred to as the *forum externum*.[46] The significance of the distinction is that the former is considered to be absolute whereas the latter is not.[47] This division between the *forum internum* (private) and the *forum externum* (public) right to free religion is strengthened by the differences between 18(1) and 18(3) in the ICCPR, where the limitations to the freedom of religion only apply to manifestations of religion. The linkage between 'manifestation' and the limitations provided in 18(3) suggests that all forms of religious manifestation are subject to limitation. Nowak quite rightly noted that this is not the case, but that there are some forms of religious manifestation that are purely private and should be treated as absolute,

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[45] Nowak, *supra* note 34 at 312-313.
[46] See, for example, Bahiyyih G Tahzib, *Freedom of Religion or Belief: Ensuring Effective International Legal Protection* (Boston: Martinus Nijhoff, 1996) at 87.
[47] *Ibid* at 88.

such as acts of prayer and worship.[48] The issue is more than merely whether or not a religious practice is a 'manifestation' of religion, it is also whether the religious practice is public or private – with only the former being subject to the limitations offered in 18(3). This is what is being nuanced in the distinction between *forum externum* and *forum internum* – it is more than the literal 'external' versus 'internal' practice of religion and focuses on the level to which the practices engage the public.[49]

An important question is whether proselytism properly classifies under the *forum internum* or *forum externum*. The difficulty with proselytism is that it represents both the internal and the external aspects of religion very strongly. To proselytize is in one sense purely an action that engages the public – it cannot be mistaken with one of the purely personal practices of religion, such as prayer, because it does not involve incidental encounters but intentional engagement between individuals. On the other hand, as Nowak argued, the notion of proselytism expresses something fundamental to the nature of religion as a whole: the conviction that one's religious beliefs are absolutely true and truer than other religious beliefs. Motivated by the core of religious belief – true conviction – acts of proselytism emerge. Proselytism is unique because it represents the merger of these two sides of the religious coin. In this context it is interesting to note that, as will be seen below, the discussion in the *travaux préparatoires* of Article 18 raises the issue of proselytism in the context of the *forum internum* right to change one's religion, as if the right to change religions implies the right to proselytize. Although proselytism is by nature external action, it is not considered separately from the *forum internum*, but rather is profoundly related to the deepest considerations of the freedom of religion (freedom to change religions and the truth of religious conviction).

As has been discussed so far, the notion of proselytism touches on many different issues of religion and engages many different rights in different ways.[50] Although

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[48] Nowak, *supra* note 34 at 319.

[49] It should be noted that the notion of 'public' in this distinction likely includes both practices that directly affect the rights of others and practices that engage some type of public interest – i.e. to affect the rights of other indirectly.

[50] Scholars such as Natan Lerner and Tad Stahnke conceptualize the issue of proselytism in terms of conflict between the various rights and interests involved. Stahnke argued that "The problem lies in finding the proper balance between the freedom to proselytize and the multitude of rights, duties, and interests of religious groups, individuals and the state that may conflict with that freedom" (Stahnke, *supra* note 2 at 252); similarly, Lerner argued that "No single human right can be considered in isolation; all human rights are interconnected" (Lerner, "Proselytism", *supra* note 7 at 483).

proselytism is, as Nowak argued, central to the nature of religion, and therefore central to the protection of Article 18, its broad engagement with the public and the rights of others leaves it subject to limitation.[51] It is important to appreciate this complex nature of proselytism, because it shows why it is such a contentious issue. Although proselytism engages so many different rights in the ICCPR, the fact that it was raised in the context of the freedom of religion more than anywhere else during the drafting process shows that, in the context of the UN system of human rights, this is its proper home.

The Articles in the ICCPR, much like in the UDHR, do not clearly articulate how the issue of religious proselytism should be dealt with. One of the most significant differences between the ICCPR and the UDHR is that the former does not include a specific right to change religion. This difference was not mentioned earlier because the significance of the difference is not apparent until one looks at the *travaux préparatoires* to the ICCPR. Now we will turn our attention to the drafting of the ICCPR and the discussions relating to the issue of proselytism.

1.3.2 Drafting the ICCPR

The relationship between Article 18 and proselytism can be seen clearly in the *travaux préparatoires*. The General Assembly's 3rd Committee was referred drafts of the ICCPR by the Commission on Human Rights. The drafting process was long and drawn out, beginning in 1950 and ending in 1966. There are several factors contributing to the protraction of the drafting process, not the least of which was the ambitious character of the project to construct an 'international bill of rights' flowing from the UDHR. One of the difficulties was to what extent the wording of the rights in the ICCPR should differ from those in the UDHR. This issue came up during the discussions regarding the right to freedom of religion, with some participants being satisfied with reproducing the language of the UDHR and others desiring to construct a more robust right (in both definition and specific limitations of the right). Although the first draft of the ICCPR guarantee of freedom of religion submitted to the General Assembly 3rd committee was based, nearly verbatim, on the wording of the UDHR, it was ultimately decided that the right to freedom of religion in the ICCPR should take a more robust form than the UDHR

[51] Nowak, *supra* note 34 at 319.

language; to duplicate the same guarantee of religious freedom would not make the concept any clearer or easier to apply and enforce domestically.[52]

The discussion regarding the freedom of religion guarantee was not based only on achieving the goals of the ICCPR as a legal instrument. There was significant discussion over the meaning of the language used in the text. The issue that occupied most of the discussion was whether the guarantee of religious freedom should specifically provide for the right to change religions. The right to change one's religion was included in the UDHR Article 18, and was part of the original draft of the ICCPR. Mr. Baroody, the representative of Saudi Arabia to the UN, made the same argument during the drafting of the ICCPR as he did during the drafting of the UDRH – that the freedom to "change" religions should not be included as part of the freedom of religion. Mr. Baroody was incredibly persistent in his argument, raising the issue at every opportunity during the entire drafting process – covering a span of over 15 years. Interestingly, in the end the right to change one's religion was omitted from the ICCPR and replaced with the "freedom to have or to adopt a religion or belief of his choice".

It is worth spending more time looking at the arguments used by Mr Baroody in this debate. Mr. Baroody first raised the issue in the 289th meeting of the 3rd Committee of the General Assembly in 1950.[53] His argument had three main points: first, it was redundant to include the freedom to change religions as it was already implied in the guarantee of freedom of religion; secondly, it was suspicious that no similar 'freedom to change' was stated regarding opinions and beliefs (such as political ideologies); and thirdly, he was concerned that there would be an adverse effect on Muslim populations. It is interesting to note that Mr. Baroody did not oppose the freedom of people to change their religions but rather the explicit inclusion of that freedom in the ICCPR text.[54]

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[52] For a discussion of this issue, see *Annotations on the text of the draft International Covenants on Human Rights*, UNGAOR, 10th Sess, Annex, Agenda Item 28 (part II), UN Doc A/2929 (1955) at 8-9. In addition, see Pechota, *supra* note 30 at 44, where he argues that the ICCPR provisions are "…sufficiently definite to have real significance both as a statement of law and as a guide to practice, but they are also sufficiently general and flexible to apply to all individuals and to allow for adjustments of national laws to suit peoples at different stages of social and political development."

[53] UNC3OR, 5th Sess, 289th Mtg, UN Doc A/C.3/SR.289 (1950) at 115ff.

[54] UNC3OR, 9th Sess, 563rd Mtg, UN Doc A/C.3/SR.563 (1954), at para 11: "It went without saying that freedom of religion in fact existed; everybody had the right 'to maintain or change his religion' at will and there seemed to be no point in laying such stress on it."

Most of the countries that opposed Mr. Baroody's proposal to remove the freedom to change one's religion did so on the basis that changing one's religion is a necessary aspect of the freedom of religion – without it the freedom of religion is meaningless.[55] As mentioned, Mr. Baroody did not oppose people changing religions per se, but rather he argued that including an explicit right to change religions would have negative effects on certain populations by unduly encouraging missionary activities. Mr. Baroody argued that missionary activities often were related to political propaganda, both in terms of methods and in terms of historical coincidence. Mr. Baroody went so far as to say that "[missionary activities] had merely been the precursors of [political propaganda]… The crusades, in particular, had concealed undeniable economic and political ambitions under the cloak of religion."[56] Specifically recognizing the right to change religions would imply that missionaries have "free reign" to seek to make converts, and in effect would have legal sanction for their activities:

> Freedom of thought, conscience and religion in itself implied the individual's right to change his belief of his own free will without compulsion. To single out the right to change beliefs might not only ruffle religious susceptibilities but – far worse – might be interpreted as giving missionaries and proselytizers a free rein. Missionaries might harbour the best intentions but, in their zeal, might unwittingly act as agents, as they had in the past, for organizations or countries bent on colonial exploitation. With the best intentions such missionary bodies might attempt to put pressure upon the Commission on Human Rights for the inclusion of such a phrase. The power of propaganda had become so strong that it was tantamount to actual pressure.[57]

Part of the problem was that allowing a guarantee for the activities of missionaries would only provoke negative memories in Muslims regarding past injustices they suffered.[58] Furthermore, Mr. Baroody argued that elaborating a specific right for missionary activity would open the door for their abuse as "…instruments for infiltration and exploitation by foreign powers."[59] To preserve such a right would fail to take account of the imbalance of resources between various religions (and especially religions from various places in the world). The existing inequalities between religions must not be ignored when drafting the freedom of religion, or some religions would be unfairly

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[55] For example, the representative of Ceylon argued, "…it was impossible to recognize an individual's right to maintain his beliefs without at the same time giving him the right to change them." (UNC3OR, 15th Sess, 1022nd Mtg, UN Doc A/C.3/SR.1022 (1960) at para 21).
[56] UN Doc A/C.3/SR.289 (1950), *supra* note 53 at para 43.
[57] UNC3OR, 6th Sess, 367th Mtg, UN Doc A/C.3/SR.367 (1951) at para 41.
[58] UN Doc A/C.3/SR.289 (1950), *supra* note 53 at paras 43-46.
[59] UNC3OR, 5th Sess, 306th Mtg, UN Doc A/C.3/SR.306 (1950) at paras 47.

advantaged by international law.[60] He rightly observed that availability of material resources is not a valid judgment of the relative values of religions.[61] Mr. Baroody then argued that the relationship between politics and proselytism would be encouraged, since countries with more resources would be able to put their religions in an unfair advantage as compared to other religions – this would allow propagation of political values alongside religious values. Mr. Baroody argues that Islam has never been a missionary religion, and hence would be disadvantaged if other religions (i.e. Western Christianity) were able to claim universal rights in support of its missionary work, since Christianity has more available resources and is a missions-based religion.[62]

Mr. Baroody claimed that he received a tip from an anonymous 'source' that the inclusion of the right to change religions in the draft ICCPR was a result of pressure from religious missionary organizations.[63] This explained the apparent arbitrariness in guaranteeing the right to change religions without also guaranteeing the right to change other 'beliefs' (such as political ideologies). He went on to say:

> The Near East, the cradles of three great religions, was at present overshadowed in the technical field by the West. Western missionaries exploited the situation in their efforts to persuade the ignorant masses that there was a connexion between the religion they sought to propagate and technical progress. That was where the danger lay: attempts were being made to spread that false idea, and article 18 as it stood lent itself to such tactics.[64]

From this quotation it seems that Mr. Baroody's greatest criticism of including a right to change one's religion was that it lent credibility to neo-colonialism dressed as religious missionary activity. In this view there is a double-sidedness to changing religions. Whereas Islamic countries are often criticized for having laws that focus on the protection of Islam (such as laws punishing apostasy), there is also a problem with missionary proselytizers as they provide the foundational structure of colonialism. Guaranteeing the

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[60] *Ibid* at paras 48.
[61] UN Doc A/C.3/SR.563 (1954), *supra* note 54 at para 11: "The fact that some countries had attained a high level of technical development and could build schools and hospitals in territories other than their own did not mean that their religion was better than others. To claim that would be to accept an unjustifiable principle of inequality."
[62] *Ibid* at para 11. The claim that Islam has never been a proselytizing religion was challenged by the representative of Pakistan, who said that Islam is a missionary religion. The Pakistan representative took the position that Islam was not opposed to other religions having the free right of conversion, saying although the means of conversion employed by some missionaries was deplorable, "it would be the greater evil to deny the freedom of exchange or belief or faith" (UNC3OR, 15th Sess, 1024th Mtg, UN Doc A/C.3/SR.1024 (1960) at para 21).
[63] UN Doc A/C.3/SR.563 (1954), *supra* note 54 at para 11.
[64] UNC3OR, 9th Sess, 566th Mtg, UN Doc A/C.3/SR.566 (1954) at 117, para 34.

right to change one's religion may in fact provide too strong of a right to persuade people to change their religion, which could cause political, not just religious, conflict.[65] It is interesting to see the full spectrum of issues regarding proselytism and religion here, and that proselytism is seen as implied by the right to change religions. The issue of changing one's religion cuts both ways, and a delicate balance between the two is necessary.

The representative of Ceylon, arguing against the Saudi Arabian suggestion to remove the freedom to change one's religion, suggested the importance of a historical perspective when looking at the issue of freedom of religion. He argued that the freedom to change religions was achieved through significant conflict, in that it was won through the religious wars in Europe, and ought not be given away lightly.[66] He argued that the right to freely change one's religion can easily be lost in the development of societies and should therefore be protected in the freedom of religion.[67] Oddly, even though he argued for the inclusion of the freedom to change religions in the ICCPR, he is still critical of historical examples of religious proselytism. For example, he recognized that the European powers, specifically the Portuguese, caused much conflict in Asia when "fired by religious zeal, had sought to impose Catholicism on the indigenous peoples…"[68] Nonetheless, the freedom to change religions should remain specifically protected. Although the representative of Ceylon did not argue that proselytism should be banned, some of the other representatives expressed their views that the right to change one's religion should not include the right to proselytize.[69] An impasse began to form regarding whether to include the freedom to change religions, and central to the issue was the way in which the change of religions related to religious proselytism and colonialism.

The resolution to the discussion of the freedom to change religions began with an amendment proposed together by the Philippines and Brazil, which replaced the right "to maintain or to change his religion or belief" with "to have a religion or belief of his choice" (which was later changed to say "to have or to adopt" pursuant to a UK

[65] UNC3OR, 15th Sess, 1021st Mtg, UN Doc A/C.3/SR.1021 (1960) at paras 11-12.
[66] UN Doc A/C.3/SR.1022 (1960), *supra* note 55 at para 21.
[67] *Ibid* at para 22.
[68] *Ibid* at para 21.
[69] E.g. Nigeria (UNC3OR, 15th Sess, 1023rd Mtg, UN Doc A/C.3/SR.1023 (1960) at para 23), or Afghanistan (UN Doc A/C.3/SR.1024 (1960), *supra* note 62 at para 28).

amendment).[70] The Philippines representative was clear in saying that his amendment did not detract any of the substantive guarantees in the original version – i.e. the right to change one's religion was implicit in the suggested amendment.[71] Mr Baroody of Saudi Arabia said that he could not accept the wording proposed by the Philippines and Brazil, and wondered why the word 'change' was being regarded as sacrosanct and could not be removed.[72] The Argentina representative supported the amendments on the basis that it did not protect militant atheists or religious propagandists.[73]

Some representatives remained in support of the original language of the ICCPR Article 18, which included the right to change one's religion. The representative of the Netherlands, for example, argued that the original language maintained the strongest legal check on the propagation of religious beliefs.[74] Likewise, the French representative criticized the Brazil/Philippine amendment as being ambiguous, especially with regard to the permanency of religious 'choice'[75] and the Cuban representative felt that the original wording of the text sufficiently enabled countries to guard against improper proselytizing or missionary activities carried for political ends.[76]

At the end of the discussion, Mr Baroody withdrew the proposed amendment of Saudi Arabia in favour of the Brazil/Philippines proposal, as amended by the UK. Mr. Baroody said that the new amendments "…would not be entirely satisfactory to his delegation but it would no longer be liable to convey the impression that the Committee unwittingly sanctioned interference with beliefs that some people regarded as sacred."[77]

Afghanistan requested a vote on the UK addition to the Brazil/Philippines amendment – it was adopted by 54-0, with 15 abstentions. The total amendment was adopted by 67-0, with 4 abstentions. Paragraph 1, as amended, was adopted by 70-0, with 2 abstentions. Paragraph 2, with the Brazil/Philippines amendment, was adopted 72-0, with 2 abstentions. Paragraph 3 was adopted unanimously. Article 18 was adopted as a

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[70] See UNC3OR, 15th Sess, 1027th Mtg, UN Doc A/C.3/SR.1027 (1960) at paras 2 and 36, and UN Doc A/C.3/L.877 for the Brazil/Philippines amendment.
[71] UNC3OR, 15th Sess, 1025th Mtg, UN Doc A/C.3/SR.1025 (1960) at para 3.
[72] *Ibid* at para 11.
[73] *Ibid* at para 27.
[74] *Ibid* at para 41.
[75] UNC3OR, 15th Sess, 1026th Mtg, UN Doc A/C.3/SR.1026 (1960) at para 7.
[76] *Ibid* at para 9.
[77] *Ibid* at para 27.

whole unanimously.[78] Disappointingly, after all of the time and effort invested in addressing the concerns of Saudi Arabia regarding Article 18, and having come to a resolution on the matter, Saudi Arabia never ratified the ICCPR.

Some scholars have argued that the text of the ICCPR successfully dodged the main issue in Article 18.[79] Petchota argued that there were a few important global factors that influenced the drafting of the ICCPR – one was the notion of compromise, inspired by the policy of détente, and the other was decolonization.[80] Whether or not the issue was successfully 'dodged' is debatable, but nonetheless it is quite clear that the acceptance of the Brazil/Philippines amendment was achieved through a spirit of compromise from all parties involved. The notion of 'compromise' was openly advocated by some states in order to try and achieve a unanimous voice on the subject rather than passing wording by a narrow margin.[81] Hence, even some of the states that did not approve of the text were willing to vote in favour of it, to contribute to the collaboration.[82]

It is debatable whether relying on compromise to come to agreement on the wording of Article 18 of the ICCPR was in fact a good thing. On the one hand, it resulted in the creation of the document and a text that ostensibly had global support. However, despite the apparent unanimity of the supporters of the text, it does not in fact accurately represent the views of states regarding the issue of freedom of religion or the issue of proselytism. If anything, the text confuses the issue. Now there is a legally binding text in existence that overtly disregards the views of different societies – the concerns expressed were not substantively addressed or actually resolved. This misconstrues the nature of some societies, and their values, because it washes them all together into one unanimous voice. The pressure to have 'unanimity' seems to me to pave the way to inconsistency in global practice regarding religious freedom and proselytism – even though the states agreed in principle to the wording of the ICCPR Article 18, that agreement did not change the local realities. This tension should be kept in mind when considering the application of the ICCPR. As will be seen later, many of the fears

[78] UN Doc A/C.3/SR.1027 (1960), *supra* note 70 at para 36ff.
[79] Pechota, *supra* note 30 at 58-59.
[80] *Ibid* at 64.
[81] See the USA comments: UNC3OR, 15th Sess, 1027th Mtg, UN Doc A/C.3/SR. 1027 (1960) at para 20.
[82] See the Yugoslavia comments: UNC3OR, 15th Sess, 1027th Mtg, UN Doc A/C.3/SR. 1027 (1960) at para 25.

expressed during the drafting of the ICCPR Article 18 have been manifested in local laws and in regional human rights regimes. This inconsistency between the ICCPR and local and regional practice should not be surprising based on the compromises made to broker an agreement on the ICCPR text.

It should be noted that the discussions regarding the freedom to change religions were with regard to both Article 18(1) and 18(2). Other than the discussions in this context there were no issues raised with the wording of Article 18(2). Egypt proposed the basis for 18(2),[83] which according to Nowak was directed "…less at protection against impermissible intellectual, moral or missionary influence as at protection against legal barriers to a change of religion or those established by the religion itself."[84] There was very little discussion directly regarding Article 18(2), and none pertaining to the issue of proselytism.

Article 18(3) did not have the same level of controversy as the rest of Article 18 of the ICCPR. None of the discussions regarding Article 18(3) are directly relevant to understanding the international community's view of proselytism. Article 18(3) only becomes relevant when considering restrictions to proselytism as a form of manifestation of religious belief. The relation between these restrictions and proselytism is not drawn until the era of the Special Rapporteur on freedom of religion or belief, which will be discussed later.

1.3.3 Summary

The notion of proselytism engages several different aspects of the ICCPR. The central focus of the ICCPR in regard to proselytism, when viewed through the eyes of the parties involved in drafting the treaty, was clearly Article 18 (especially the 18(1) notion of the freedom to change religions). The issue of the right to change religions was perceived to be in direct relation to missionary activities of proselytism. The question for the drafters was whether or not the goals of missionaries (religious conversion) should be reflected in the religious protections offered in Article 18. It is worth emphasizing that the discussion of proselytism at the drafting stage did not at all engage Article 18(3) and whether proselytism is a valid form of religious manifestation (and should therefore be

[83] Nowak, *supra* note 34 at 317, referring to UN Doc E/CN.4/L.187.
[84] *Ibid* at 317-318 – referring to UN Doc A/2929 (1955), *supra* note 52 at para 110.

protected). The greater interest was on the results of proselytism – conversion – and whether this should be permitted. The arguments against allowing religious conversion were based largely on fears associated with a negative view of proselytism, similar to those expressed during the drafting of the UDHR: that it will promote unfair competition between religions, that it will destroy local cultures and that it will result in a sort of neo-colonialist spread of western culture.

This developing understanding of proselytism is interesting for many reasons. For one, anti-proselytism seems to be based on a set of assumptions about the nature and probable result of proselytic activity. This, combined with the fact that proselytism was dealt with only secondarily and was not itself considered as a form of religious manifestation, resulted in proselytism being viewed as the source of the problem for some states. On the other hand, the vast majority of states participating in the drafting of the ICCPR saw the process of conversion as a necessary part of religious freedom, and were unwilling to restrict *ab initio* the dissemination of religions. The emerging view is that the dangers regarding religious proselytism should not affect the notion of proselytism as a part of religious freedom and practice, but rather that these dangers should be managed within the legal framework of free religious choice. Unfortunately, the final product of the ICCPR does not provide a very clear representation of how proselytism is to be dealt with legally. The tension between religion as a necessary part of religious practice and as a threat to the religious convictions of others was not resolved. Furthermore, the basis on which religious proselytism could be restricted was not explicated.

A final note regarding the developments in the ICCPR regarding religious proselytism is that it appears the fears regarding religious proselytism (e.g. concern regarding the relationship between religious proselytism and politics) were still very much alive in some states, even after reaching a compromise to the wording of the ICCPR text. As will be seen, this divergence of perspective persisted in the development of the notion of freedom of religion, as reflected in the 1981 Declaration. It is also important to begin to consider how this divergence in perspective will affect the treatment of religious proselytism in regional human rights organizations.

1.4 Continuing Divergence – the Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief[85]

1.4.1 Introduction to and importance of the 1981 Declaration

The 1981 Declaration is one of the most important UN documents regarding religion, as it is the first document dedicated specifically to addressing the topic. The history of the development of the 1981 Declaration shows the significance of religious freedom to the international community. This statement carries some controversy largely because the 1981 Declaration took over 20 years to create, from its conceptual inception until its final adoption by the General Assembly.[86] Another reason, which stems from this protracted drafting process, is what seems to be the lack of importance placed upon drafting the 1981 Declaration by the various UN bodies.

There are a couple of things to consider when weighing the importance of the 1981 Declaration to the international community. First, the length of the drafting process was not born out of ambivalence, but out of contention. The UN perceived the importance of creating instruments to deal with racial and religious discrimination in the world. But right from the beginning the notion of racial discrimination was separated from issues of religion and religious discrimination.[87] It is commonly understood that this was a result of pressure from two sources: the Soviet bloc wanting to avoid religion from gaining recognition and protection internationally, and Arabic states wanting to avoid international attention being drawn to the anti-Semitism issue.[88] These two forces, complimented by the pressure from African nations (especially South Africa) facing severe racial problems, succeeded in moving the UN to deal with issues of racism

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[85] *Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief*, GA Res 36/55, UNGAOR, 36th Sess, Supp No 51, 73rd Plen Mtg, UN Doc A/36/51 (1981) [1981 Declaration] at 171-172.

[86] Many scholars look to the time around the creation of the report of Arcot Krisnaswami, Special Rapporteur of the Sub-Commission on Prevention of Discrimination and Protection of Minorities, *Study of Discrimination in the Matter of Religious Rights and Practices* (Paris: UN, 1960) UN Doc E/CN.4/Sub.2/200/Rev.1, as the beginning of the process of creating the 1981 Declaration (see, e.g. Tahzib, *supra* note 46 at 164-165).

[87] *Preparation of a draft declaration and a draft convention on the elimination of all forms of racial discrimination*, GA Res 1780 (XVII), UNGAOR, 17th Sess, Supp No 17, UN Doc A/RES/1780 (1962) 32, and *Preparation of a draft declaration and a draft convention on the elimination of all forms of religious intolerance*, GA Res 1781 (XVII), UNGAOR, 17th Sess, Supp No 17, UN Doc A/RES/1781 (1962) 33.

[88] See Natan Lerner, "Toward a Draft Declaration Against Religious Intolerance and Discrimination" (1981) 11 Isr YB Hum Rts 82 at 86 [Lerner, "Toward a Draft Declaration"] and Tahzib, *supra* note 46 at 142.

quickly, which had the effect of postponing dealing with the issue of religion.[89] So, it seems that the delays in the creation of the 1981 Declaration were a result of the structure of the UN and the successful tactics used by opponents of these instruments to delay their production. The fact that the 1981 Declaration was met with such opposition affirms the importance of religion as an international issue. The fact that these oppositional forces were able to succeed in delaying the construction of the 1981 Declaration is more of a testament to the limitations of the UN system than the lack of importance of the content of the 1981 Declaration.

Another important factor to consider when weighing the importance of the 1981 Declaration to the international community was the difficulty encountered during the drafting process. It was not simply the external forces that slowed the drafting process. Even after the UN clarified the mandate to draft a declaration and convention pertaining to religious discrimination, the process still took a very long time to complete. For example, the process of agreeing on a title for the declaration and the preamble took over two years.[90] The reason for this delay was because of the contentious nature of the issue of religion. The difficulties were not only substantive but also conceptual. For example, questions like 'what is a religion' were heavily contested, especially with regard to whether 'religion' should include non-religious beliefs.[91] So, from this view, it seems that the further delays in drafting the 1981 Declaration resulted from differing perspectives on religion rather than indifference. The fact that different societies represented at the drafting table were willing to battle over things as simple as the title of the declaration demonstrates the importance of the issue of religion globally.

Unfortunately, all of the time and energy spent was only to achieve a declaration from the General Assembly.[92] Obviously, a declaration does not have the same binding legal effect as a convention, which calls into question the usefulness of the 1981

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[89] Lerner, "Toward a Draft Declaration", *supra* note 88 at 86; and Tahzib, *supra* note 46 at 142 and 145.
[90] Tahzib, *supra* note 46 at 158-159.
[91] See, e.g., the comments of the representative of the Ukrainian Soviet Socialist Republic in the debates of the 3rd Committee, UNC3OR 28th Sess, 2011th Mtg, UN Doc A/C.3/SR.2011 (1973) at paras 6-10 and 50.
[92] The initial stages of drafting were geared towards creating a treaty, but as the process continued the UN General Assembly switched the focus to developing the instrument as a declaration (*Elimination on all forms of religious intolerance*, GA Res 3027 (XXVII), UNGAOR 27th Sess, Supp No 30, UN Doc No A/8945 (1972) 72). Also see Lerner, "Toward a Draft Declaration", *supra* note 88 at 87-88.

Declaration.[93] However, it cannot be forgotten that the waters through which this instrument was created were tumultuous. Indeed, some would argue that against the historical background, despite its limitations, the 1981 Declaration should be considered a significant development of religious rights internationally.[94] Although the 1981 Declaration is 'just' a declaration, and therefore has limited legal power, it does set a general standard towards which the international community is moving; it marks progress towards religious freedom, equality and mutual respect, and it establishes a moral basis for guiding state practice.[95] Based on the contentious nature of religion, the value of the progress achieved through the 1981 Declaration should not be understated. On the other hand, the 1981 Declaration has not factored in developing the notion of proselytism in the United Nations as much as the ICCPR. This is probably because the ICCPR carries more weight than the 1981 Declaration and has its own enforcement body (the Human Rights Committee).

1.4.2 Comparison of the 1981 Declaration to other UN texts

The text of the 1981 Declaration is almost totally unique, as the entire instrument is dealing with issues of freedom of religion. Although the 1981 Declaration emerges from a similar inspiration that generated the UDHR and ICCPR, it has its own distinctive qualities. This difference should not be surprising, considering how the makeup of the UN changed between 1948, 1966 and 1981, most notably in the strengthening of the Soviet empire, and increased participation from Islamic nations and the developing

[93] Elizabeth Odio Benito, the former Special Rapporteur Sub-Commission on Prevention of Discrimination and Protection of Minorities, when commenting on the 1981 Declaration discussed two common views regarding the legal effect of declarations in the UN: one regards them as non-binding and merely containing goals and moral platitudes; the other regards them to be legally obligatory, albeit differently than typical legal mechanisms. The latter group sees declarations as not giving rise to 'rights' in the traditional sense, but rather as containing 'values' that should govern the relationship between states and individuals (see Elizabeth Odio Benito, "Elimination of all forms of intolerance and discrimination based on religion or belief" (New York: UN, 1989) at paras 191-195 (also accessible at UN Doc E/CN.4/Sub.2/1987/26 (1986)).
[94] This view is expressed by Tahzib, *supra* note 46 at 165; and Natan Lerner, "The Final Text of the UN Declaration against Intolerance and Discrimination Based on Religion or Belief" (1982) 12 Isr YB Hum Rts 185 at 189 [Lerner, "The Final Text"].
[95] Lerner goes further and agues that the 1981 Declaration has "moral weight" insofar as it "…express[es] the more or less agreed upon trends prevailing in the international community on a given subject at a specific time" and provides a strong expectation for states to follow it (Lerner, "Toward a Draft Declaration", *supra* note 88 at 103). Also see Tahzib, *supra* note 46 at 186-188.

world.[96] Article 1 is the portion of the Declaration that most closely resembles the UDHR Article 18 and the ICCPR Article 18. In fact Article 1 of the 1981 Declaration is almost exactly the same as Article 18(1)-(3) of the ICCPR. The rights and interests of a child were taken out of the main guarantee of religious freedom in Article 1 and placed on its own in Article 5, being significantly expanded from the language encountered in the UDHR and the ICCPR.

The major development offered by the 1981 Declaration is found in Article 6. The reference in Article 18 of the ICCPR religious 'practices' protected under the freedom of religion was expanded in the 1981 Declaration Article 6, which sets out a 9-point list of religious practices that are protected. The list of practices outlined here are not exhaustive of practices that are normally considered important to religion and preventing religious intolerance.[97] Interestingly, proselytism is not specifically mentioned as a religious practice. It is possible, however, to find space in the language of the 1981 Declaration to include proselytism by implication. The two areas which imply proselytism as a protected religious practice are 6(d) and 6(e), which ensure freedom to "write, issue and disseminate relevant publications" and "teach a religion or belief in places suitable for these purposes", respectively. As will be discussed later, the rights to disseminate publications and the right to teach religions have been used as support for the view that proselytism is a valid form of religious practice.[98] However, in the context of the drafting of the 1981 Declaration, there was no explicit connection made between the Article 6 enumerated practices and proselytism.

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[96] Pechota argued this, in the context of the differences between the UDHR and the ICCPR (Pechota, *supra* note 30 at 64). There is no reason for this to apply any less to the differences in the 1981 Declaration.
[97] Natan Lerner argues that the list is not exhaustive (Lerner, "Toward a Draft Declaration", *supra* note 88 at 94). Tahzib, *supra* note 46 at 183, provides a list of other important religious practices that are missing. It is also interesting to note that the Sub-Commission on Prevention of Discrimination and Protection of Minorities adopted a set of draft principles regarding religious rights and practices that should be guaranteed (for a detailed discussion see *Report of the twelfth session of the Sub-Commission on Prevention of Discrimination and Protection of Minorities to the Commission on Human Rights*, UN Doc E/CN.4/800 (1960)). The Sub-Commission included in these principles that "Everyone shall be free to teach or to disseminate his religion or belief, either in public or in private" (*ibid* at 55). Many of the principles adopted here were not imported carte blanche into the 1981 Declaration. It is interesting that the freedom to disseminate was not included. The reason for not including this is unsurprising given the resistance to including the freedom to change religions in the ICCPR – the freedom to disseminate being a correlative right. For further discussion regarding the draft principles see Tahzib, *supra* note 46 at 133-139.
[98] See section 1.5, below.

As was mentioned, Article 1(1) of the 1981 Declaration is nearly identical to Article 18(1) of the ICCPR. However, the difference between these sections is quite significant, in that the 1981 Declaration only provides for the right to 'have' a religion or belief of one's choice, whereas in the ICCPR it is to 'have or to adopt'. This difference in wording seems to show that the 1981 Declaration takes a further step back from the right to change one's religion. As was shown earlier, the UDHR explicitly guaranteed the freedom to change religions, whereas the ICCPR embedded the language in strong implications by using language of the freedom to adopt and maintain a religion of one's choice. The 1981 Declaration does not even include the measured language used in the ICCPR. One important reason for this is because of further pressure from Islamic states to remove the language.[99] It is interesting to note that this wording was not changed until the very end of the drafting process. The Commission on Human Rights adopted a final draft on March 10, 1981, by a vote of 33-0, with 5 abstentions.[100] The Economic and Social Council of the United Nations also approved the draft by a vote of 45-0, with 6 abstentions, and referred the draft to the 3rd Committee for debate. At this final stage, the 3rd Committee made several important changes to the draft: 1) to place the word "whatever" in front of "belief" in the third preambular paragraph; 2) to remove the reference to the right to "choose, manifest and change one's religion or belief" from the second preambular paragraph; 3) to remove 'or to adopt' from Article 1(2); and 4) to add Article 8.[101] The first change was made to appease the Soviet bloc, the second and third to appease Muslim states, and the fourth to maintain continuity with other UN instruments.[102] Once these changes were made, the Third Committee adopted the final

[99] Lerner, "The Final Text", *supra* note 94 at 187-189. Also see the comments of the Iranian representative in the meetings of the 3rd Committee: UNC3OR, 36th Sess, 29th Mtg, UN Doc A/C.3/36/SR.29 (1981) at para 16.
[100] *Commission on Human Rights: report on the 37th session*, UNESCOR, 1981, Supp No 5, UN Doc E/1981/25/Add.1, at 222.
[101] See *Resolutions and decisions of the Economic and Social Council*, UNESCOR, 1981, Supp No 1, UN Doc E/1981/81, at 25, for the draft of the 1981 Declaration (Res 1981/36 of May 8, 1981). The Final 1981 Declaration was adopted by the General Assembly November 25, 1981 (*Resolutions and decisions adopted by the General Assembly during its 36th session*, GA Res 36/55, UNGAOR, 36th Sess, Supp No 51, UN Doc A/36/51 (1981) at 171-172).
[102] See Lerner, "The Final Text", *supra* note 94 at 186-188; and Tahzib, *supra* note 46 at 167.

draft without a vote, and referred it to the General Assembly.[103] The General Assembly also adopted the Declaration without a vote.[104]

This difference in language should not be interpreted as removing the freedom to change religions. According to Natan Lerner, the Western countries wanted the language of the 1981 Declaration to explicitly guarantee the freedom to change religions to make clearer the freedom to propagate one's own religion, but they chose to sacrifice this clarity to avoid jeopardizing the declaration as a whole.[105] Others agree that the softened language in the 1981 Declaration shows a compromise from western nations to gain broader support for the declaration.[106] What ultimately maintains congruity with the earlier UN instruments, and helps to safeguard the 1981 Declaration from being read as depriving the right of persons to change their religion, is the inclusion of Article 8.[107] Article 8 provides that "Nothing in the present Declaration shall be construed as restricting or derogating from any right defined in the Universal Declaration of Human Rights and the International Covenants on Human Rights." Another, and perhaps more important, point that demonstrates that the softer wording in the 1981 Declaration does not indicate a retraction from the right to change one's religion is the practice of various UN bodies assuming that the right to change one's religion is part of the freedom of religion, which will be discussed later.[108]

1.4.3 Mention of proselytism in the *travaux préparatoires* of the 1981 Declaration

During the drafting of the 1981 Declaration concern was again raised regarding the relationship between proselytizing and colonialism. Similar to the drafting of the ICCPR, this concern was expressed in the context of the freedom to change religions. For

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[103] *Elimination of all forms of religious intolerance: Report of the 3rd Committee*, UNGA, 36th Sess, Agenda Item 75, UN Doc A/36/684 (1981) at paras 7 and 10. Also see Tahzib, *supra* note 46 at 162-163.
[104] See *supra*, *Resolutions and decisions adopted by the General Assembly during its 36th session*, GA Res 36/55, UNGAOR, 36th Sess, Supp No 51, UN Doc A/36/51 (1981) at 171.
[105] Lerner, "The Final Text", *supra* note 94 at 188.
[106] Paul M Taylor, *Freedom of Religion: UN and European Human Rights law and Practice* (Cambridge: Cambridge University Press, 2005) at 36 [Taylor, *Freedom of Religion*]: "Those countries which resisted a different version from that in Article 18 of the ICCPR agreed to compromise in order that the form of the draft could win more widespread acceptance throughout the Islamic world that was represented, but only on the understanding that the Article as amended still entitled everyone to have or adopt their religion of choice."
[107] Scholars have argued that the core purpose of Article 8 of the 1981 Declaration was to ensure continuity between the 1981 Declaration and previous UN instruments. See Taylor, *Freedom of Religion*, *supra* note 106 at 36; and Lerner, "The Final Text", *supra* note 94 at 188-189.
[108] For examples, see Taylor, *Freedom of Religion*, *supra* note 106 at 37.

example, Mr. Baroody of Saudi Arabia again argued that there was a relationship between proselytism and colonialism and that special consideration regarding the differences between religions (such as the fact that not all religions were active in proselytism, and because of the imbalance of resources between different religions and their associate governments) should be reflected in the 1981 Declaration.[109] Other countries also expressed concern regarding the relationship between certain religions and colonialism, and of the aggressive proselytic nature of some religions.[110]

Some of the members involved in the drafting of the 1981 Declaration took a very different view of the issue of colonialism and proselytism. For example, the representative of Costa Rica argued that those who viewed acts of proselytism, especially missionary activities, as "enemy agents" displayed an extreme form of paranoia. For the Costa Rica representative, the non-discrimination laws proposed in the 1981 Declaration did not prevent a country from protecting its policies and citizens from missionaries that are acting illegally, even if certain freedoms to seek to convert others were expressed therein.[111] Likewise, the representative from the Netherlands argued that although there have been connections in the past between religion and colonialism that this is no longer the case; rather, religious, and specifically missionary, activity is more of a force of good than evil in the international context.[112]

1.4.4 Summary

The comments of countries such as Costa Rica and the Netherlands show a strengthening of the attitude that the difficulties posed by proselytism should be seen in terms of legality rather than as an issue of colonialism – i.e. that proselytism is not, per se, problematic, but that certain methods of proselytizing may be legally restricted. As such, the *travaux préparatoires* of the 1981 Declaration shows the solidification of the view of proselytism that arose during the drafting of the ICCPR. The question of religious

[109] See UNC3OR, 28th Sess, 2009th Mtg, UN Doc A/C.3/28/SR.2009 (1973) at paras 3-9.
[110] For example, see the comments of Burundi (UNC3OR, 28th Sess, 2010th Mtg, UN Doc A/C.3/28/SR.2010 (1973) at 179), Byelorussian Soviet Socialist Republic (UNC3OR, 28th Sess, 2011th Mtg, UN Doc A/C.3/28/SR.2011 (1973) at 185), and Zambia (*Ibid* at 183).
[111] UN Doc A/C.3/28/SR.2011 (1973), *supra* note 110 at paras 18-21.
[112] UNC3OR, 28th Sess, 2012th Mtg, UN Doc A/C.3/28/SR.2012 (1973) at paras 11-14. Paul M Taylor makes a similar argument: "Few commentators today would disagree with the remarks made on behalf of Saudi…but few would consider that missionary work or proselytism, as understood in the West, bore any relation to such historic events." (Taylor, *Freedom of Religion*, *supra* note 106 at 56)

proselytism (and freedom of religion more generally) was being de-politicized and de-historicized, focusing attention on the legal rights and freedoms of individuals rather than on historic and global factors. Perhaps this changing attitude towards religious freedom was precipitated by growing disenchantment with dissident countries, like Saudi Arabia, whose role in human rights discussions appeared to be focused on disrupting the process rather than moving it forward.[113]

As was mentioned, the arguments regarding proselytism used during the drafting of the 1981 Declaration are very similar to those that were used during the drafting of the ICCPR. Although the same concerns regarding proselytism were being expressed by the same countries (e.g. Mr. Baroody from Saudi Arabia), there is also evidence of growing resolve of the majority to maintain freedom to change religions and refuse to restrict proselytism outright. This was shown by the comments in the *travaux préparatoires* as well as the inclusion of Article 8 in the 1981 Declaration. Therefore, although the 1981 Declaration has different language than the ICCPR (language that appears to be more restrictive of proselytism), the conception of proselytism and religious freedom employed are very much the same, and must be considered complimentary. The greatest advancement made in the 1981 Declaration is the more thorough articulation of protected 'religious practices' in Article 6, which provided greater support for proselytic acts by including protection for writing, issuing and disseminating religious publications and the freedom to teach religious beliefs in certain forums.

With a firm notion of the developing concepts of religious proselytism emerging from the UDHR, ICCPR and 1981 Declaration, it is necessary to now look at how these concepts have been applied in specific situations. The next section of this project will look at the continued development of the UN concepts regarding proselytism through the mechanisms put in place specifically with regard to the UN instruments and with regard to the freedom of religion and belief.

[113] It would not likely have been forgotten that Saudi Arabia made these same arguments during the drafting of the ICCPR and in the end, even after all the compromises made to the text, refused to ratify it.

1.5 An Emerging Approach: Peaceful Sharing vs Coercion – Application and Interpretation of the UN Instruments

1.5.1 Introduction to application and interpretation of UN instruments

There are two main sources for developing our understanding of the UN conception of the issue of proselytism: the Human Rights Committee (HRC) and the reports of the Special Rapporteur on freedom of religion or belief (SRFRB). Both of these sources contain some information relevant to the issue of proselytism, but the information from the reports of the Special Rapporteur is more voluminous and directly relevant to the issue. The HRC has elaborated in more general terms what is meant by the freedom of religion guarantee in the ICCPR, but has not provided any definitive statement regarding the issue of proselytism. There are many sources of information regarding the freedom of religion besides the HRC and the SRFRB, such as the Human Rights Council (formerly the Commission on Human Rights) and other Special Rapporteurs (e.g. the Special Rapporteur appointed under the Sub-Commission on the prevention of discrimination and protection of minorities, and the Special Rapporteur on contemporary forms of racism, discrimination, xenophobia and related intolerance). Although these various bodies tend to draw on each other in forming their understanding of religious freedom, unfortunately, since they act independently of each other, they do not always espouse opinions consistent with one another. Developing an understanding of the UN's position on the issue of proselytism is thus an inexact exercise, and requires piecing together information from the various sources. Since the HRC and the SRFRB provide the most relevant information regarding proselytism, they will be at the centre of the discussion below.

The Human Rights Committee was created under the ICCPR[114] to help regulate the application of the covenant. It is given limited powers in the ICCPR, being able only to comment on annual reports received from states that are signatories to the ICCPR, to comment on complaints between state parties, or to publish "general comments" deemed appropriate for communication to state parties.[115] The "general comments" published by the HRC are quite helpful as they provide general principles for interpreting the ICCPR. Under the terms of the Optional Protocol to the ICCPR the HRC is also charged with the

[114] ICCPR, *supra* note 32 at Articles 28ff.
[115] *Ibid* at Articles 40 and 41.

task of considering complaints received from individuals subject to the jurisdiction of a state party to the ICCPR when that state is also a party to the Optional Protocol.[116]

The position of "Special Rapporteur on freedom of religion or belief" was created in 1986 and has continued on until today. The Special Rapporteur was initially created by the United Nations Commission on Human Rights pursuant to its resolution 1986/20, and was first called the "Special Rapporteur on religious intolerance".[117] The Commission on Human Rights changed the name of the office to the "Special Rapporteur on freedom of religion or belief" in 2000.[118] It was originally created as a temporary position, but has constantly been renewed.[119] There have been several different individuals who have occupied the post of SRFRB since its inception. The mandate of the SRFRB is fourfold:

> -To promote the adoption of measures at the national, regional and international levels to ensure the promotion and protection of the right to freedom of religion or belief;
>
> -To identify existing and emerging obstacles to the enjoyment of the right to freedom of religion or belief and present recommendations on ways and means to overcome such obstacles;
>
> -To continue her/his efforts to examine incidents and governmental actions that are incompatible with the provisions of the [1981 Declaration] and to recommend remedial measures as appropriate;
>
> -To continue to apply a gender perspective, inter alia, through the identification of gender-specific abuses, in the reporting process, including in information collection and in recommendations.[120]

Although the SRFRB is not given the powers to authoritatively interpret the various human rights instruments, it is charged with reviewing whether the human rights principles regarding religious freedom are being applied or violated in specific situations. The mandate of review and ensuring application assumes that the SRFRB will engage in interpreting the obligations of the human rights instruments (especially the 1981 Declaration) and that the SRFRB is competent to speak to its application. This strongly endorses the SRFRB's views as authoritative without specifically calling it so.

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[116] *Optional Protocol to the International Covenant on Civil and Political Rights*, 19 December 1966, 999 UNTS 171 [Optional Protocol].
[117] See *Commission on Human Rights: Report on the 42nd Session*, UNESCOR, 1986, Supp No 2, UN Doc E/1986/22, at 66-67.
[118] Commission on Human Rights resolution 2000/33 at para 11, reproduced in *Commission on Human Rights: Report on the 56th Session*, UNESCOR, 2000, Supp No 3, UN Doc E/CN.4/2000/167 at 169-172.
[119] The Commission on Human Rights (now the Human Rights Council) always gave a mandate of three years, the most recent renewal being in 2010 – see, *Freedom of religion or belief: mandate of the Special Rapporteur on freedom of religion or belief*, UN Human Rights Council Res 14/11, 14th Sess, 36th Mtg, UN Doc A/HRC/RES/14/11 (2010) at para 9.
[120] *Elimination of all forms of intolerance and of discrimination based on religion or belief*, Human Rights Council Res 6/37, 6th Sess, 34th Mtg, UN Doc A/HRC/RES/6/37 (2007), at para 18.

There are several advantages to the information accessible through the SRFRB. First, the SRFRB is not restricted in the same way as the HRC, in that the SRFRB's reports are not bound to speak to the interpretation of one single document, as the HRC is with regard to the ICCPR. Secondly, the SRFRB is able to engage in broad investigations and communications with individual states, even with regard to complaints from individuals, regardless of the state's involvement in the ICCPR and the Optional Protocol. These first two advantages provide for the third: that the SRFRB is encouraged to focus on specific issues rather than broad categories. In fact, the SRFRB has on several occasions dealt with the issue of proselytism directly, which has not been done by any of the 'official' UN bodies or treaty committees. A fourth advantage of the SRFRB's reports is that they provide an ongoing source of inquiry and comment showing the development of the freedom of religion over time. As a result, the SRFRB documents, although not binding and not official statements of UN policy, are still a valuable source of insight into the developing understanding and application of the human right to freedom of religion and belief.

1.5.2 Human Rights Committee: comments, decisions and official statements

The HRC does not deal directly with the issue of proselytism. However, the issue of proselytism can be seen implicitly in the comments of the HRC. One of the most important documents for the HRC's interpretation of the ICCPR Article 18 protections of religious freedom is General Comment 22.[121] In Paragraph 4 of General Comment 22 the HRC provides a description of what manifestations of religion included as protected under Article 18(1) of the ICCPR. The description provided here essentially reproduces the items outlined in Article 6 of the 1981 Declaration, providing protection for ritual and ceremonial acts, the building of places of worship, the use of ritual objects, observance of holidays and dietary regulations, wearing religious clothing, using specific languages, regulating the affairs of religious groups, regulating religious leadership, establishing religious schools, and "…the freedom to prepare and distribute religious texts or publications."[122] The significance of this is that the principles outlined in Article 6 of the 1981 Declaration gain a new level of legal recognition, having been incorporated into the

[121] HRC General Comment 22, *supra* note 39.
[122] *Ibid* at para 4.

interpretation of the ICCPR Article 18 by the HRC. The freedom to prepare and distribute religious texts or publications seems to imply at least a minimal protection for religious proselytism – although the extent of that protection is indistinct.

Another important issue dealt with by the HRC was with regard to the divergent wording between the UDHR and ICCPR. As was discussed earlier, the ICCPR does not include a specific reference to the right to change religions. Although there is an argument that the right to change religions is implied in the wording of the ICCPR, which is evident in the *travaux préparatoires*, the HRC clarified in General Comment 22 that "…the freedom to 'have or to adopt' a religion or belief necessarily entails the freedom to choose a religion or belief, including the right to replace one's current religion or belief with another…as well as the right to retain one's religion or belief."[123] Although this does not necessitate an affirmation of the freedom to proselytize, it does provide the necessary foundation for making such an affirmation by protecting the right to change religions. The offence of denying individual freedom to change religions can be manifested positively, in actively criminalizing changes of religion, or negatively, in prohibiting those factors necessary to allow an individual to make a meaningful religious choice. It could well be argued that one of the factors necessary to ensure an individual's freedom to change religions is to allow exposure to, and the free exchange of, religious ideas in the public space, because religious choice is relatively meaningless without religious options. In this view the prohibition of proselytism as well as the prevention of changes of religion are two sides of the same violation of the freedom of religion – the forced homogenization of religious belief violates the freedom of religion.

The merger between the right to change religions and protection against proselytism is echoed later in the HRC General Comment 22, regarding the prohibition against coercion in Article 18(2) of the ICCPR:

> Article 18.2 bars coercion that would impair the right to have or adopt a religion or belief, including the use of threat of physical force or penal sanctions to compel believers or non-believers to adhere to their religious beliefs and congregations, to recant their religion or belief or to convert. Policies or practices having the same intention or effect, such as, for example, those restricting access to education, medical care, employment or the rights guaranteed by article 25 and other provisions of the Covenant, are similarly inconsistent with article 18.2.[124]

[123] *Ibid* at para 5.
[124] *Ibid* at para 5.

Members of the ICCPR are not permitted to use any force or violence to affect religious beliefs (either to maintain or change them). In addition, it is considered coercive for state policies or practices to use government programs or resources to bring about a change in a person's religion. The government programs contemplated here seem to be those essential in nature, since the provision or restriction of the programs must have "the same intention or effect" of compulsion as physical force or penal sanctions. This is reflected in the types of policies or practices enunciated in the text: education, medical care, employment, and other rights in the ICCPR.

An example of the application of this standard can be found in the HRC case *Kang v Korea*[125] considered under the Optional Protocol. In this case the claimant was convicted of espionage and other related anti-state actions. There were several issues in this complaint considered by the Committee, but one that has particular relevance to the issue of proselytism relates to the treatment of the claimant while in prison. What was at issue was a program instituted by Korea called the "ideology conversion system", where preferential treatment was given to inmates who were willing to change their ideological commitments to come in line with the state (sort of an ideological repentance). Since Kong did not succumb to this coercion, he spent most of his sentence in solitary confinement. The HRC took the position that such a practice was coercive and violated Article 18 and 19, in conjunction with Article 26, of the ICCPR.[126] Although this case does not deal with religious beliefs, it does draw on the right to maintain beliefs free from coercion more generally and therefore also sheds light on how principles of coercion relate to religious freedom. The importance of this case is that it shows how strongly the HRC considers the right to freedom of belief, and how the state is very limited in its capacity to influence individual beliefs. Both "belief" and "coercion" are given wide application when state action interacts or interferes with individual beliefs.[127]

Non-essential government programs or resources will not likely be captured by this definition of "coercion"; however, the administration of non-essential government programs or resources will likely be captured by the rules prohibiting discrimination on

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[125] *Views of the Human Rights Committee under Article 5(4) of the Optional Protocol to the ICCPR,* concerning Communication No 878/1999 (submitted by Yong-Ju Kang against Republic of Korea), Human Rights Committee, 78th Sess, UN Doc CCPR/C/78/D/878/1999 (2003) [*Kang v Korea*].
[126] *Ibid* at para 7.2.
[127] This is affirmed by the SRFRB, see UN Doc A/HRC/6/5 (2007), *supra* note 39 at para 9.

the basis of religion, as guaranteed in Articles 2 and 26 of the ICCPR. An example of this might be the unequal treatment of non-Muslims (*dhimmi*) in Islamic states, which includes things such as taxation of *dhimmi* (a head tax, taxes on the right to use land and on commercial activities) and restrictions to holding political office.[128] This is a difficult example because although the policy was explicitly intended to not coerce *dhimmi* into converting to Islam or prevent converting away from Islam it may in fact have that very result.[129] It is important to note that the HRC standard outlined in General Comment 22 does not require the state to intend to affect religious beliefs, so long as the use of the programs or resources has the same coercive effect on religious beliefs.

The view of coercion set out by the HRC seems to be directed towards state action, and does not contemplate the actions of individuals or non-state groups.[130] This view is also presented as a merely negative obligation on state action – i.e. that states cannot act or adopt policies that create coercive situations. This does not address whether a state has an obligation to restrict actions of private parties that may be considered coercive, or whether a state has an obligation to allow the actions of private parties that are not considered coercive. Hence, this view of coercion is limited in its ability to address the issue of religious proselytism, in that it does not consider the enormous class of actions conducted by private parties (such as missionaries) and the proper response of the state to them. Another limitation of the HRC conception of coercion is that, despite the implications of the freedom to change religions mentioned above, there is still no positive affirmation by the HRC that proselytism is an aspect of religion that warrants specific protection.

The HRC also provided in General Comment 22 a more detailed explanation of the limitations to the freedom of religion provided in Article 18(3) of the ICCPR:

> …The Committee observes that paragraph 3 of article 18 is to be strictly interpreted… Limitations may be applied only for those purposes for which they were prescribed and must be directly related and proportionate to the specific need on which they are predicated. Restrictions may not be imposed for discriminatory purposes or applied in a discriminatory manner. The Committee observes that the concept of morals derives from

[128] Uriah Furman "Minorities in Contemporary Islamist Discourse" (2000) 36:4 Middle Eastern Studies 1. Also see Donna E Arzt, "The Application of International Human Rights Law in Islamic States" (1990) 12:2 Hum Rts Q 202 at 208-209.
[129] Uriah Furman notes that a common argument of Islamic scholars in defence of the treatment of *dhimmi* is to fulfil the Islamic principle of non-coercion by designing a way for *dhimmi* to participate in society without having to convert to Islam (see Furman, *supra* note 128 at 3, 4, 8 and 16).
[130] This was also argued by Paul Taylor, *Freedom of Religion*, *supra* note 106 at 46-47.

> many social, philosophical and religious traditions; consequently, limitations on the freedom to manifest a religion or belief for the purpose of protecting morals must be based on principles not deriving exclusively from a single tradition...[131]

Assuming that acts of proselytism are valid manifestations of religion, this excerpt has relevance for proposed limitations to proselytism by the state in several ways.

Article 18(3) of the ICCPR allows for restrictions for reasons of "morals", but according to the Committee this does not justify the enforcement of the morality of one particular understanding of what is 'moral'. The notion of 'morals' promoted here must also be seen in context, which is that the reference to 'morals' follows immediately after a comment on the importance of non-discrimination. The implications of this reasoning are demonstrated in the SRFRB's consideration of the laws of the Lao People's Democratic Republic, where proselytism and missionary acts were being restricted by the state on the basis that they created divisions among religions.[132] The government's expressed intention in preventing division and maintaining social order was interpreted by the SRFRB as based on the issue of morals, as intending to maintain 'harmony' and 'unity'.[133] The problem was that these restrictions were based on a particular notion of social harmony and unity informed exclusively by Lao cultural mores. The law criminalizing proselytism was highly subjective, punishing "all acts creating division among religions," which lent it to being used as a tool of discrimination against religious minorities and to threaten protected religious freedoms such as teaching and disseminating religious beliefs.[134] The problem was not that the restrictions were solely derived from a particular cultural notion of 'harmony' and 'unity', nor was it solely that the restrictions were discriminatory; rather, it was the combination of these two factors that made the restrictions fail the standard of Article 18(3). The standard set by the HRC regarding limitations to manifestations of religious belief does not express concern with the source of the 'morals' being protected as much as whether the legal instantiation of these 'morals' is discriminatory.

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[131] HRC General Comment 22, *supra* note 39 at para 8.
[132] *Report of the Special Rapporteur on freedom of religion or belief, Asma Jahangir, on her mission to the Lao People's Democratic Republic*, UN Human Rights Council, 13th Sess, Agenda Item 3, UN Doc A/HRC/13/40/Add.4 (2010). The Laos laws were reviewed by the Special Rapporteur at paras 12-17, and formed the basis of much of the discussion in the report.
[133] *Ibid* at para 28.
[134] *Ibid* at para 29.

It is difficult to imagine restrictions to religious manifestation derived solely from a single tradition that would not be discriminatory. This seems to be why the HRC singled out morals from the other bases of justified limitation to religious manifestations (public safety, order and health), which are distinctly less difficult to demonstrate objectively. Morals are difficult because they involve a blatant reliance on non-legal values, and are therefore highly contestable. The position taken by the HRC seems to be an attempt to avoid making a statement on the justification of values, deferring instead to a pluralistic definition. This inscribes the notion of discrimination onto the issue of 'morals' – that legislating on the basis of morals should only be done when all of the affected parties are carefully taken into account, and none are excluded or treated unfairly as a result of its implementation. Restrictions to religious manifestations (which might include proselytism) for reasons of 'morals' do not necessarily have to be secular in origin, but they must not be discriminatory, ignorant or intolerant of religious differences.

Unfortunately the HRC does not make any comments directly regarding the issue of proselytism in its official statements, which is why I have explored some of the ways in which their statements might implicitly relate to proselytism. However, proselytism has been raised by the HRC during its committee discussions pertaining to the recent state report submitted by Uzbekistan.[135] One of the concerns raised by the Committee was with regard to the Uzbek laws criminalizing activities leading to the religious conversion of an individual, along with other missionary activities. The HRC's comments during the discussion of the Uzbek laws show that it views proselytism as inherent to religion and protected under international law. One Committee member said that the right to proselytize others is implied in the right to manifest religion in teaching, as referred to in Article 18 of the ICCPR.[136] Another member said that the right to proselytize should be read in conjunction with the ICCPR Article 19 as implying a corresponding right to receive information.[137] The Committee members also expressed an understanding of proselytism that distinguished between aggressive and non-aggressive proselytizing,

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[135] HRC Uzbekistan report (2010), *supra* note 15.
[136] *Ibid* at paras 5 and 22.
[137] *Ibid* at para 22. The SRFRB also takes the view that proselytism is protected by the right to freedom of expression under Article 19 of the ICCPR: see e.g. *Report of the Special Rapporteur on Freedom of Religion or Belief, Asma Jahangir, on Her Mission to Turkmenistan*, UN Human Rights Council, 10th Sess, Agenda Item 3, UN Doc A/HRC/10/8/Add.4 (2009) at para 59.

where the former was unacceptable for assaulting the conscience and employed non-peaceful means, while the latter was permitted and should not be restricted by law.[138] The precise meaning of "assaulting the conscience" and "non-peaceful" proselytizing were not explained, which leaves the matter ambiguous.

So, although there are no official statements from the HRC regarding proselytism, the attitude of the Committee members towards proselytism emerging from the meeting with Uzbekistan, in conjunction with the implications from their official statements, reveals that the HRC views proselytism as a legitimate form of religious manifestation and as the corollary of the right to free expression (as the freedom to receive information). There is also a sense that proselytism has limited protection, and should not be sanctioned in its aggressive coercive methods. Unfortunately, the HRC does not indicate how it would distinguish between the allowable and non-allowable proselytic acts of non-state parties. With regard to state action, the HRC is clearer about the forms of coercion that are not permitted with regard to religious belief.

1.5.3 Comments and reports of the Special Rapporteur on Freedom of Religion or Belief

In addition to affirming the general principles outlined by the HRC, the SRFRB has dealt directly with the issue of proselytism. There are several situations in which the SRFRB has dealt with conversion and proselytism, including situations involving Greece,[139] Sri Lanka,[140] Tajikistan,[141] Lao People's Democratic Republic,[142] Turkmenistan,[143] and Azerbaijan[144]. In addition there are more general reports from the SRFRB, either to the General Assembly or the HRC, which deal with proselytism.[145] From all of these documents there appear to be three main points emerging with regard to proselytism. First, the act of proselytism is itself a valid form of religious manifestation

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[138] HRC Uzbekistan report (2010), *supra* note 15 at para 5.
[139] Abdelfattah Amor, Special Rapporteur of the Commission on Human Rights, *Implementation of the Declaration on the Elimination of All Forms of Intolerance and Discrimination Based on Religion or Belief*, (interim report) UNGA, 51st Sess, Agenda Item 110(b), UN Doc A/51/542/Add.1 (1996).
[140] UN Doc E/CN.4/2006/5/Add.3 (2005), *supra* note 38.
[141] *Report of the Special Rapporteur on freedom of religion or belief, Asma Jahangir*, UN Human Rights Council, 7th Sess, Agenda Item 3, UN Doc A/HRC/7/10/Add.2 (2007).
[142] UN Doc A/HRC/13/40/Add.4 (2010), *supra* note 132.
[143] UN Doc A/HRC/10/8/Add.4 (2009), *supra* note 137.
[144] *Report of the Special Rapporteur on freedom of religion or belief, Asma Jahangir, on her mission to Azerbaijan,* UN Human Rights Council, 4th Sess, Agenda Item 2, UN Doc A/HRC/4/21/Add.2 (2006).
[145] For example, see: SRFRB GA report (2005), *supra* note 15; or UN Doc A/HRC/6/5 (2007), *supra* note 39.

and is protected as such under the ICCPR Article 18 and the other international human rights instruments.[146] Secondly, acts of proselytism cannot be considered to violate the freedom of religion or beliefs of others if the exchange is between adults able to reason on their own and if there is no relationship of dependency or hierarchy between them.[147] Thirdly, proselytism should not be criminalized *in abstracto* – it should not be subject to carte blanche restrictions, and it should not be exercised independent of complaints from the actual targets of proselytic activity.[148] These three points are addressing three main issues: 1) the extent of religious freedom, and how proselytism fits within it; 2) how the principle of coercion weighs in on determining the limitations of proselytism; and 3) how the law should properly deal with conflict surrounding proselytism.

With regard to the definition of freedom of religion, the SRFRB affirms and applies the principle discussed by the HRC. Certainly one of the most significant principles to the SRFRB is the affirmation that despite divergent wording in the UDHR, ICCPR and 1981 Declaration, international human rights law ensures the freedom of individuals to change their religion or beliefs.[149] The SRFRB has treated the matter as decisively decided, and has relied on this principle as axiomatic; the legal guarantee to freely choose and change religions is seen by the SRFRB as one of the fundamental principles of religious freedom in the UN system of human rights. Indeed, the SRFRB has said that conversion is at the centre of the freedom of religion.[150] The SRFRB has taken this principle one step further to formally say that proselytism is itself a valid form of manifestation of religious belief and is therefore protected under Article 18 of the

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[146] See UN Doc A/51/542/Add.1 (1996), *supra* note 139 at paras 12 and 134; SRFRB GA report (2005), *supra* note 15 at paras 52 and 59-68; UN Doc A/HRC/7/10/Add.2 (2007), *supra* note 141 at para 53; UN Doc A/HRC/13/40/Add.4 (2010), *supra* note 132 at para 43; UN Doc A/HRC/10/8/Add.4 (2009), *supra* note 137 at paras 49 and 60; UN Doc A/HRC/6/5 (2007), *supra* note 39 at para 17.

[147] See UN Doc A/HRC/7/10/Add.2 (2007), *supra* note 141 at para 53; UN Doc A/HRC/13/40/Add.4 (2010), *supra* note 132 at para 43; UN Doc A/HRC/10/8/Add.4 (2009), *supra* note 137 at para 49; UN Doc A/HRC/6/5 (2007), *supra* note 39 at para 17.

[148] See UN Doc A/HRC/6/5 (2007), *supra* note 39 at para 8. Also see, e.g., UN Doc A/HRC/13/40/Add.4 (2010), *supra* note 132 at para 30.

[149] This has been stated by the SRFRB on several occasions, including in the *Report submitted by Mr. Abdelfattah Amor, Special Rapporteur, in accordance with Commission on Human Rights resolution 1996/23*, UN Commission on Human Rights, 53rd Sess, Agenda Item No 19, UN Doc E/CN.4/1997/91 (1996), at paras 77-79. Also see UN Doc A/HRC/6/5 (2007), *supra* note 39 at para 7. The SRFRB draws this point from the earlier work of Elizabeth Odio Benito, in her role as the Special Rapporteur appointed under the Sub-Commission on Prevention of Discrimination and Protection of Minorities, *supra* note 93 at para 21.

[150] SRFRB GA report (2005), *supra* note 15 at para 40.

ICCPR. The first statement in this regard was from an SRFRB report pertaining to the anti-proselytism laws of Greece: "The Special Rapporteur notes that proselytism is itself inherent in religion, which explains its legal status in international instruments and in the 1981 Declaration."[151] This statement was carried forward and referred to in future reports of the SRFRB.[152] More recently the phrasing of this principle was altered:

> The Special Rapporteur wishes to recall that *peaceful sharing of one's belief* is a critical element of the *freedom to manifest one's religion or belief*, which explains its legal status in international instruments and the 1981 Declaration.[153]

The first change in wording, from referring to "proselytism" to "peaceful sharing of one's belief", emphasizes the notion that only non-coercive forms of proselytism are permitted and protected under human rights instruments. The other change in wording, from referring to proselytism as inherent in "religion" to merely an element of the "freedom to manifest one's religion or belief", clarifies that proselytism is conceived of as a form of manifestation of religious belief, which can be limited, rather than as an aspect of the *forum internum* (i.e. at the centre of religion), which cannot be limited.

These changes to the conception of proselytism take away a significant amount of protection for religious proselytism, and raise some very significant difficulties. First, restricting the definition of protected proselytism to "peaceful sharing of one's beliefs" obfuscates what is actually protected. "Peaceful sharing of one's beliefs" could be interpreted in a litany of ways, covering a range from the mere absence of physical violence to the total absence of conflict (e.g. insulted or hurt feelings). Such a vague definition is unbefitting a human rights standard, especially with regard to an issue as complex as religious proselytism. It leaves the standard open to manipulation by domestic authorities based on their interpretation of 'peaceful', making the issue a question of what constitutes peaceful action (which is rife with complexities and cultural distinctions) rather than religious freedom (which is much clearer and more properly legal). Secondly, related to the first issue, by building a limitation into the definition of proselytism (that it must be 'peaceful' to be protected) multiplies the opportunity for limitation to religious proselytism. Limitations to proselytism are no longer considered solely in terms of whether the proselytic act was coercive. Proselytic acts can be deemed

[151] UN Doc A/51/542/Add.1 (1996), *supra* note 139 at para 12.
[152] See, e.g. UN Doc A/HRC/6/5 (2007), *supra* note 39 at para 17.
[153] UN Doc A/HRC/10/8/Add.4 (2009), *supra* note 137 at para 49 [emphasis added].

illegitimate manifestations of religion prior to considering the issue of coercion, if they are not done 'peacefully'. This seems to displace the role of coercion in the analysis, replacing it with an even less clear standard. Finally, proselytism is said to be central to religious 'manifestation of religious belief' rather than being central to religion more generally. The difficulty here is that the *forum internum* aspect of religious proselytism is minimized and focus is placed solely on its *forum externum* nature. This is dangerous because it does not recognize the heart of why religions engage in proselytic actions, failing to acknowledge the way in which religion is endowed with the conviction of its truth. Ultimately, moving the focus towards the *forum externum* aspect of religious proselytism exposes it to misunderstanding, degradation and, likely, further restriction. Seeing religious proselytism as nothing more than a common practice minimizes the perception of the impact felt by religious practitioners when proselytism is limited; the impact appears much more profound if proselytism is a necessary part of religion.

The next topic dealt with by the SRFRB is with regard to coercion. Although I argued earlier that importing a limitation into the definition of protected proselytism (i.e. 'peaceful sharing one's faith') seems to displace the role of coercion, this is in fact not the view taken by the SRFRB. Instead, the SRFRB says that coercion is the central factor in defining violations of freedom of religion pertaining to proselytism: "On proselytism, the Special Rapporteur is of the view that no restrictions or sanctions should be imposed on peaceful missionary activities which do not amount to coercion."[154] When examining coercion in freedom of religion there is an important distinction to be made between state action and non-state action. State action that affects religious beliefs is held to quite a strict standard; in this regard the SRFRB reflects the principles developed by the HRC.[155] However, the SRFRB goes further and says that states not only have a negative obligation to avoid coercing people into maintaining or changing their religious beliefs but also have an obligation to take positive steps to ensure that persons "…can practice the religion of their choice free of coercion and fear."[156] According to the SRFRB the state's positive obligation is twofold: 1) to punish those who exercise violence or other acts of religious

[154] *Ibid* at para 60.
[155] See UN Doc A/HRC/6/5 (2007), *supra* note 39 at para 9.
[156] *Ibid* at paras 9 and 41.

intolerance; and 2) to promote a culture of religious tolerance.[157] Unfortunately the SRFRB does not elaborate what sort of 'coercive' non-state actions a state is obliged to prevent – it is not clear how the state's obligation to ensure religious freedom might restrict proselytic activities of non-state actors. It seems that the standard is quite high, based on the references by the SRFRB to "violence", "intolerance" and "fear". The extent to which developing a culture of religious tolerance restricts proselytism is also not developed, which is disconcerting because it provides opportunity for a broad range of restrictions to be justified based on the domestic understanding of what is needed to develop a 'culture of religious tolerance'.

Even though coercion is at the core of the evaluation of both state and non-state proselytic actions, as mentioned above, the standard for non-state action to constitute coercion is different from government actions and policies. This makes sense, given that the relationship between the government and its subjects is unique. In order for private actors to effectively coerce someone regarding their religious beliefs (to change or maintain it) will depend on different factors and the use of different tools and techniques. The most common accusation against non-state actors is that they engage in 'unethical' conversions, which commonly refers to promising some material benefit or taking advantage of the vulnerable situation of a person whose conversion is sought – practices often associated with missionary activity. The standard emerging from the SRFRB reports and communications in this regard is as follows:

> Missionary activity cannot be considered a violation of the freedom of religion and belief of others if all involved parties are adults able to reason on their own and if there is no relation of dependency or hierarchy between the missionaries and the objects of the missionary activities.[158]

Consistent with what has been said so far, the core of this definition is coercion. But this notion of coercion is different than that used for state action, in that the focus here is on inequalities of power between proselytizers and their targets in terms of mental capacity, resources and relative status. When there is sufficient disparity in power between the proselytizer and the targeted person then the proselytic act will be considered a violation of the freedom of religion and belief of the targeted person. The idea developed here is that the legal evaluation of religious proselytism must not look solely at the method used

[157] *Ibid* at para 41.
[158] SRFRB GA report (2005), *supra* note 15 at para 67.

by the proselytizer and must also take into account the circumstances affecting the way in which the parties relate to each other. The ideas of 'dependency', 'hierarchy' and the ability of the target of proselytism to reason independently suggests that the SRFRB has in mind more extreme situations where proselytism should be restricted – such as proselytizing the mentally delayed, hospital staff proselytizing patients, teachers proselytizing children students, etc. But it is not clear how far this logic goes. For example, is there 'hierarchy' or 'dependency' between a flood victim and a Christian aid volunteer? The application of this standard ultimately depends on the definitions given to 'hierarchy' and 'dependency'. Does 'dependency' imply that there is some provision of something necessary for life or death? Does 'dependency' include the provision of private goods rather than the distribution of public goods? Unfortunately, the SRFRB has not provided further elaboration on what level of disparity in power constitutes coercion.[159] So this standard merely begs the question: what actions are coercive and constitute a violation of the freedom of religion of targeted individuals?

The vagueness of the standard for judging coercive practices of non-state parties connects with the third main issue addressed by the SRFRB, which is the matter of how to properly deal with proselytic acts by legal means. The SRFRB has refused to accept 'unethical conversion' as a legal category that can be restricted altogether, and has instead created a different standard for evaluating non-state party actions. This can best be seen in a statement made by the SRFRB to the General Assembly:

> …[C]ertain forms of "unethical" conversion are not per se contrary to international standards. Moreover, while some of these acts may not enjoy protection under human rights law, they should not as a result necessarily be seen to constitute a criminal offence. [The Special Rapporteur]… recommends that cases of alleged "unethical" conversion be addressed on a case-by-case basis, examining the context and circumstances in each individual situation and dealt with in accordance with the common criminal and civil legislation. The Special Rapporteur is therefore of the opinion that the adoption of laws criminalizing in abstracto certain acts leading to "unethical" conversion should be avoided, in particular where these laws could apply even in the absence of a complaint by the converted person.[160]

The main point here is that government legislation regarding proselytism should not deny proselytism (by making it criminal or illegal) categorically. Change in religion is seen to be a matter of basic individual choice, which means that acts of proselytism between

[159] The SRFRB does indicate in SRFRB GA report (2005), *supra* note 15 that restrictions to the freedom to proselytize should not be based merely on the freedom of religion of others, since the issue of religion is basically a question of individual choice (at para 62).
[160] SRFRB GA report (2005), *supra* note 15 at para 68.

individuals should not be criminalized simply to avoid the conflict of religious beliefs between individuals.[161] Acts of proselytism cannot be punished merely because they engage means that are 'unethical', even if these practices are not protected as part of the freedom of religion.

It is remarkable that the SRFRB here takes the position that even acts of proselytism falling outside of the definition of 'protected' by the right to religious freedom should be given a measure of procedural protection. This raises the question: on what basis does the SRFRB defend this protection? If a proselytic action is not protected by the freedom of religion, then what is it protected by? Despite not providing an answer to this question, the SRFRB opines that improper proselytism should not be outlawed outright, but that each situation should be weighed individually and depend on the complaints of the individual being proselytized. The confusion arising in the position of the SRFRB seems to be a by-product of the problems I identified earlier regarding the limited protection for "peaceful sharing of one's beliefs". Having provided a limitation to the definition of proselytism protected by the freedom of religion, a gaping hole was left whereby a state could legislate general restrictions to 'unethical' proselytism with nothing preventing the legislation from being applied very broadly. Now faced with the dangerous realities of the distinction between ethical/unethical proselytism, the SRFRB is trying to stem the inevitable tidal flow enabled by its own decision. The SRFRB's decision here provides a makeshift objective standard protecting all forms of proselytism (even unethical proselytism), separating it from the evaluation of whether the proselytic action can be restricted. Rather than allowing domestic criminal laws based on the ambiguous standard of ethical versus unethical proselytism, the SRFRB says that every proselytic act should be weighed individually. It is unfortunate that the problem being addressed here by the SRFRB was created by its own poor interpretations, and could have been avoided if these subjective definitions were not introduced in the first place.

The SRFRB view also has some positive aspects, which take into account several complexities in the process of conversion and proselytism. First, in an effort to clarify the ambiguity of whether a proselytic act can rightly be restricted or punished legally, the SRFRB injects a helpful objective standard: that punishment should only be considered if

[161] *Ibid* at para 62 and 65.

the person being proselytized complains.[162] By doing this, the SRFRB recognizes the impossibility of entering into the mind of a convert to determine whether the proselytic action in question was in fact coercive or whether the choice to change religions was made freely.[163] This avoids having to answer questions arising from the vague standards of coercion ('dependency' and 'hierarchy') if the proselytized individual does not complain.

A second complexity taken into account is with regard to the factors underlying anti-proselytism sentiment. Although every situation is unique, the SRFRB indicates that restrictions to proselytism are commonly based on misconceptions of the nature of other religions.[164] Failing to recognize this exposes laws to being used as tools of discrimination.[165] The SRFRB emphasizes that limitations to proselytism cannot be applied in a discriminatory manner, but "…must be directly related and proportionate to the specific need on which thy are predicated", and must "…promote religious tolerance and avoid stigmatizing any particular religious community".[166] To prevent the association between proselytism and a sort of colonial renaissance (an association prevalent in the drafting of the various UN instruments) the focus in limitations to religious proselytism must be on proving actual coercion rather than mere allegations or speculation.[167] This relates to the earlier discussion of restricting proselytism on the grounds of 'morality': the SRFRB has said that it is not consistent with the international human rights standards to restrict proselytism out of concern for maintaining social

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[162] *Ibid* at para 68. I recognize that this standard is not truly 'objective', in a literal sense, insofar as it is based on the subjective perception of harm by the target of proselytic action. I describe it as 'objective' because it ties any legal regulation of religious proselytism to an event that is outside of the 'subjective' judgments of local authorities (courts or legislators). The complaint of the proselytic target is therefore an objective threshold that must be crossed before engaging in further analysis of the matter.

[163] See, e.g., UN Doc E/CN.4/2006/5/Add.3 (2005), *supra* note 38 at para 76: "…it is very difficult to assess the genuineness of a conversion. While it may be easy to prove that a person has received a gift, it would not be easy to demonstrate that the person has converted because of the gift."

[164] See e.g. UN Doc A/HRC/4/21/Add.2 (2006), *supra* note 144 at para 39. Here the SRFRB discussed the way in which the Azerbaijan government engaged in questionable activities harassing certain religious groups (especially Jehovah's Witnesses – at para 43) and portraying them in a negative manner. The SRFRB has also dealt here with situations where government actors were actively involved in portraying proselytic religions – especially Jehovah's Witnesses – to be anti-social and anti-governmental (*ibid* at para 43).

[165] See e.g. UN Doc E/CN.4/2006/5/Add.3 (2005), *supra* note 38 at para 78.

[166] UN Doc A/HRC/6/5 (2007), *supra* note 39 at para 45.

[167] In the report regarding Sri Lanka the SRFRB discussed alleged reports of 'unethical' proselytism, but noted that there was no evidence substantiating the alleged abuses connected with of proselytism: see UN Doc E/CN.4/2006/5/Add.3 (2005), *supra* note 38 at para 48.

harmony and unity.[168] For the SRFRB, even though proselytism may involve one religion asserting superiority over other religions, it is necessary for the state to allow this as an expression of religious belief. States must protect all religious beliefs and practices "…even if these appear to be competing or contradictory in some cases."[169]

Looking at the situations considered by the SRFRB it seems that it promotes quite a high standard of tolerance for acts of proselytism by requiring a high threshold for demonstrating coercion and justifying state intervention. For example, in the report regarding Sri Lanka in 2005, the SRFRB acknowledged that missionary organizations were engaged in questionable conduct, but did not declare such activity to be in violation of the freedom of religion of others, or that such activity justified legal limitations to proselytism as a whole. Rather, the SRFRB merely encouraged missionary organizations to work towards tolerance and peaceful dissemination of their beliefs and to follow generally accepted guidelines for international missionary operations.[170] In other situations the SRFRB has consistently criticized government limitations on proselytic activities of private parties, whether that be through restrictions on conversion,[171] verbal discussion[172] or distribution of religious material.[173]

In summary, the standard promoted by the SRFRB regarding religious proselytism is somewhat confused. Religious proselytism is recognized as a religious practice which should be protected by the freedom of religion, but only when it is a 'peaceful sharing' of one's beliefs. The notion of coercion, which has been developed through the HRC, is retained as an important part of the proselytism analysis regarding religious proselytism conducted by private parties, such that non-coercive proselytism cannot be considered a violation of the rights of the party being proselytized. Unfortunately, the standard of coercion is made less clear with added notions of 'dependence' and 'hierarchy' between the proselytizer and the proselytized. Despite this, the SRFRB has attempted to objectify the proselytism analysis by creating two standards for its regulation: first, that proselytism (even unethical proselytism) should not be criminalized as a category; and secondly, that

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[168] UN Doc A/HRC/7/10/Add.2 (2007), *supra* note 141 at paras 28-29.
[169] UN Doc A/HRC/10/8/Add.4 (2009), *supra* note 137 at para 60.
[170] See UN Doc E/CN.4/2006/5/Add.3 (2005), *supra* note 38, especially at paras 50, 115-116, 118-119 and 130.
[171] UN Doc A/HRC/13/40/Add.4 (2010), *supra* note 132 at para 40.
[172] UN Doc A/HRC/7/10/Add.2 (2007), *supra* note 141 at para 35.
[173] UN Doc A/HRC/10/8/Add.4 (2009), *supra* note 137 at para 43-44.

proselytic acts should not be punished when the person proselytized does not complain. The approach adopted by the SRFRB has proven to provide relatively high protection for acts of religious proselytism, which seems somewhat surprising considering the vagueness of the standards used. This has been reflected in the cases considered by the SRFRB, where it has been reluctant to find proselytic action to be in violation of the freedom of religion of others, reluctant to define the actual standard necessary to find such a violation, and highly critical of government restrictions to religious proselytism. This leads to the view that proselytism is a fairly well protected religious practice, and cannot be subject to limitation unless extreme circumstances are demonstrated.

1.6 Conclusion

The notion of proselytism emerging from the UN system of human rights is somewhat mixed. There is a structure set in place in the instruments adopted (UDHR, ICCPR and 1981 Declaration) that provides the foundation for a relatively strong protection for religious proselytism. The freedom to change religions endured years of scrutiny and recognition of the freedom to share one's religion has continued to grow (evidenced in the attitudes taken by the majority of states in the drafting of the various instruments, and gaining explicit representation in the 1981 Declaration). The early opinions of the HRC and SRFRB supported the strong protection of proselytism – that proselytism was an essential aspect of religion and could only be restricted in limited situations where actual coercion could be demonstrated.

In recent times, however, the picture has become obscure. The comments from the SRFRB began to incorporate into the notion of proselytism a certain form of propriety (i.e. 'peaceful' and 'ethical' sharing of one's beliefs), which resulted in the view that proselytism is only protected under the freedom of religion when it meets this standard. The vagueness of the concepts used to distinguish acceptable and unacceptable forms of proselytism poses problems for its enforcement as an international standard. Quite surprisingly, despite the injection of vagueness the standard of 'coercion' was still maintained as the basis for justifying limitations to religious proselytism. Also, the SRFRB has introduced new objective principles, such as that there should be no *prima facie* prohibitions on proselytism, that proselytic acts should not be restricted without complaints from those who have been proselytized, and that limitations to proselytism

cannot have a discriminatory effect, which helps to ensure protection of religious proselytism regardless of its propriety. This mixture of vague elements with objective principles creates some confusion as to the precise nature of the proselytism standard. When considered as a whole the UN standard seems to provide relatively high protection for religious proselytism, focusing on legal definitions and limitations rather than on social and cultural factors. This is evidenced by the way that the SRFRB has continually applied the standards so as to protect proselytic activities.

It is important to keep in mind the dissenting views regarding proselytism that persisted through the drafting of all of the UN instruments discussed, especially in light of the ambiguities present in the UN conception of religious proselytism. These dissenting views include fears that protecting religious proselytism will result in ongoing political conflict via neo-colonial activity, that it will destroy religious communities (especially Muslim communities), and that it will result in unfair competition between religions for adherents (providing the advantage to aggressive and well-funded foreign religions). These concerns do not seem to have been resolved during the process of developing the idea of religious freedom in the UN human rights regime. The same arguments made during the drafting of the UDHR prior to 1948 were being made during the drafting of the 1981 Declaration in the late 1970s. Having such consistent objections should make hesitant and tentative any claims that the UN standard represents a truly global perspective on religious proselytism.

Given that the UN instruments represent a compromise of the opinions of the majority to gain the assent of the minority, and that there exists a gap for some states between their view of proselytism and the language used in the UN texts, we can expect divergence between the regional treaties and the emerging UN standard. This is not to say that the UN standard is fundamentally flawed or unable to respond to these divergent views. Rather, it is to say that we can expect to see these diverging opinions come through more strongly in the regional treaties because they are not subject to the same pressures of compromise that exist in the UN. The regional treaties will therefore more closely represent the attitudes of the various groups in the global community. Hence, comparing the regional treaties – with each other as well as against the UN – will help

give a clearer picture of how religious proselytism is conceptualized and dealt with globally.

Part 2: Developed Regional Human Rights Bodies

2.1 Introduction

In this section the European and the Inter-American human rights regimes will be analyzed. There are several reasons for examining the European and Inter-American regimes immediately after the discussion of the UN, and why they should be classified together. First, these two regional organizations are contemporaries of the UN in terms of age – as will be seen below both of these regimes implemented their first human rights instruments around the same time as the UN adopted the UDHR. Secondly, given their age, the European and Inter-American regimes have relatively well-developed mechanisms and conceptions of human rights. Both regimes have independent human rights courts that are fully functioning and have developed a body of jurisprudence regarding human rights. Thirdly, and perhaps most importantly, the general ideology by which the European and Inter-American regimes approach human rights are relatively congruent with the approach taken in the UN, insofar as they focus on the protection of individual rights while allowing for limitations to those rights to protect the rights of others and, to a lesser degree, for common social interests. The concepts developed in the European and Inter-American human rights regimes are intertwined with each other and with the UN. Although there are differences between these regimes, which have an impact on how religious proselytism is conceived, the general approach taken to the issue of religious proselytism is similar. Both regimes approach the issue in a way that merges the rights to religious freedom and freedom of expression. Despite this general similarity in approach, the European and Inter-American regimes arrive at drastically different views of religious proselytism – the latter developing expansive limitations to religious freedom through a hyper-contextual and subjective analysis, and the former providing broader support for religious proselytism as a part of the process of changing religions. Ultimately, these regional organizations show some of the more nuanced issues that arise with regard to religious proselytism in the context of an individual-rights-based approach.

2.2 Expanding Limitations to Proselytism - European Human Rights Regime

2.2.1 Introduction to the European regime

The international legal landscape in Europe is old and complex. The multilayered nature of the international institution make-up complicates any determination of the present state of the international law in Europe. The body charged with regulating many of the laws and international courts in Europe is the Council of Europe.[174] Emerging from the Council of Europe is the core of the human rights system in Europe: the European Convention for the Protection of Human Rights and Fundamental Freedoms.[175] The ECHR entered into force shortly after the UDHR. In many ways the ECHR was based on the UDHR, but was altered to meet the needs specific to Europe.[176] This is particularly so with regard to Article 9, which is nearly a carbon-copy of the UDHR Article 18 freedom of religion. Article 9 reads as follows:

> (1) Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief, and freedom, either alone or in community with others and in public or private, to manifest his religion or belief, in worship, teaching, practice and observance.
>
> (2) Freedom to manifest one's religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or the protection of the rights and freedoms of others.

The discussion engaged in during the drafting of the ECHR freedom of religion was not nearly as extensive as that surrounding the UN instruments.[177] This is largely because the members of the Council of Europe were (and are) much more homogeneous than the members of the UN at the times that the respective instruments were drafted, so the same issues were not raised in discussion. Most of the discussion regarding Article 9 surrounded the wording of the limitations portion of the article.[178] There is nothing in the

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[174] Ed Bates, *The Evolution of the European Convention on Human Rights: From its Inception to the Creation of a Permanent Court of Human Rights* (Oxford, Oxford University Press, 2010) at 2: "The political organ of the Council of Europe, the Committee of Ministers, undertakes the task of supervision of the execution of judgments to ensure that they are fully implemented."

[175] *European Convention for the Protection of Human Rights and Fundamental Freedoms*, 4 November 1950, 213 UNTS 221, Eur TS 5 [ECHR].

[176] See generally Bates, *supra* note 174.

[177] Mark W Janis, Richard S Kay & Anthony W Bradley, *European Human Rights Law: Text and Materials* (3d ed) (Oxford: Oxford University Press, 2008) at 339. Also see Carolyn Evans, *Freedom of Religion Under the European Convention on Human Rights* (Oxford: Oxford University Press, 2001) at 40 [C Evans, *Freedom of Religion*].

[178] Even though there is little recorded regarding these discussions. See C Evans, *Freedom of Religion*, *supra* note 177 at 41-45.

drafting process that has particular relevance to the issue of proselytism. The discussion did not engage the issue of changing religions and proselytism, as was the case when the UDHR was drafted.[179]

As mentioned, the wording of Article 9(1) of the ECHR is not unique, as it very closely resembles the wording in Article 18 of the UDHR. As such, many of the distinctions noted between the religious freedom guarantees in the UDHR and the ICCPR also apply between the ECHR and the ICCPR. One difference is that Article 9 of the ECHR explicitly includes as part of the freedom of religion the freedom to change religions, which is not included in Article 18 of the ICCPR. Another difference is that the ECHR Article 9 does not include the right to be free from coercion, which is guaranteed in the ICCPR Article 18(2). The limitation portion of Article 9 in the ECHR is more similar to the wording of Article 18(3) of the ICCPR than Article 29(2) of the UDHR. The ECHR follows the ICCPR in restricting limitations to the right to freedom of religion on the basis of being prescribed by law, and according to what is necessary for protecting public safety, public order, health, morals and the rights of others. The major differences between the ECHR Article 9(2) and the ICCPR Article 18(3) are that the former says "necessity" is determined in relation to a "democratic society" and the latter says the "rights of others" must be "fundamental" rights to justify the limitation. In this way the ECHR takes its lead from the UDHR Article 29(2).

By far the most significant sources for the development of human rights in the European regime are the institutional mechanisms created with the specific role of applying the ECHR: the European Court of Human Rights [ECtHR] and the European Commission on Human Rights [ECmHR].[180] Originally the ECtHR and the ECmHR were separate entities, but their functions were united together in 1998 pursuant to

[179] "Perhaps the most that can be said in regard to the drafting of Article 9(1) is that delegates considered the issue of freedom of religion to be of great importance and that they accepted that the Universal Declaration provided an appropriate model for its protection. There is no evidence of debate over the issues, such as the definition of religion or belief and the right to change religion, that were so controversial during the drafting of various United Nations instruments." (*Ibid* at 40, references omitted).

[180] The differences between the ECmHR and the ECtHR are ultimately not important for the purposes of this project. For a detailed discussion of the formation of the human rights mechanisms in Europe, including a detailed discussion of the purposes of the ECmHR and the ECtHR, see Bates, *supra* note 174.

Protocol 11 to form the current unified court.[181] Even though not much is added to the understanding of the freedom of religion or proselytism through the *travaux préparatoires*,[182] the ECtHR has provided a comprehensive understanding of the right and how it works. The ECtHR has downplayed the importance of the *travaux préparatoires* to the ECHR generally, saying that the ECHR should be treated teleologically (i.e. that it is constantly changing and evolving with time), which emphasizes the importance of the ECmHR and ECtHR decisions.[183] In order to develop our understanding of the freedom of religion and how it relates to the issue of proselytism we will have to look to the jurisprudence emerging from the ECtHR.

In its early jurisprudence the ECtHR did not deal directly with the freedom of religion, but rather engaged it as a right secondary to other rights.[184] More recently the ECtHR has considered the content of Article 9 on its own, as the primary right at issue, starting with the case *Kokkinakis v Greece*.[185] As will be discussed more below, the *Kokkinakis* case had to do with the issue of anti-proselytism laws in Greece. So, in the European regime the issue of proselytism stands at the beginning of the court's jurisprudence dealing directly with the freedom of religion – the two issues are intricately intertwined. The issue of proselytism has been treated several times by the ECtHR in several cases, although not commonly as the primary issue.

It is necessary to look beyond cases dealing directly with Article 9 of the ECHR, since, as mentioned, a large portion of the ECtHR jurisprudence deals with the freedom of

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[181] *Protocol No 11 to the Convention for the Protection of Human Rights and Fundamental Freedoms, restructuring the control machinery established thereby*, 11 May 1994, ETS No 155 (entered into force 1 November 1998).

[182] Carolyn Evans recognized that the records of the *travaux préparatoires* of the ECHR is incomplete, in that many of the discussions were not recorded; as such, the reasons why Article 9 developed as it did is a matter of guesswork and "piecing together the reasons" from various second-hand accounts (C Evans, *Freedom of Religion*, *supra* note 177 at 38).

[183] Ed Bates argues that the ECtHR jurisprudence takes the view that the interpretation of the ECHR should not be overly restrictive, which establishes the 'teleological' interpretation noted above (Bates, *supra* note 174 at 16). According to Bates, this interpretive view has set itself up to be more of a bill of rights than an international human rights treaty – acting as a sort of constitutional court of Europe (*ibid* at 17). Although an interesting topic, the principles relating to the interpretation of the ECHR are not relevant enough to the thesis topic (i.e. they do not have enough significance to the issue of proselytism) to justify exploring in greater detail.

[184] Janis et al, *supra* note 177 at 333-334, where the authors argue that the court avoided dealing with religious freedom directly because it was a 'touchy' subject.

[185] *Kokkinakis v Greece* (1993), 260A ECHR (Ser A), 17 EHRR 397 [*Kokkinakis*]. Malcolm Evans argues that "The *Kokkinakis* case provided the Court with its first real opportunity to set out its approach to Article 9." (M Evans, *Religious Liberty*, *supra* note 17 at 282).

religion in conjunction with other rights. In the European context, there has been an important connection between the freedom of religion (Article 9) and the freedom of expression (Article 10). Article 10 of the ECHR says:

> 1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.
>
> 2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.

It is important to note that the limitations available in Article 10(2) are much more broad than those in Article 9(2). Article 10 cases in the ECtHR have often dealt with the issue of religious freedom secondarily to the freedom of expression, and often in the context of cases where some form of expression is anti-religious or religiously offensive. Although the Article 10 cases do not address proselytism as their subject they have a powerful impact on the issue of proselytism. The connection between expression and religious proselytism is obvious: proselytism is a form of religious expression. But, as will be seen, the most powerful impact that Article 10 cases have on our understanding of proselytism is not through a direct discussion of proselytism as a form of expression but rather through a discussion of the justifications for limiting the rights of expression. As will become clearer during the later discussion of the ECtHR cases, there is an odd circular relationship that has formed between Articles 9 and 10 of the ECHR: the protections offered by Article 9 are discussed in Article 10 cases to determine to what extent Article 10 rights should be limited to protect the Article 9 rights of others, and simultaneously the limitations in Article 10 are refracted into the limitations permitted to the manifestations of religion protected in Article 9 (including proselytism).

To understand how the issue of proselytism is dealt with in Europe we have to look at the ECtHR cases dealing directly with the issue of proselytism as well as at the cases dealing with the relationship between Article 10 and Article 9 of the ECHR. In the following discussion I will first examine the ECtHR cases dealing directly with religious proselytism, and will secondly examine some of the marquee Article 10 cases that deal with issues of religious freedom. This analysis will round out the European conception of

religious proselytism, and will show some of the ways in which this conception clarifies and obfuscates the matter. Importantly for this project, the European regime helps bring to light some of the negatives and positives that can emerge from an individualist-based approach to religious proselytism. Understanding this helps develop a more comprehensive view of the issues that must be accounted for in a truly international understanding of religious proselytism.

2.2.2 ECtHR Cases dealing directly with proselytism

There are two cases from the ECtHR that deal directly with the issue of proselytism, in that proselytism is the primary issue in the cases: *Kokkinakis v Greece*[186] and *Larissis and Others v Greece*[187]. Both of these cases deal with challenges to the same law in Greece, which criminalizes proselytism. The definition of "proselytism" under the Greek law is:

> …[A]ny direct or indirect attempt to intrude on the religious beliefs of a person or a different religious persuasion, with the aim of undermining those beliefs, either by fraudulent means or by taking advantage of his inexperience, trust, need, low intellect or naivety.[188]

The court in *Kokkinakis* considered the history of the Greek law, and its accompanying jurisprudence,[189] and concluded that the Greek criminal law did not criminalize all religious proselytism but only 'improper proselytism'.[190] Since the law against proselytism was only with regard to 'improper' proselytism the ECtHR found the law in

[186] *Kokkinakis, supra* note 185.
[187] *Larissis and Others v Greece* (1998), 65 ECHR (Ser A) 362, 27 EHRR 329 [*Larissis*].
[188] From the background description of the case in *Kokkinakis*, *supra* note 185 at 404, referring to section 4(2) of the Greek Act 1363/1938 (amended by Greek Act 1672/1939).
[189] The ECtHR in *Kokkinakis* reviewed the history of this Greek law, tracing its origin back to the first constitution of Greece in 1844 (ECtHR *Kokkinakis, supra* note 185 at para 15). The first criminal law against proselytism in Greece was created in 1938 (*ibid* at para 16). Interestingly, the ECtHR observed that the prohibition of proselytism was originally intended to protect the Orthodox religion from being decimated by foreign religious proselytes, but now has extended to protect all forms of proselytism (*ibid* at paras 15-21). In addition to all this, the ECtHR provided a brief synopsis of the jurisprudence regarding the anti-proselytism law (*ibid* at paras 18-20).
[190] See *ibid* at para 48. It is very interesting to note that the ECtHR looked to the World Council of Churches report from 1959, where a distinction was drawn between "Christian witness" and "improper proselytism". The ECtHR adopted the standard of the WCC, which described "improper proselytism" as: "…activities offering material or social advantages with a view to gaining new members for a Church or exerting improper pressure on people in distress or in need; it may even entail the use of violence or brainwashing; more generally, it is not compatible with respect for the freedom of thought, conscience and religion of others" (*ibid* at para 48).

principle consistent with Article 9 of the ECHR.[191] It is important to note the obvious divergence between the ECtHR view on proselytism and the UN – the UN, at least the SRFRB in the UN, takes the view that criminalizing proselytism is inconsistent with the notion of freedom of religion, whereas the ECtHR ratifies the Greek criminal law against improper proselytism as justifiable in principle.[192]

As mentioned earlier, the *Kokkinakis* case is unique because it is one of the first cases to directly deal with Article 9 of the ECHR. The views it expresses regarding freedom of religion are therefore quite important. One of the most oft quoted passages from *Kokkinakis* is the declaration by the court that the freedom of religion is vitally important and that it is central to the notion of democratic society:

> …[F]reedom of thought, conscience and religion is one of the foundations of a 'democratic society' within the meaning of the Convention. It is, in its religious dimension, one of the most vital elements that go to make up the identity of believers and of their conception of life, but it is also a precious asset for atheists, agnostics, sceptics and the unconcerned. The pluralism indissociable from a democratic society, which has been dearly won over the centuries, depends on it.[193]

Another important principle developed in *Kokkinakis* (which was followed in *Larissis*) is that proselytism is a legitimate form of religious manifestation protected under Article 9:

> Bearing witness in words and deeds is bound up with the existence of religious convictions. …[F]reedom to manifest one's religion…includes in principle the right to try to convince one's neighbour, for example through 'teaching', failing which, moreover, 'freedom to change [one's] religion or belief,' enshrined in Article 9 would be likely to remain a dead letter.[194]

The court in *Larissis* clarified that although proselytism involves expression it is properly dealt with under Article 9 rather than Article 10. This also means that restrictions to proselytism must be justifiable under Article 9(2) rather than under 10(2).[195] Another important principle emerging from *Kokkinakis* and *Larissis* is that the right to proselytize, like other forms of religious manifestation, is not absolute (unlike the internal right of religious freedom) – religious manifestations, such as proselytism, may be limited "…in

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[191] *Ibid* at para 48.
[192] The disjoint between the UN standard and the ECtHR standard is not totally foreign to the UN – as was argued earlier, the standard of the UN SRFRB is confusing because it both supports the distinction between proper and improper proselytism (saying that the latter is not protected under international human rights) as well as opposes general limitations to improper proselytism. The position taken by the ECtHR in *Kokkinakis* avoids the inconsistency found in the UN SRFRB standard.
[193] *Kokkinakis*, *supra* note 185 at para 31.
[194] *Ibid* at para 31.
[195] See *Larissis, supra* note 187 at para 64, where the court said that no separate issue arises in relation to Article 10.

order to reconcile the interests of the various groups and ensure that everyone's beliefs are respected."[196] At first blush, this standard is not controversial, but, as will be seen in the discussion below regarding Article 10 cases, the notion of 'respect' for the beliefs of others has entered through the back door, so to speak, to weaken the protections for religion and religious proselytism.

Kokkinakis and *Larissis* established the analysis for determining whether there is a violation of Article 9 of the ECHR.[197] First, it is necessary to determine whether there was in fact a restriction of religious freedom (based on the list of protected aspects outlined in Article 9(1)). Secondly, the court is to determine whether the restriction was justified pursuant to Article 9(2). This second part of the test has three sub-parts: a) determining whether the restriction was "prescribed by law"; b) determining whether the restriction pursued a "legitimate aim"; and c) determining whether the restriction was "necessary in a democratic society".

The court found that the Greek law was in principle justified in limiting proselytism. First, despite dissenting opinions in both *Kokkinakis* and *Larissis*, the court found the Greek law criminalizing proselytism to be prescribed by law.[198] Secondly, the ECtHR in *Kokkinakis* said that the law in question pursued the legitimate aim of protecting the right to religious freedom of others.[199] To determine whether the anti-proselytism law was justified as 'necessary in a democratic society', the ECtHR in *Kokkinakis* looked to balance the rights of those involved to determine whether the restriction was justified "in principle" and whether it was "proportionate".[200]

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[196] *Kokkinakis, supra* note 185 at para 33.
[197] This analysis was clearly set out in *Larissis*, *supra* note 187 at para 43.
[198] This is in itself an interesting (and controversial) issue. This issue was discussed in the *Kokkinakis* case in relation to whether the vagueness and broadness of the definition of improper proselytism violated Article 7 of the ECHR (see *Kokkinakis, supra* note 185 at paras 37-41 and 51-53). The majority of the court held that the law was not overly broad or too vague – it was sufficiently clear to enable Mr. Kokkinakis to regulate his conduct in the matter. Judges Pettiti and Martens provided strong dissenting arguments that the Greek criminal law was too vague and allowed the government excessive discretion in finding proselytism to be 'improper'. Judge Repik, partly dissenting in the *Larissis* decision, argued that although the law may have been 'prescribed by law' in the *Kokkinakis* case that the further applications of the law by the Greek courts revealed that it could not longer be considered such (*Larissis*, 27 EHRR 329 at 369-371). These issues, although very interesting are ultimately not related to the current discussion of proselytism, and therefore will not be dealt with in any great detail.
[199] *Kokkinakis, supra* note 185 at para 44.
[200] *Ibid* at para 47.

In deciding that the law was in principle justified, the ECtHR said that it only punished "improper proselytism" but not proper "Christian witness".[201] It is interesting that in coming to this conclusion the ECtHR relied on a report of the World Council of Churches produced in 1956, which outlined the responsibilities of Christian missionaries and outlined what proselytic actions were considered improper. The ECtHR summarized the WCC report as follows:

> …[Christian witness] corresponds to true evangelism, which… [is] an essential mission and a responsibility of every Christian and every Church. [Improper proselytism] represents a corruption or deformation of it. It may, according to the same report, take the form of activities offering material or social advantages with a view to gaining new members for a Church or exerting improper pressure on people in distress or in need; it may even entail the use of violence or brainwashing; more generally, it is not compatible with respect for the freedom of thought, conscience and religion of others.[202]

In *Kokkinakis* the ECtHR does not directly adopt the WCC definition as its own; rather, the court claimed that in the present case it did not have to define 'improper proselytism' in the abstract.[203] But even still, the court clearly employed the WCC standard when deciding whether the Greek law was restricted to punishing improper proselytism, and hence justified in principle. The ECtHR in *Larissis*, however, more openly adopts a definition of improper proselytism closely in line with the WCC definition relied on by *Kokkinakis*. The definition in *Larissis* of improper proselytism, which is narrower than the *Kokkinakis* definition, includes activities "...such as the offering of material or social advantage or the application of improper pressure with a view to gaining new members for a church."[204] This standard is used by *Larissis* slightly differently, and more explicitly, than in *Kokkinakis* to define the limit to the protection of proselytism guaranteed under Article 9.

The final portion of the balancing analysis used in both *Kokkinakis* and *Larissis* required evaluating the circumstances of the case to determine whether the application of the anti-proselytism law to the accused was justified. The court looked at the actions of the applicant and the particular situation of the target of the proselytism (including her intelligence, and perception of the events). In *Kokkinakis* the court found that the criminal law against proselytism was justified in principle and proportionate, but that

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[201] *Ibid* at para 48.
[202] *Ibid* at para 48. This standard was also repeated in *Larissis*, *supra* note 187 at para 45.
[203] *Kokkinakis*, *supra* note 185 at para 48.
[204] *Larissis*, *supra* note 187 at para 45.

there was insufficient evidence to justify using it to punish the applicant for his proselytic interaction with the complainant.[205] The circumstances considered in *Larissis* are significantly more complicated and deserve a closer look, as the application of the principles to the facts of *Larissis* is quite informative to the legal nature of proselytism (even more so than *Kokkinakis*).

In *Larissis*, there were three applicants, all of whom were officers in the Greek air force. The three applicants were convicted for proselytizing a variety of individuals, some of whom were subordinate airmen and some of whom were ordinary citizens. The significant development in the *Larissis* case is that the court expanded the scope of circumstances relevant to the 'propriety' of proselytism to include the context of the relationship between the proselytizer and the target.[206] In *Larissis* the court found that the hierarchical nature of relationships between people in the military colours the interactions between them, such that proselytic actions of a superior officer towards his or her subordinates are more likely to be improper by reason of 'undue influence'.[207] Unfortunately, the court in *Larissis* focused so heavily on this relational factor that other important issues seem to have been lost sight of. For example, the court found the applicants guilty on all counts of proselytizing fellow airmen, failing to consider that one of the airmen (named Kafkas) had himself approached the applicants to discuss issues of religion.[208] The court overlooked the evidence of Kafkas that he had converted of his

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[205] *Kokkinakis*, *supra* note 185 at para 49.

[206] The relationship between the parties has also been an important part of the prohibition of religious garb in public schools in France. For example, the ECtHR dealt with a case where a teacher was restricted from wearing a religious headscarf, and found that the restriction was not a violation of Article 9 of the ECHR (*Dahlab v Switzerland*, No 42393/98, [2001] V ECHR 449). Part of the court's reasoning for allowing the restriction of the wearing of religious headscarves by teachers is because of the effect it might have on the religious freedom of young students (*ibid* at 463): "The Court accepts that it is very difficult to assess the impact that a powerful external symbol such as wearing a headscarf may have on the freedom of conscience and religion of very young children. The applicant's pupils were aged between four and eight, an age at which children wonder about many things and are also more easily influenced than older pupils. In those circumstances, it cannot be denied outright that the wearing of a headscarf might have some kind of proselytizing effect, seeing that it appears to be imposed on women by a precept which is laid down in the Koran and which, as the Federal Court noted, is hard to square with the principle of gender equality. It therefore appears difficult to reconcile the wearing of an Islamic headscarf with the message of tolerance, respect for others and, above all, equality and non-discrimination that all teachers in a democratic society must convey to their pupils." For a thorough discussion of *Dahlab v Switzerland*, and other headscarf cases in Europe, see Carolyn Evans, "The 'Islamic Scarf' in the European Court of Human Rights", (2006) 7:1 Melbourne J Int'l L 52 [C Evans, "The Islamic Scarf"].

[207] *Larissis*, *supra* note 187 at para 51.

[208] *Ibid* at para 53.

own free will independent of any influence or pressure from the applicants (his superior officers), without providing much explanation. Instead, the court concluded that Kafkas "must have felt" pressure from the applicants in making his decision to convert.[209] The dissenting opinion of Judge Van Dijk addressed this matter, and rightly suggested that the court should give primacy to the evidence of the complainant/target of proselytism.[210]

There are a couple of significant difficulties with the standard regarding religious proselytism emerging from the *Kokkinakis* and *Larissis* cases. The first difficulty is that the notion of 'improper proselytism' was taken from a 1956 report of the World Council of Churches. A standard created by a Christian missionary organization, intended to improve the ethics of missionary activity, was essentially converted into a legal obligation for the protection of religious freedom.[211] Converting an ethical standard, such as this, directly into a legal rule does more than merely impose a religious ethical standard on all religious people, it also removes the protection of the ECHR for activities that fall below the prescribed standard of conduct. Proselytism that does not meet the standard of 'true' or 'pure' Christian witnessing is no longer recognized as a manifestation of religion. Failing to demonstrate 'respect' for the beliefs of others in the way prescribed by the standard of conduct is no longer considered a 'religious' act. As such, the ECtHR has

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[209] *Ibid* at para 53.

[210] The opinion of Judge Van Dijk dissented with regard to the majority decision regarding the proselytism of Kafkas. In this regard, Van Dijk said: "All in all, I find it difficult to understand why the Court should accept, without any examination and supervision, the domestic court's findings with regard to the proselytising of the airmen, while taking a critical view towards their findings concerning the proselytising of the civilians. I am of the opinion that, in these circumstances, the Court should not have deferred to the domestic courts on the question of the evidence of airman Kafkas… and should, in the absence of any counter-indication, have given greater weight to the testimony of the alleged victim of the proselytism than to that of a witness whose testimony was based upon hearsay information" (see *Larissis*, 27 EHRR 329 at 372). The position of Judge Van Dijk is consistent with the UN standard regarding proselytism.

[211] Richards, Svendsen & Bless, *supra* note 44, argue that voluntary standards regarding religious proselytism can be more effective than legal standards in regulating religious conflict. The focus of the analysis in this article is on the many different voluntary codes that exist and how the differences in language and approach affect their ability to resolve religious tensions arising through religious proselytism (as opposed to creating more tension). The article briefly mentioned that the ECtHR in *Kokkinakis* referred to the WCC standard, but did not critically analyze what the outcome of legalizing that standard might entail – the authors overlooked the significance of the reference to the WCC standard by suggesting that the ECtHR only made the reference in passing (*ibid* at 180). This fails to appreciate the force that such a reference makes in future cases, as was evident in the *Larissis* decision. Although there may be truth to the claim that voluntary standards are effective tools for managing religious conflict, this does not justify converting those standards from voluntary to legal obligations. The authors rightly identified the risk associated with converting religious standards into legal principles: "Close regulation of religious choices according to a single worldview risks delegitimizing the codes in the minds of significant populations" (*ibid* at 173).

imposed upon all religious people the standard of "respect" for the religious rights of others, which is quite different than prohibiting actions that are in fact contrary to the religious freedoms of others (i.e. to remove their religious freedom). In the context of proselytism, this new standard moves away from the notion of coercion and towards a more subjective perspective focused on preventing social and religious conflict. As will be discussed in more detail later, this standard of 'respect' is indistinct and is subject to being changed in ways inimical to religious freedom.

Another difficulty with the standard in *Kokkinakis* and *Larissis* is that it seems to focus on the intent of the proselytizer when defining 'impropriety', which will lead to absurd results. Read literally, this standard only prohibits offering material or social advantage or applying improper pressure when the intention is to gain new members for a church. So, a person is not able to use their position of authority to influence someone else to attend their church (as was the case in *Larissis*, roughly). However, a person *is* able to use their position of authority to dislodge someone else's beliefs, as long as they are not trying to gain that person as a new church member. In other words, a person is able to use their position of authority to terrorize other people or to promote (religious) anarchy but not to spread the notion of truth they believe in.[212] This limitation to religious proselytism is odd, given that what makes proselytism quintessentially religious and properly protected as a manifestation of religious belief is that it is rooted in a claim that the proselytizer believes to be true and that must be shared. It would be better for the restrictions to proselytism to focus on the ways in which harm is actually caused to the targets of proselytism rather than on the motivation for proselytizing.

Although the standard related to proselytism seems at first glance to be clear, it is not. The definition of propriety used by the ECtHR is indistinct and opens the door to

[212] The difficulty becomes even clearer with a specific example. A Buddhist and an Atheist, both living in Greece (where proselytism is criminalized), get into a discussion regarding religion and science. Let's say that the most unlikely event occurs: they both successfully convince each other that the other person's beliefs are wrong – now the Buddhist is atheist and the atheist is Buddhist. The Buddhist-turned-atheist could be charged criminally without violating the ECHR, while the atheist-turned-Buddhist could not – since the atheist-turned-Buddhist was not trying to gain a new member for his church, but rather was trying to dislodge the beliefs of the Buddhist. Although this scenario is unlikely, it does show the difficulty with the definition of improper proselytism adopted by the ECtHR. Really, the problem is not trying to gain a new church member, but it is the improper use of power or resources. More than that, it is the use of power or resources in a way that threatens religious freedom. The focus of the analysis should be on whether an action in fact deprives a person of their freedom to decide and practice their own religion rather than on church membership.

broad restrictions based on subjective factors. Rather than focusing on objective and demonstrable harms resulting from proselytism, the ECtHR leaves open the opportunity for domestic authorities to use the indistinct and vague notions of 'impropriety' provided in the case law to justify broad limitations to proselytism.[213] As was mentioned earlier, the perspective taken by the ECtHR is clearly different than that taken by the relevant UN bodies. The standard emerging from the UN, although imperfect, has tried to retain objective factors and principles of demonstrable harm when justifying restrictions to religious proselytism. Quite opposite to this, the ECtHR opens the door to restrictions on proselytism based on vague notions of 'respect' and intent. Subjectivity has also permeated the analysis, insofar as the circumstances of the parties is given priority even to the exclusion of other relevant evidence regarding the actual harm (or lack thereof) of the person proselytized. It appears from this that the use of principles of 'tolerance' and 'respect' in the ECtHR standard provides opportunity for public policy to influence the regulation of religious proselytism rather than the actual rights of the individuals involved.

The UN shows a disposition towards limiting the allowable restrictions to proselytism, but to the contrary the ECtHR shows openness towards expanding restrictions to proselytism. These tendencies emerging from the cases dealing directly with proselytism (*Kokkinakis* and *Larissis*) are magnified and further complicated by developments in other ECtHR cases dealing with Article 10 and Article 9 together, to which we now turn our attention.

2.2.3 Article 9 and 10 cases compounding the problem

There are several cases regarding Article 10 of the ECHR that are particularly relevant to the issue of proselytism, despite the fact that none of them deals with proselytism as though it is a matter protected under Article 10. The court clearly expressed in *Kokkinakis* and *Larissis* that proselytism is a matter of religious manifestation and therefore dealt with under Article 9. The Article 10 cases of particular

[213] This is the view taken by Judge Pettiti in his dissenting opinion in *Kokkinakis*: "The wording adopted by the majority of the Court leading to the conclusion of violation, which allowed them to hold that the condemnation of the applicant was not justified in the circumstances of the case, leaves too much room for subsequent repressive interpretation on the part of Greek courts… It was possible, in my opinion, to clarify the concepts of abuse, coercion, constraints and to better defined 'in the abstract' the exact area of liberty which must be reserved for religious freedom and testimony." (*Kokkinakis*, 17 EHHR 397 at 428).

relevance to the issue of religious freedom and proselytism are those that deal with some expression (such as a movie, or piece of art) that is offensive to religion. These cases provide insight into our understanding of Article 9 (and hence also proselytism) in several ways: first, they discuss the contents of the rights guaranteed under Article 9; secondly, their discussion of Article 10(2) (regarding limitations) develops the notion of context-specific analysis, which may have some application to Article 9(2); and thirdly, they suggest the role which the government ought to play when social conflict arises out of issues of religious belief. Although the ultimate extent of the effect of these insights on proselytism is unclear, these insights might provide potentially potent restrictions to the freedom of religion and the freedom to proselytize.

Shortly after *Kokkinakis* was decided (in 1994) the ECtHR came out with a relatively famous decision, *Otto-Preminger Institute v Austria*[214], dealing with Article 10 (in 1995). In this case the Austrian government seized a film called "Council of Heaven"[215] prior to its premier showing. The court considered whether the seizure of the film by the government was a violation of Article 10. The main question was whether the offensive nature of the film, as perceived by Christians, was a sufficient basis on which to justify restricting free expression.[216] Article 10(2) of the ECHR, which provides for limitations to Article 10(1), says that the freedom in Article 10(1) carries "special duties and responsibilities" and enumerates the grounds on which such limitation is justified – including to protect the "reputation or the rights of others". The court in *Otto-Preminger* decided that the government was justified in seizing the film in order to protect the rights of others guaranteed in Article 9 of the ECHR. In this context *Otto-Preminger* developed the novel idea that Article 9 requires the protection of "…respect for the religious feelings of believers".[217] The court found that the film's provocative portrayal of the objects of religious veneration was a violation of the Article 9 rights of those who would be offended by the film.[218] Restricting the showing of the film was hence pursuing a 'legitimate aim'.[219]

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[214] *Otto-Preminger Institute v Austria* (1994), 295A ECHR (Ser A), 19 EHRR 34 [*Otto-Preminger*].
[215] English translation – the actual title was *Das Liebeskonzil*.
[216] *Otto-Preminger*, *supra* note 214 at para 55.
[217] *Ibid* at para 47.
[218] *Ibid* at para 47.
[219] *Ibid* at para 48.

It is quite interesting that *Otto-Preminger* interpreted Article 9 as protecting religious *feelings*, when this was neither explicitly stated in the convention nor in the prior jurisprudence regarding Article 9. *Otto-Preminger* recognized that religion (and religious feelings) is not an absolute right – that religion is not insulated against all forms of criticism. But on the other hand, religious freedom is protected against forms of criticism that nullify the free exercise of religion:

> Those who choose to exercise the freedom to manifest their religion, irrespective of whether they do so as members of a religious majority or a minority, cannot reasonably expect to be exempt from all criticism. They must tolerate and accept the denial by others of their religious beliefs and even the propagation by others of doctrines hostile to their faith. However, the manner in which religious beliefs and doctrines are opposed or denied is a matter which may engage the responsibility of the State, notably its responsibility to ensure the peaceful enjoyment of the right guaranteed under Article 9 to the holders of those beliefs and doctrines. Indeed, in extreme cases the effect of particular methods of opposing or denying religious beliefs can be such as to inhibit those who hold such beliefs from exercising their freedom to hold and express them.[220]

From this observation, *Otto-Preminger* noted that *Kokkinakis* permitted restriction to actions that are "…not compatible with *respect* for the freedom of thought, conscience and religion of others."[221] The court then combines the requirement for 'peaceful enjoyment' of religious practice with the demand for 'respect' for religious practice to assert that Article 9 includes protection for the religious feelings of others. The court provided no rationale or justification for its assertion that Article 9 includes protection for religious feelings – the court seems to assume that this is self-evident. The court went on to say that the provocative portrayal of objects of religious veneration threatens the free exercise of religious freedom of others and constitutes a "malicious violation of the spirit of tolerance".[222] Considering the law being challenged in *Otto-Preminger*, the court concluded that it pursued the legitimate aim of protecting the rights of others by prohibiting portrayals of objects of religious veneration in such a way "likely to cause 'justified indignation'."[223] So, the subjective feeling of religious offence constitutes the basis on which to determine when the right to peaceful enjoyment of religious freedom is being threatened.

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[220] *Ibid* at para 47.
[221] See *Kokkinakis, supra* note 185 para 48 (emphasis added) referred to in *Otto-Preminger*, *supra* note 214 at para 47.
[222] *Otto-Preminger*, *supra* note 214 at para 47.
[223] *Ibid* at para 48.

Although *Otto-Preminger* does make a valid point that certain forms of criticism of religious beliefs may in fact inhibit the free exercise of religious belief, it is questionable whether the chosen standard for drawing the line – i.e. offence of religious feelings – is correct. The common term for criticisms of religion that cross the line to inhibit the free exercise of religion is 'hate speech'. Societies generally recognize that there is a point where free speech becomes harmful and therefore can rightly be restricted – the difficulty is defining that line. Some countries require a relatively high standard to demonstrate hate speech, requiring some form of demonstrable harm that the speech will likely incite.[224] But the standard chosen by the ECtHR in *Otto-Preminger* is when the feelings of the religious followers are not respected. Although there are several difficulties with this standard, there are two aspects that I wish to discuss here: first, it focuses on the subjective reaction of those against whom the statement was made in a sort of hyper-contextual analysis; and secondly, it relies on the unjustified presumption that Article 9 protects religious feelings. These aspects of the *Otto-Preminger* standard potentially have an impact on the freedom of religion more broadly, and especially on the issue of proselytism. I will deal with each in more detail in turn.

First, I will address the notion of the contextual analysis. The use of 'context' has had a significant impact on the development of the analysis regarding limitations to Article 10 expressions, which has factored into the establishment by the ECtHR of a wide margin of appreciation for domestic authorities. An example showing the extent of this contextual analysis at work can be seen in the case *Murphy v Ireland*[225], where the ECtHR upheld the domestic regulatory decision to not allow any religious advertisements via radio. The reason for the ban on religious advertising on the radio was because of the history of religious division in Ireland.[226] The applicant argued that the advertisement in

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[224] The American jurisprudence is an example of a high standard for demonstrating hate speech, although the jurisprudence on the topic is complex. For a brief review of the American standards regarding hate speech, see: Tom Hentoff, "Speech, Harm, and Self-Government: Understanding the Gambit of the Clear and Present Danger Test" (1991) 91:6 Colum L Rev 1453; Toni M Massaro, "Equality and Freedom of Expression: The Hate Speech Dilemma" (1991) 32:2 Wm & Mary L Rev 211; Kevin Boyle, "Hate Speech – The United States Versus the Rest of the World?" (2001) 53:2 Me L Rev 487; and John C Knechtle, "When to Regulate Hate Speech" (2006) 110:3 Penn St L Rev 539. For a brief review of hate speech in the international context, see: Elizabeth F Defeis, "Freedom of Speech and International Norms: A Response to Hate Speech" (1992) 29:1 Stan J Int'l L 57; and Stephanie Farrior, "The Historical and Theoretical Foundations of International Law Concerning Hate Speech" (1996) Berkeley J Int'l L 1.

[225] *Murphy v Ireland*, No 44179/98, [2003] IX ECHR 1, 38 EHRR 13.

[226] *Ibid* at paras 12, 38 and 73.

question was not advocating any particular religious belief but was merely advertising an event that was happening at a local church.[227] The ECtHR said, however, that the state is justified in taking action to avoid potential causes of social conflict resulting from religious beliefs, and that "…an expression, which is not on its face offensive, could have an offensive impact in certain circumstances."[228] As such, the analysis requires a close look at the particular situation to determine whether the impugned conduct would be considered problematic and could properly be suppressed by the state. The ECtHR abnegated its own responsibility for making such an evaluation and deferred to the domestic authorities, since they are better acquainted with the state of the society and how people in society would perceive the expression in question.[229] Indeed, the focus of the analysis was on how people in society would respond (subjectively) to the impugned expression (the advertisement) – saying that the subjective element is particularly present in cases of religion or morals, hence requiring greater deference to the local authorities.[230]

There are several difficulties with the standard in *Murphy v Ireland*, that the protection of the right to free expression is contingent upon the subjective perception of society (or, rather, the state's perception of society). This standard renders the rights guaranteed under Article 10 indeterminate: although a person making a particular expression may be mindful not to infringe the rights of others (i.e. aware of their 'duty' and 'responsibility' under Article 10(2)) whether the expression infringes the rights of others is out of his or her hands because the protection of Article 10 depends entirely on the whimsy of society's response to the expression. This is particularly poignant when the expression engages religious sentiments. In *Murphy v Ireland* it did not matter that the advertisement was purely informative in nature, describing the time an event was to

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[227] *Ibid* at para 50.
[228] *Ibid* at para 72.
[229] *Ibid* at para 67: "By reason of their direct and continuous contact with the vital forces of their countries, State authorities are in principle in a better position than the international judge to give an opinion on the exact content of these requirements with regard to the rights of others as well as on the "necessity" of a "restriction" intended to protect from such material those whose deepest feelings and convictions would be seriously offended."
[230] *Ibid* at para 67: "…a wider margin of appreciation is generally available to the Contracting States when regulating freedom of expression in relation to matters liable to offend intimate personal convictions within the sphere of morals or, especially, religion. Moreover, as in the field of morals, and perhaps to an even greater degree, there is no uniform European conception of the requirements of "the protection of the rights of others" in relation to attacks on their religious convictions. What is likely to cause substantial offence to persons of a particular religious persuasion will vary significantly from time to time and from place to place, especially in an era characterised by an ever growing array of faiths and denominations."

take place at a local church;[231] the state reasoned (and the ECtHR sanctioned) that the mere presence of a religious aspect to the advertisement (i.e. it was a religious event being advertised) would potentially be perceived by the public as offensive and incite religious conflict.[232] It is puzzling why the court would defer the determination of this to the local authorities, since if the risk of inciting social unrest is a legitimate concern there should be sufficient evidence to actually demonstrate to the ECtHR the reality of the risk. It appears that the subjective nature of the evidence itself poses the need for the margin of appreciation – the hyper-subjective nature of religious feelings (declared by *Otto-Preminger* to be protected under Article 9) requires a wide margin of appreciation for the state because determination of religious offence does not depend on factual/objective evidence but on the perceptions of individuals. The evidence is ultimately not reproducible in court – it is not objective evidence that is at play, but rather subjective perception. Deference to the local authorities by the ECtHR sanctions the state's suspected suspicions/perceptions of its citizens, which leaves enormous space for local authorities to inject their own bias into the evaluation. Hence, the hyper-subjective and contextual view taken with regard to religious offence endangers the rights at play (free speech) and subverts the very purpose of the ECtHR to scrutinize local rules and decisions. This seems to ignore that although the specific reasons for restricting Article 10 may differ from time to time and from place to place it is still important to identify objective facts for demonstrating the 'risk' of social conflict and evaluating the means taken by a state to prevent it.

Closely related to the contextual nature of the analysis is the principle of the protection of 'religious feelings'. These are so closely related that it is difficult to separate them – you cannot talk about the one without also talking about the other. In fact, it could be argued that the vagueness of the contextual analysis is rooted in the nature of the 'right' threatened by the expression in question. Since the freedom of religion is seen to protect religious sentiment/feelings, the infringement of the right depends on how the external factors are internally perceived. As the ECtHR has said, it

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[231] *Ibid* at para 8.

[232] The ECtHR reasoned: "…that Irish people with religious beliefs tended to belong to a particular church so that religious advertising from a different church might be considered offensive and open to the interpretation of proselytism…. [I]t was the very fact that an advertisement was directed towards a religious end which might have been potentially offensive to the public." (*Ibid* at para 73).

will vary from time to time and from place to place.[233] If the right threatened by the expression were to be less subjective in nature than religious feelings, then the analysis would be less contextual and more objective.[234]

The protection of 'religious feelings' carries other difficulties as well – in that it actually limits the freedom of religion. This can be seen quite clearly in *Murphy v Ireland*, where the protection of religious feelings justified restrictions to religious institutions making any advertisements on the radio. Although advertising events on the radio is not technically a religious practice, restricting such advertisements does have an adverse effect on the liberties of religious organizations. The odd result in *Murphy v Ireland* is that the protection of religious freedom (based on the *Otto-Preminger* reading of *Kokkinakis*) restricts the freedom of religious organizations. Although the ECtHR decided *Murphy v Ireland* in the context of Article 10, the same issue has come up in Article 9 cases. This can be seen in the *Sahin v Turkey*[235] case, which dealt with the freedom of religion of a student to wear a religious headscarf in school. The university prohibited wearing any religious articles in school, including the Islamic headscarf, claiming it was entitled to do so in order to follow the principle of secularism, which is acknowledged in the Turkish constitution as one of the fundamental principles of the Turkish state.[236] The court's analysis of the case was very similar to the *Murphy v Ireland* decision, in that the court focused on the Turkish historical context, giving great weight to the way in which the Islamic headscarf is interpreted in society generally.[237] The court relied on the findings of the Turkish court, which said that the Islamic headscarf is perceived to be in opposition to the principles of secularism.[238] The subjective perception of the religious practice of wearing an Islamic headscarf was justifiably used to limit the freedom of religion of Islamic women to wear the headscarf, regardless of what religious beliefs motivated adherence to the practice. This analysis

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[233] See *Ibid* at para 76; and *Wingrove v The United Kingdom* (1996), 23 ECHR (Ser A) 1937, 24 EHRR 1 at para 58 [*Wingrove*].
[234] For example, if the right to freedom of privacy were threatened by some expression, whether the expression could rightly be limited would be based on an objective evaluation of whether the right to privacy was violated.
[235] *Sahin v Turkey* [GC], No 44774/98, [2005] XI ECHR 175, 44 EHRR 5. For further discussion, see C Evans, "The Islamic Scarf", *supra* note 206.
[236] See *ibid* at paras 44-47.
[237] *Ibid* at para 109 and 111
[238] *Ibid* at paras 112-116.

was made possible by the interpretation of *Otto-Preminger* that the protection of religious freedom in Article 9 includes protection of religious feelings, together with the contextual analysis emerging from this interpretation of religious freedom. Article 9(2) permits limitations to the freedom of religion in order to protect the rights of others – which was the operative provision in *Kokkinakis* and *Larissis*. *Sahin v Turkey* is an example of how the hyper-subjective contextual analysis and the protection of religious feelings (perception of religious offence) developed in the context of an Article 10 analysis is able to transfer to an analysis under Article 9. The new principle of the protection for 'religious feelings' emerging from *Otto-Preminger* opens the door for the contextual analysis and, oddly, for greater restriction to the freedom of religion itself.

It is difficult to determine exactly what the final result of all of this will mean for proselytism. Since proselytism is clearly a matter of religious freedom under Article 9, as opposed to expression under Article 10, it is possible that different standards will be used to determine the restrictions allowed for proselytism. It could be argued that there should be a distinction between limitations allowed to Article 9 and Article 10, since the language used in both limitations passages are quite different. Article 10(2) frames the available limitations to freedom of expression as based on certain "duties and responsibilities" inherent in the freedom of expression itself. This suggests that the enumerated grounds in Article 10(2), which are more extensive than those listed in Article 9(2), are different in character and hence more onerous. Some support for this argument can be found in the ECtHR Article 10 case *Wingrove v United Kingdom*[239]. *Wingrove* is quite similar to *Otto-Preminger*, in that a film with images profane to Christianity was refused licensing/distribution rights by the UK regulatory body on the basis that the film likely violated the criminal law against Christian blasphemy.[240] The ECtHR in *Wingrove* found that there was no violation of Article 10 (i.e. that the UK law against Christian blasphemy was justified). The significance of the *Wingrove* decision is that although it embraced the strong contextual approach and wide margin of appreciation used in *Otto-Preminger*[241], it attempted to draw a distinction between the limitations provided for in Article 10(2) and 9(2). The *Wingrove* decision focused on the analysis of

[239] *Wingrove*, *supra* note 233.
[240] *Ibid* at para 13.
[241] *Ibid* at para 58.

Article 10(2) with very little focus on the contents of Article 9 – in fact the comments regarding Article 9 merely said that the intended protection of the UK blasphemy law, as protecting against extremely offensive forms of expression, was consistent with it.[242] Reading *Wingrove* in this way (as distinguishing between Articles 10(2) and 9(2)) is supported by the concurring opinion of Justice Pettiti:

> Certainly the Court rightly based its analysis under Article 10 on the rights of others and did not, as it had done in the Otto-Preminger Institute judgment combine Articles 9 and 10, morals and the rights of others, for which it had been criticized by legal writers.[243]

If the differences between Articles 10(2) and Article 9(2) are to be taken to mean that the restrictions under the former are broader than the latter, then the broad restrictions permitted in 10(2) – such as the protection of 'religious feelings' – should not apply to restrict proselytism. Restrictions to proselytism should be narrower than restrictions to non-religious expression because religious proselytism is a protected form of religious manifestation. However, this may yield odd results: for example, in a situation similar to *Murphy v Ireland* the government would have a more difficult time justifying restriction of an advertisement that is overtly proselytic than an advertisement that is on its face informational, despite the fact that a proselytic advert would likely cause greater conflict. The task of defending such a sharp distinction between Articles 10(2) and 9(2) encounters the additional difficulty that it depends upon investing a significant amount of meaning to the Article 10(2) notion of 'duties' and 'responsibilities' – so much so that it changes the substantive meaning of the rights guaranteed in other Articles for the purposes of restricting the right of expression in Article 10.[244]

On the other hand it could be argued that the standards developed in the Article 10 analysis will (and should) directly affect the limitations allowed to religious freedom (including proselytism). Such an argument does not require drawing fancy linguistic similarities between the Articles. Since Article 9(2) already allows restriction to religious manifestations in order to protect the 'rights of others', the principles developed under the

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[242] *Ibid* at para 48.

[243] *Ibid* at 34. Some scholars also point to the opinion of Justice Pettiti to argue that *Wingrove* distinguished between the Article 10(2) and 9(2) analyses (see, e.g., Paul M Taylor, "The Questionable Grounds to Objections to Proselytism and Certain Other Forms of Religious Expression" (2006) BYU Law Rev 811 at 827 [Taylor, "Questionable Grounds"]).

[244] In other words, the 'rights of others' justifying restriction to expression, as referred to in 10(2), are different in substance than the rights guaranteed in the other Articles of the ECHR. For example, what is protected by religious freedom in Article 9 would be different when considered in the context of Article 10(2) than when determining whether there is a violation of Article 9 on its own.

Article 10(2) analysis regarding the 'protection of the rights of others' should directly influence the Article 9(2) restrictions. Thus, if, as *Otto-Preminger* suggests, the right to religious freedom includes the protection of religious feelings, and the ensuing hyper-contextual analysis, then proselytism could be restricted when it is considered to be offensive to another religion. There would ultimately be no distinction between proselytism, as a religious manifestation, and any other non-religious expression. But this view is not without difficulty. Although this would bring consistency between proselytism and other forms of expression (as, e.g., in a situation like *Murphy v Ireland*), it would cause problems for forms of religious manifestation which are regulated under Article 9(2): since there is nothing to distinguish proselytism from any other form of religious manifestation, the extended limitations available under 10(2) could be applied against any form of religious manifestation (such as wearing of religious symbols or clothing, etc). Paul M Taylor rightly observed that if the principles of 'respect' (including protection of religious feelings and the hyper-contextual analysis) developed in the Article 10 jurisprudence are allowed to permeate the application of Article 9 "…the potential result would be an extremely broad interpretation of the limitation ground, 'the rights and freedoms of others,' in such a way as to suggest a fundamental departure from universal standards."[245] Interestingly, this merger seems to have already occurred in some ECtHR cases, such as *Sahin v Turkey*, where restrictions to wearing the Islamic headscarf in university was justified based on the popular public perception of the headscarf as an anti-secular symbol. Merging together Articles 9(2) and 10(2) results (and is resulting) in the degradation of the freedom of religion to a level below what a plain reading of the ECHR would suggest. The differences in language between 9(2) and 10(2) cannot be totally ignored, which implies that there should be a difference between the limitations permitted to religious manifestations (such as proselytism and wearing religious clothing/symbols) and limitations to non-religious forms of expression. It seems that the law in Europe is caught oscillating somewhere between religious freedom and freedom of expression.

[245] Taylor, "Questionable Grounds", *supra* note 243 at 813.

2.2.4 Conclusion

Although at first glance the ECtHR jurisprudence seems to have a clearly defined understanding of proselytism, a closer look reveals deep confusion. The confusion is not limited to the issue of proselytism, however, and is indicative of deeper problems in applying the limitations sections of Articles 10(2) and 9(2). There are a few important problem areas with the ECtHR jurisprudence that must be addressed in order to clarify the law and resolve the existing tension. For example, the highly contextual analysis regarding religion should be made more objective. Rather than focusing on subjective feelings to define the proper restrictions to the rights in the covenant (as has been used in both Article 10 and Article 9 cases), focus should be brought to more objective facts, such as demonstrable harm or real risk of harm. Another example is the difficulty with importing the notion of 'religious feelings' into the definition of the protections offered in Article 9, which has been used to restrict both freedoms of expression and religion. To give proper meaning to the rights guaranteed in Article 9, a distinction must be made with Article 10 – especially with regard to the limitation analysis of both Articles.

An interesting thought that can be taken away from the ECtHR jurisprudence is that having different analyses for proselytism and other forms of non-religious expression may lead to inconsistent and absurd results – as was mentioned regarding situations similar to *Murphy v Ireland*. This forces us to consider whether proselytism should be conceptualized and dealt with as a form of free expression rather than a form of religious manifestation. This is a difficult question, and one that goes beyond the scope of this current investigation. There is a valid argument linking proselytism to religious practice since it is related to the notions of religious truth and religious conviction, which is central to religion qua religion.[246] On the other hand, proselytism is an act that will likely be perceived by some as offensive and a prime source of conflict between religious groups, and therefore should be subject to broader restrictions than other forms of religious practice. In this second approach, to maintain consistency with the other rules restricting freedom of expression, proselytism should not be guaranteed greater protection under the right to freedom of religion. This second approach depends on the restrictions allowed to non-religious forms of expression. The argument is relevant in the European

[246] See the discussion earlier in section 1.3.1, above, regarding Nowak, *supra* note 34.

context since the ECtHR jurisprudence establishes an expansive source of justification for limiting free speech – including the protection of religious feelings. But if the limitations to free speech are narrower, as they are in the UN, then there will not likely be the same conflict because proselytism is not given special treatment. Another issue with this second approach is that blurring the lines between free expression and free proselytism will also reduce the protection for other forms of religious freedom.

Whether or not the second approach is problematic depends on the view taken regarding the proper relationship between religion and society more generally. The European experience is strongly focused on the notions of secularism, tolerance and open-mindedness, and on the conviction that the state should take positive steps to promote equality and the full experience of the rights guaranteed under the ECHR. Such a view requires the state to prevent social conflict and lends itself to the contextual/subject approach criticized earlier. A more minimal view of the role of the state in ensuring 'peaceful' coexistence and engineering a society without social conflict is more interested in preserving the individual choices related to religion, is in favour of greater freedom to proselytize, and is more protective of religious freedom in general.

What is important is to see how different views of proselytism emerge from what appears to be a chasm between different views of law, religion and society in general. Even though the European regime is nearest to the UN regime – culturally, historically and geographically – there is still a significant difference in its approach to proselytism. Both the UN regime and the European regime focus on the rights of the individual, but they diverge with regard to the definition of peaceful co-existence in society and the role of the state in bringing this about. The European regime focuses on subjective experiences whereas the UN regime focuses on more objective factors that are actually demonstrable (such as coercion). Since the purpose of this project is to understand the rules relating to religious freedom and proselytism it is necessary to take into account the varying theoretical foundations of the various regions when considering their approaches to the issue of religious proselytism.

2.3 Proselytism and the Process of Changing Religion – Inter-American Human Rights Regime

2.3.1 Introduction to the Inter-American regime

The Inter-American system of human rights is rooted in the organizational structure of the Organization of American States [OAS], which was formalized at the inception of the OAS Charter on April 30, 1948 at the Ninth International Conference of American States.[247] The OAS is a regional system within the definition of the UN Charter Article 52.[248] The human rights obligation of states party to the OAS is relatively complex, because it involves two different instruments and two enforcement bodies that affect countries differently depending on what instruments those countries have ratified.

The two sources of human rights are the *American Declaration of the Rights and Duties of Man*,[249] which was adopted at the same time as the OAS Charter in 1948, and the *American Convention on Human Rights*,[250] which was open for signature in 1969 and came into force in 1978. The American Declaration is the first human rights instrument of its kind (predating the UDHR by several months) – as a response to the experiences of World War II.[251] The American Declaration is binding on all OAS member states, but there is some debate regarding its precise legal nature. Since it is not a treaty, but a resolution of the Inter-American community, it was originally intended not to be a binding instrument.[252] However, over the passage of time and with changes to the OAS system, the American Declaration has come to be understood as binding on all signatories

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[247] *Charter of the Organization of American States*, 30 April 1948, 119 UNTS 3, OAS TS Nos 1-C and 61, (entered into force 13 December 13 1951) [OAS Charter].
[248] OAS, Inter-American Court of Human Rights, "Basic Documents Pertaining to Human Rights in the Inter-American System", Secretariat of the Inter-American Court of Human Rights (2011), online: Inter-American Court of Human Rights official website <http://www.corteidh.or.cr/index.cfm> at page 1 [OAS "Basic Documents"].
[249] OAS Res XXX, adopted by the Ninth International Conference of American States (1948), OR OEA/Ser.L.V/II.82 doc.6 rev.1 at 17 [American Declaration].
[250] *American Convention on Human Rights*, 22 November 1969, 1144 UNTS 123, OAS TS 1969 No 36 [ACHR].
[251] David Harris, "Regional Protection of Human Rights: The Inter-American Achievement" in David J Harris & Stephen Livingstone, eds, *The Inter-American System of Human Rights* (Oxford: Clarendon Press, 1998) 1 at 4 [Harris, "Regional Protection"].
[252] See Scott Davidson, *The Inter-American Human Rights System* (Aldershot: Dartmouth Publishing Company, 1997) at 12; also see Harris, "Regional Protection", *supra* note 251 at 4.

of the OAS Charter – as giving content to the obligation in Article 5(k) of the OAS Charter for all member states to respect the 'fundamental rights of the individual'.[253]

The second source of human rights, the ACHR, was created much later than the American Declaration. The ACHR defined its own set of human rights obligations and created the Inter-American Court of Human Rights as the interpretation and enforcement mechanism.[254] Although the ACHR was drafted by OAS committees[255] it is not mandatory for all OAS members to sign and ratify it, unlike the European Community where the ECHR must be signed by all members of the EU.[256] The result is two tiers of human rights obligations in the OAS community – those that are bound by the principles outlined in both the American Declaration and the ACHR, and those that are bound only by the principles in the American Declaration.[257]

The two bodies charged with the interpretation, application and enforcement of the human rights standards in the OAS are the Inter-American Commission on Human Rights [IACmHR] and the Inter-American Court of Human Rights [IACtHR].[258] The IACmHR was created earlier than the IACtHR, having originated in 1959.[259] The IACmHR was originally considered to be an independent body for the regulation of human rights, but with amendments made to the OAS Charter in 1970 it has been

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[253] For a discussion of the origin and evolution of the American Declaration, see *Interpretation of the American Declaration of the Rights and Duties of Man within the Framework of Article 64 of the American Convention on Human Rights (Columbia)* (1989), Advisory Opinion OC-10/89, Inter-Am Ct HR (Ser A) No 10, (1989) YBHR 630; for the interpretive significance of the American Declaration, see especially *ibid* at paras 42-46. For further discussion, see Davidson, *supra* note 252 at 13 and 15; and Harris, "Regional Protection", *supra* note 251 at 6 and 8.

[254] ACHR, *supra* note 250 at Articles 52-73.

[255] For an overview of the drafting history of the ACHR, see Davidson, *supra* note 252 at 30-31; Marco Gerardo Monroy Cabra, "Rights and Duties Established by the American Convention on Human Rights" (1980) 30:1 Am U L Rev 21 at 22-23; and Cecilia Cristina Naddeo, "The Inter-American System of Human Rights: A Research Guide", online: Hauser Global Law School Program, NYU School of Law, Globalex International Law Research <http://www.nyulawglobal.org/Globalex/>.

[256] See *Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community*, European Union, 13 December 2007, (2007) 50 Official Journal of the European Union C 306/01, available online: UNCHR Refworld <http://www.unhcr.org/refworld/docid/476258d32.html>. For more information on accession of the EU to the ECHR, see the Council of Europe website, online: <http://www.coe.int/lportal/web/coe-portal/what-we-do/human-rights/eu-accession-to-the-convention>.

[257] The IACtHR has held that the American Declaration continues to have authority over those OAS members that have ratified the ACHR, and that the IACtHR has the power to interpret the meaning of the American Declaration – see IACtHR Ad Op OC-10/89, *supra* note 253 at paras 42-46.

[258] For a brief synopsis of the formation and functions of the IACmHR and the IACtHR, see Harris, "Regional Protection", *supra* note 251. For a more detailed description, see Davidson, *supra* note 252.

[259] The IACmHR was originally created at the Fifth Meeting of Consultation of Ministers of Foreign Affairs (Santiago, Chile, 1959). See OAS "Basic Documents", *supra* note 248 at 6.

incorporated into the Charter and now is part of the OAS Charter body.[260] The IACtHR, on the other hand, was created by the ACHR and was charged with the interpretation and application of the ACHR. The IACtHR is able to provide advisory opinions to any state of the OAS even if the state is not a signatory to the ACHR, and acts as a judiciary body for those states that are members of the ACHR and have accepted its contentious jurisdiction.[261] The ACHR not only created the IACtHR but also altered the mandate of the IACmHR, so that the two bodies now work together to provide interpretation, application and enforcement of the human rights obligations in the OAS system.[262]

The human rights system in the OAS is therefore a combination of obligations arising from the American Declaration, the ACHR, and the decisions, opinions and reports of the IACmHR and the IACtHR. The obvious difficulty is that there are varying levels of obligation for different states in the OAS system depending on their assent to the various developments in the human rights regime. The purpose of this study is not to uncover all of the potential obligations regarding proselytism, but to examine the ways in which various human rights systems respond differently to the issue of proselytism. As such, the potential diversity in how the OAS system might deal with proselytism, although worth mention, will not be discussed further. My analysis of the OAS system will therefore not attempt to draw distinctions between the obligations of different countries based on their assent to the various developments in the Inter-American human rights regime, but will rather look at the highest possible level of human rights obligation and how proselytism fits into a legal analysis.[263]

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[260] See Davidson, *supra* note 252 at 21. Also see Thomas Buergenthal, "The Revised OAS Charter and the Protection of Human Rights" (1975) 69 AJIL 828.

[261] ACHR, *supra* note 250, Article 64 permits the IACtHR to provide advisory opinions at the request of any member of the OAS. What is more is that this Article also enables the IACtHR to provide advisory opinions regarding any other treaty that concerns "…the protection of human rights in the American states." See *"Other treaties" subject to the advisory jurisdiction of the Court (Art. 64 American Convention on Human Rights) (Peru)* (1982), Advisory Opinion OC-1/82, Inter-Am Ct HR (Ser A) No 1 [IACtHR, Ad Op *"Other Treaties"*].

[262] The IACtHR and the IACmHR have distinct powers and functions, which are intended to work together to promote compliance with human rights obligations in the OAS system. The precise functions of the IACtHR and the IACmHR are not important for the present study, and will therefore not be discussed. For a detailed look at the functioning of the IACmHR and the IACtHR, see Harris, "Regional Protection", *supra* note 251; also see generally Davidson, *supra* note 252.

[263] Related to this, there are some very interesting issues regarding the various levels of human rights obligations in the Inter-American system. It is interesting to note that there has been a surprisingly high level of synthesis between the various levels of human rights obligations. For example, one issue with some relevance to the present study deals with the authority of the American Declaration that survives the

2.3.2 Content of the American Declaration and ACHR regarding proselytism

The American Declaration includes the protection of the freedom of religion at Article 3: "Every person has the right freely to profess a religious faith, and to manifest and practice it both in public and in private." This iteration of the right to freedom of religion is much less elaborate than any of the other international human rights documents. It is interesting that the right to 'profess' a religion is protected along with the right to 'manifest and practice it' in public. This is significantly different than the traditional formulation, which guarantees 'thought, conscience and religion' (which is in all of the UDHR, ICCPR and ECHR). The focus of the right guaranteed here has more of a public and practical dimension whereas the traditional formulation focuses first on the *forum internum* aspect of religion, protecting the freedom of practice/manifestation secondarily. Also noteworthy is that there is no limitation built into the religious freedom guarantee, which is similar to the UDHR. The limitation to the freedom of religion comes at Article 28, as a general limitation to the rights in the American Declaration: "The rights of man are limited by the rights of others, by the security of all, and by the just demands of the general welfare and the advancement of democracy."

The ACHR provides a much more robust definition for the protection of religious freedom, which can be found at Article 12:

> 1. Everyone has the right to freedom of conscience and of religion. This right includes freedom to maintain or to change one's religion or beliefs, and freedom to profess or disseminate one's religion or beliefs, either individually or together with others, in public or in private.
>
> 2. No one shall be subject to restrictions that might impair his freedom to maintain or to change his religion or beliefs.

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coming into force of the ACHR. The American Declaration has lost much of its power over those states that have ratified the ACHR, but simultaneously the ACHR, in Article 29, restricts is own interpretation from excluding the operation of any other human rights treaty, specifically including the American Declaration (ACHR, *supra* note 250 at Article 29(d)). Some scholars have argued quite convincingly that where the rights guaranteed in the American Declaration are broader than those in the ACHR, the former still has force and effect (Davidson, *supra* note 252 at 31 and 260). The IACtHR has taken the view that both the American Declaration as well as the ACHR contributes to the normative framework of human rights obligations in the OAS community (see, e.g. *Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism (Arts. 13 and 29 American Convention on Human Rights) (Costa Rica)* (1985), Advisory Opinion OC-5/85, Inter-Am Ct HR (Ser A) No 5, (1985) YBHR 1148 [IACtHR, Ad Op *Compulsory Membership*], where the limitations of the American Declaration Article 28 and ACHR Article 13(2) were synthesized on the basis that the American Declaration should guide the interpretation of the Convention – at para 44). For more discussion see IACtHR, Ad Op *"Other Treaties"*, *supra* note 261; and IACtHR Ad Op OC-10/89, *supra* note 253.

> 3. Freedom to manifest one's religion and beliefs may be subject only to the limitations prescribed by law that are necessary to protect public safety, order, health, or morals, or the rights or freedoms of others. […]

There are several interesting similarities and differences between ACHR Article 12 and the other major international human rights instruments examined so far. The explicit right to change religion is similar to the ECHR and UDHR but different from the ICCPR. The explicit right to profess and disseminate religion or beliefs is distinct from both the ICCPR as well as the ECHR, but it resonates with Article 6(d) of the 1981 Declaration. One of the distinct features of Article 12 is that it does not include freedom of thought, which is included in both the ICCPR Article 18 and the ECHR Article 9; instead, thought is protected in Article 13 of the ACHR. Although Article 12(1) specifically refers to "beliefs", which clearly implies an interior aspect of religion, the right to maintain or change these beliefs is inextricably tied to the freedom to profess or disseminate those beliefs. Premium seems to be given to the freedom to maintain or change religious beliefs, as can be seen by its protection being reiterated in Article 12(2). The language of the ACHR here differs from Article 18(2) of the ICCPR by focusing on the freedom to maintain or change religions rather than on prohibiting the coercion that impairs the freedom to have or adopt a religion or belief.

It is difficult to say what precise legal effect this difference in language will precipitate for the issue of proselytism. Although Article 12(2) of the ACHR is more directly intended to protect the freedom to change religions, it is not clear whether it is intended to include both government and private 'restrictions' or whether the standard of 'coercion' will be used to determine inappropriate restrictions (to comport with the developing UN standard). In any event, reading Articles 12(1) and (2) together shows that the focus of religious freedom in the ACHR is on all aspects of change in religious beliefs – freedom not only to have and change beliefs but also to share and disseminate those beliefs. Hence, the importance of external aspects of religious freedom emphasized in the American Declaration are reflected in Article 12 of the ACHR, in the explicit protection of the freedom to maintain and change religions as well as the process by which that change is possible – i.e. through dissemination of religious belief.

Article 12(3) provides specific allowable restrictions to the freedom of religion in a way closely resembling ICCPR Article 18 and ECHR Article 9 – in fact, they are

virtually identical to those provided in ICCPR Article 18(3). The 12(3) limitation refers not to the practices explicated in 12(1) – to profess or disseminate – but rather more generally to 'manifestations' of religion. It is worth noting that 12(1) of the ACHR does not specifically provide a right to manifest one's religion or beliefs. This does not mean that Article 12(1) does not protect the right to manifest religion generally or that the practices outlined should be read restrictively. The general right to manifest beliefs beyond profession and dissemination can be read into Article 12(1) on the basis that Article 12(3) provides restrictions allowable to "manifestations" rather than to those practices stated in 12(1). Failing to make this inference would render Article 12(3) meaningless, as it is impossible to provide a limitation without also implying prima facie protection for that which can be limited. In other words, it is nonsensical to provide a justification for limiting 'manifestations' of religion if 'manifestations' were not protected to begin with – there would be no need to justify the limitation.

2.3.3 Proselytism in the Inter-American regime

Looking at the wording of the ACHR it is quite obvious that proselytism would best classify as a matter of religious freedom under Article 12, as it specifically protects dissemination of religious beliefs.[264] On the other hand it should not be taken as self-evident that proselytism in general is synonymous with dissemination, as we have already seen how proselytic activities might be subdivided as 'proper' and 'improper'. Such a distinction might suggest a difference between informing others of one's religion versus attempting to convince someone of one's religion – the former being 'proper'; it might also be used to distinguish whether the force applied during the proselytic interaction was 'coercive'. Understanding how the IACtHR defines 'dissemination' and relates it to proselytic activities is the first step in determining how the Inter-American system of human rights would regulate the issue of proselytism. In addition, since the restrictions set out in Article 12(3) deal only with manifestations of religion, it has to be determined

[264] It ultimately does not matter how proselytism classifies under the American Declaration (*supra* note 249) either as a matter of religious freedom (Article 3) or freedom of expression (Article 4) since both share the same limitation provision in Article 28. Although an independent interpretation of the American Declaration protection of religious freedom would be different than the interpretation regarding the ACHR, it is not my intention to explore it. Since my interests lie in understanding how the most developed aspect of the Inter-American system of human rights deals with the issue of proselytism, a detailed investigation of the American Declaration is not essential.

whether dissemination and proselytism classify as forms of 'manifestation' that can be limited. Assuming that this is the case, it is necessary to interpret the meaning of the terms in Article 12(3) in order to understand the extent of the right of proselytism.

In order to understand the extent of the freedom of religion protected in Article 12, whether it also protects proselytism, and how the limitation to the freedom of religion operates, it is necessary to look at the jurisprudence of the enforcement bodies – the IACmHR and the IACtHR. Unfortunately, there are no cases dealing with the issue of proselytism. In the cases the only mention of proselytism is given in passing and in the context of promoting political views rather than religious views.[265] Even more incredible is that there are almost no cases dealing with the freedom of religion in general, and those cases that do mention freedom of religion do not deal with its substantive elements.[266] Even the secondary literature dealing with the Inter-American system of human rights does not discuss the freedom of religion in any great detail.[267] This lack of attention to freedom of religion is likely due to the fact that the institutional structures under the OAS tend to be occupied by matters involving gross violations of human rights, which leaves more nuanced issues, such as proselytism, untouched.[268] This has left the freedom of religion considerably underdeveloped, and many of the questions regarding proselytism unanswered.

There is a case that comments on the substantive elements of Article 12 of the ACHR – in fact, it is the only comment in the IACtHR or IACmHR jurisprudence directed at the substantive nature of the right to religious freedom – called *Olmedo-Bustos*

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[265] For example, see OAS, Inter-American Commission on Human Rights, *Annual Report 1976*, OR OEA/Ser.L/V/II.40, Doc.5, corr.1, (1977) at para 1.

[266] Cases dealing with Article 12 of the ACHR include matters involving massacres (*Case of Plan de Sánchez Massacre v. Guatemala* (2004), Inter-Am Ct HR (Ser C) No 105, (2004) 1 YBHR 229), broad persecutions of Jehovah's Witnesses in Argentina (see OAS, Inter-American Commission on Human Rights, *Report on the Situation of Human Rights in Argentina*, OR OEA/Ser.L/V/II.49/Doc.19, corr 1 (1980) at Chapter X). For a brief summary, see Natan Lerner, *Religion, Secular Beliefs and Human Rights: 25 Years After the 1981 Declaration* (Leiden: Martinus Nijhoff, 2006) at 75 [Lerner, *Religion, Secular Beliefs and Human Rights*].

[267] The freedom of religion is of such minimal significance in the Inter-American system that the most recent publication on the Inter-American Court of Human Rights does not have a chapter regarding freedom of religion, and there are no index references to religious freedom: see Laurence Burgorgue-Larsen & Amaya Úbeda De Torres, *The Inter-American Court of Human Rights: Case Law and Commentary* (Oxford: Oxford University Press, 2011) (NOTE: Translated by Rosalind Greenstein).

[268] Lerner, *Religion, Secular Beliefs and Human Rights*, *supra* note 266 at 75.

et al v Chile (Case of "The Last Temptation of Christ").[269] Although the nature of the freedom of religion works its way into the decision, this case does not deal solely with religious freedom but primarily the issue of freedom of expression. This case is relevant to the earlier analysis because it deals with a situation similar to the ECtHR cases of *Otto-Preminger* and *Wingrove v UK*, where the state prohibited the public exhibition of a film with offensive religious content. In *The Last Temptation of Christ* case the applicants argued that the censorship of the film was a violation of both the freedom of expression (Article 13) as well as the freedom of religion (Article 12). The IACmHR found that there was a violation of both freedoms – the Article 13 prohibition of any prior censorship was violated, and Article 12 was violated because censorship of the film restricted the freedom of the public to receive information relevant to making religious choices (violating the freedom to change religions).[270] The matter was referred to the IACtHR where it was decided that Article 13 was violated but that Article 12 was not.[271]

The IACtHR's decision regarding Article 13 is markedly different from the rationale employed by the ECtHR. For example, the IACtHR did not consider it relevant whether or not the film offended people's religious feelings, and did not defer to the margin of appreciation to the state party.[272] Instead, the IACtHR clearly stated that the protection of the right to free expression in the ACHR is very high because of the importance of protecting the free exchange of ideas in a democratic society, which protects both the freedom to express ideas as well as the freedom to seek, receive and impart ideas.[273]

Unfortunately, the majority decision of the IACtHR in *The Last Temptation of Christ* case did not elaborate why Article 12 was not violated. Justice Roux-Rengifo alone addressed this issue in his brief concurring decision. For him, the IACmHR view regarding the nature of Article 12 was correct – the freedom to choose a religion implied the freedom to access all information relevant to making that choice. Article 12 therefore protects not only the freedom to have a belief but also the *process* by which a religious

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[269] (2001), Inter-Am Ct HR (Ser C) No 73, (2001) 2 Inter-Am YBHR 699 [*The Last Temptation of Christ*].
[270] *The Last Temptation of Christ*, *supra* note 269 paras 10, 61 and 74.
[271] *Ibid* at paras 73, 79 and 103.
[272] Interestingly, the margin of appreciation does not seem to factor into the Inter American System of human rights. See Harris, "Regional Protection", *supra* note 251 at 10-12.
[273] *The Last Temptation of Christ*, *supra* note at paras 64-69.

belief is freely chosen, which necessitates having access to all forms of religious views in order to make an informed decision. So, religious freedom requires the removal of impediments to receiving information relevant to making religious choices:

> A change of religion or beliefs is usually the result of a long, complex process that includes hesitation, reflection and research. The State should guarantee that, if he should so decide, a person may undergo this process in an environment of complete freedom and, in particular, that no one should be prevented from gathering information and experience and all the elements of an emotional, conceptual or any other nature, without violating the rights of others, that he considers necessary in order to make a fully-informed decision to change or maintain his faith. If the State, by act or omission, fails to ensure those rights, it violates the right to freedom of conscience and religion.[274]

Judge Roux-Rengifo still agreed with the majority that Article 12 was not violated by the public censorship of the film. Although the film was restricted from public exhibition there was no evidence showing that the applicants could not have legally obtained the film for their own private viewing.[275] The freedom of the applicants to access information relevant to their religious choices was not circumvented, and as such, Article 12 of the ACHR was not violated.

Judge Roux-Rengifo's comments regarding Article 12 of the ACHR are important to the issue of proselytism. Proselytism is core to the free exchange of religious ideas, which, it could be argued, would be protected as part of the process necessary for freedom of religion. On the other hand, it could be argued that restricting proselytism does not in fact deprive people of their freedom to access other religious ideas – in that various religious ideas can be accessed if pursued. So, perhaps restricting proselytism does not affect the freedom of religious choice as a process. It seems that Judge Roux-Rengifo flirts with both sides of the argument, which unfortunately does not help resolve the issue. Perhaps the greatest contribution of Roux-Rengifo's comment is that he opens the possibility to think of religious freedom as a matter of the process of religious choice rather than simply as a moment of religious action. This emphasizes the broad impact of limitations to proselytism in determining whether it violates the freedom of religion, making the impact on the receiver of religious information of particular importance. In a way this inverts the more common analysis regarding proselytism in the UN and European systems where the focus of religious freedom is on the individual doing the proselytizing; Roux-Rengifo's focus would instead be on the religious freedom of the

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[274] *The Last Temptation of Christ*, (2001) 2 Inter-Am YBHR 699 at 747.
[275] *Ibid*.

target of proselytism. How far this principle takes us, and what it means for proselytism, is an open-ended question and depends, largely, on the interpretation given to the limitations permitted to religious freedom in the Inter-American system.

Another contribution made by Judge Roux-Rengifo's comment is to draw the connection in the OAS system between the issues of religious freedom and the freedom of expression. The IACtHR has said on several occasions that the freedom of expression is not only an individual right to give expression but also a communal right to receive all forms of expression.[276] This right to reception embedded in the freedom of expression is reflected in the notion that freedom of religion guarantees not only the right to choose a religion but the right to receive information pertinent to making that choice. Although this analogy does not show precisely the extent to which proselytism will be protected, it suggests that preference will be given in the Inter-American system of human rights to the freedom to proselytize over the forces that would seek its limitation. However, even if this is the case the extent to the freedom to proselytize will depend largely on the interpretation given to the limitation provisions regarding freedom of religion.

Unfortunately there are no cases emerging from the OAS regime that discuss the interpretation of Article 12(3) of the ACHR, but there are several other places to consider when interpreting Article 12(3) of the ACHR. One possibility is to look at the limitations defined in Article 13. This seems reasonable, at first, because of the parallel drawn between Articles 12 and 13 in *The Last Temptation of Christ*. The link drawn between Articles 9 and 10 of the ECHR by the ECtHR seems to affirm this suspicion. However, upon closer examination it does not seem that Article 13(2) will be terribly helpful in understanding the limitations in Article 12(3). The first difficulty is that the structures of Article 12(3) and Article 13(2) are drastically different. Article 13(2) reads as follows:

> The exercise of the right provided for in the foregoing paragraph shall not be subject to prior censorship but shall be subject to subsequent imposition of liability, which shall be expressly established by law to the extent necessary to ensure:
>
> a. Respect for the rights or reputations of others; or
> b. The protection of national security, public order, or public health or morals.

This limitation is quite unique. Rather than providing for terms of limitation, as is done in Article 12(3), Article 13(2) says that no limitation is allowed (there shall be no prior

[276] *The Last Temptation of Christ*, *supra* note 269 at paras 64-66. Also see IACtHR, Ad Op *Compulsory Membership*, *supra* note 263 at para 30.

censorship) and that damages resulting from free speech shall be dealt with subsequently, as a matter of civil liability. The general limitations to freedom of expression are stated in Articles 13(4), for the moral protection of children, and 13(5), for hate speech. The structures for limitations in Articles 12(3) and 13(2) are so different that there is little chance of interpretive interconnection. In addition to the structural difference is the difference in wording between the Articles. Recall that the connection drawn between Articles 9 and 10 of the ECHR was in the common limitation for the 'rights and freedoms of others'. There is no such commonality between Articles 12(3) and 13(2) of the ACHR. The limitation mentioned in Article 13(2)(a) is with regard to respect for the 'rights or reputations' of others, whereas the limitation in Article 12(3) is with regard to the 'rights or freedoms of others'. The inclusion of 'reputation' in 13(2), and its exclusion from 12(3), makes it difficult to draw an interpretive connection between these two Articles. Although there may be some minimal definitional crossover between Articles 13(2) and 12(3), such a connection will likely be quite fragile – it will certainly not be strong enough to import carte blanche the extensive jurisprudence of Article 13 into Article 12, as might be the situation in the ECHR.

To the contrary, the similarity in form and language between Article 12(3) of the ACHR, Article 18(3) of the ICCPR and Article 9(2) of the ECHR, suggests that they will be a more ready source of interpretive aid than Article 13 of the ACHR. This connection is strengthened by Article 29, which says that interpretation of the ACHR must give effect to other human rights conventions. Although the ECHR does not have direct influence over ACHR state parties, the IACtHR has relied on it in its case law regarding Article 13.[277] The difficulty with following the ECHR Article 9 principles when interpreting Article 12 of the ACHR is that it relies on the ECHR Article 10. This reliance weakens the connection between Article 12 of the ACHR and Article 9 of the ECHR because, as argued earlier, Article 10 injects into Article 9 a tendency towards limiting the freedom of religion. As the *Last Temptation of Christ* case showed, such a tendency is not reflected in the ACHR. It would seem to make more sense for the interpretation of ACHR Article 12 to look to the principles emerging regarding Article 18 of the ICCPR. Unfortunately there are no cases from the IACtHR or IACmHR that draw

[277] E.g. see IACtHR, Ad Op *Compulsory Membership*, *supra* note 263 at paras 43-44.

the connection between the ACHR Article 12 and the ICCPR Article 18, so it is difficult to say whether this is the interpretation that the IACtHR will take.

Although not all of the differences between the American Declaration and the ACHR have significant legal effect, it is important to consider the differences between the limitation provisions in the two instruments. The sole limitation in the American Declaration to religious freedom is found at Article 28: "The rights of man are limited by the rights of others, by the security of all, and by the just demands of the general welfare and the advancement of democracy." The freedom of religion in the ACHR contains its own specific limitation in Article 12(3). Although these limitations are quite different, there is significant overlap between them. This can be seen in Article 32(2) of the ACHR, which imposes a general limitation on all of the rights in the ACHR similar to that in the American Declaration: "The rights of each person are limited by the rights of others, by the security of all, and by the just demands of the general welfare, in a democratic society."

The inclusion of the principles of democracy as a consideration for determining the limitations of the right to freedom of religion is quite interesting. Neither the ICCPR nor the ECHR contain such a principle. The importance of the principles of democracy can be seen again in Article 29(d) of the ACHR, which integrates the American Declaration into the interpretation of the ACHR as a whole:

> No provision of this convention shall be interpreted as: … Excluding or limiting the effect of that the American Declaration of the Rights and Duties of Man and other international acts of the same nature may have.

This was also affirmed by the IACtHR in the *Compulsory Membership* case, where the court said that the concepts shared by the ACHR and the American Declaration are to be used as general principles of interpretation for the whole of the ACHR:

> The just demands of democracy must consequently guide the interpretation of the Convention and, in particular, the interpretation of those provisions that bear a critical relationship to the preservation and functioning of democratic institutions.[278]

The principles of the general welfare and democracy are not to be applied in a static manner,[279] but rather are to be taken into consideration generally while analyzing whether

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[278] IACtHR, Ad Op *Compulsory Membership*, *supra* note 263 at para 44. This case dealt with the restriction of freedom of religion protected under Article 13 of the ACHR, not with Article 12. However, this principle likely still applies as the court made the statement with an air of generality.

[279] *Ibid* at para 65: "In the opinion of the Court that does not mean, however, that Article 32(2) is automatically and equally applicable to all the rights which the Convention protects, including especially

there was a violation of a right and whether the limitation was justified – the principle can be used either to justify or to condemn the limitation.[280] It is difficult to say how much the principles of democracy will factor into issues of religious freedom since the *Compulsory Membership* case dealt with freedom of expression. The court's heavy reliance on the principle of the just demands of democracy and the general welfare of society in the *Compulsory Membership* case emerges from the high regard given to expression in the Inter-American system.[281] The case dealt with limitations to the freedom of expression through the regulation of journalists – a matter which the court found to be a direct assault on the freedom of expression.[282] However, *The Last Temptation of Christ* shows there is a connection between the freedoms of expression and religion, which may support using the principles of general welfare and democracy as part of the definition of a proper limitation to the freedom of religion. It still remains unclear what this will look like in the context of proselytism. But the similarity between proselytism and free expression, both as forms of dissemination of ideas, which is important to the proper functioning of democracy, suggests that religious proselytism will be given a high amount of protection.

2.3.4 Conclusion

There is little opportunity to do more than speculate regarding proselytism in the Inter-American system. This is due largely to the lack of jurisprudential development of the right to religious freedom in general, especially considering that the regime is quite old. It is unlikely for things to remain this way. Judging from the European experience, it is likely that in time the Inter-American system will eventually see the freedom of religion move from the background to centre stage. Although it is impossible to predict with certainty, there are some early indications as to which way the Inter-American system will unfold regarding proselytism. The connection drawn by the IACtHR between religious freedom and freedom of expression, together with the high value placed on the freedom of expression, suggests that proselytism will be highly protected. This view is

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those rights in which the restrictions or limitations that may be legitimately imposed on the exercise of a certain right are specified in the provision itself."

[280] *Ibid* at para 67.

[281] On the importance of free expression, see the court's comments at paras 50 and 70; for the court's final analysis, see *ibid* at paras 71-81.

[282] *Ibid* at para 74.

strengthened by the way in which religious freedom is worded in the ACHR – as a right that has an outward tendency, specifically preserving the right to disseminate religious beliefs. This is also strengthened by the view taken by Judge Roux-Rengifo in the case *The Last Temptation of Christ*, that freedom to choose religion implies the right to access religious ideas. Finally, the limitation provisions regarding freedom of religion in the Inter-American system are geared towards a less restrictive approach to religious freedom – similar to the UN context and distinct from the European context. Although the direct relation between the freedom of expression limitation in the ACHR to the freedom of expression is tenuous, the indirect impact of the freedom of expression limitations suggests minimal limitations will be allowed to the freedom of religion, perhaps especially to proselytism because of its particularly expressive nature. Ultimately only time will tell how the Inter-American system of human rights will deal with proselytism, but it appears from this early view that it will provide broad rights and minimal limitations to this practice.

Part 3: Developing Regional and Intergovernmental Human Rights Organizations

3.1 Introduction

The last category to be considered is one of young and developing human rights regimes and intergovernmental institutions. The three regional regimes to be considered are: 1) the African human rights, 2) the Arab/Islamic human rights, and 3) the newly developing Asian human rights. Although these regional organizations are very different in many ways, they also share some core similarities. One of the main differences between these organizations is their institutional structuring. The African regime is very similar in structure to the European and Inter-American human rights regime, insofar as it has a binding multilateral human rights treaty and a fully functioning human rights court. This differs significantly from both the Islamic and Asian human rights regimes, which do not have similar institutional structures. Despite their differences, the African, Islamic and Asian human rights systems all share a similar important distinction from the UN, European and Inter-American regimes, insofar as their approaches to human rights are all influenced by the importance of communal integrity and identity. This is particularly important for the present study, as it has a profound impact on the way in which religious

proselytism is conceived of and how it is dealt with as a matter of human rights. Many of the issues raised during the drafting of the UN human rights instruments were with regard to this unique approach taken in the African, Islamic and Asian regions.

The following discussion will critically analyze the institutional and legal structures of the African, Islamic and Asian human rights in relation to the issue of religious proselytism. There are many limitations to the African, Islamic and Asian mechanisms, but they provide an important perspective that must be taken into account when conceptualizing a global perspective on the issue of religious proselytism. Most importantly, it is in these developing regions that the concerns regarding religious proselytism (especially as expressed during the drafting of the UN instruments) have their clearest representation. The perspectives taken by these developing human rights bodies draw our attention to cultural and historical considerations relevant to religious proselytism.

3.2 The Importance of Cultural Context – African Human Rights Regime

3.2.1 Introduction to the African regime

The main regional body in the continent of Africa is the African Union [AU]. The AU is relatively new, having emerged in the year 2000 to replace its predecessor the Organization of African Unity [OAU].[283] The OAU was first created in 1963, pursuant to the *Charter of the Organization of African Unity*;[284] it was the first pan-African intergovernmental organization[285] and was intended to foster unity in Africa and to aid the continent in the movement out of colonialism, towards state sovereignty and freedom from racism.[286] On July 9, 1999, a declaration was adopted by the OAU to create the AU;[287] the constitutive act of the AU was adopted one year later – on July 11, 2000.[288]

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[283] See African Union website, online: <http://www.au.int/en/about/nutshell>. See AU Act, *infra* note 288 at Article 33.
[284] *Charter of the Organization of African Unity*, 25 May 1963, 479 UNTS 69 [OAU Charter].
[285] Frans Viljoen, *International Human Rights Law in Africa* (Oxford: Oxford University Press, 2007) at 162.
[286] *Ibid* at 164 – see pages 162-169 for a full discussion of the development of human rights in the OAU. For further discussion of the creation of the OAU see Addo, *supra* note 14 at 343-348; also see Fatsah Ouguergouz, *The African Charter on Human and Peoples' Rights: A Comprehensive Agenda for Human Dignity and Sustainable Democracy in Africa* (The Hague: Martinus Nijhoff, 2003).
[287] OAU, Fourth Extraordinary Session of the Assembly of Heads of State and Government, *Sirte Declaration*, 8-9 September 1999, EAGH/Draft/Decl.(IV)Rev.1, online: <http://www.au2002.gov.za/>.

One noteworthy change from purposes of the OAU to the AU is the inclusion of the protection of human and peoples' rights – protection of human rights is mentioned in the preamble as well as in Article 3(h) of the AU Act.[289] Despite the nominal support for human rights given in the AU Act, the AU (and the OAU before it) does not provide an institutional structure to oversee or promote human rights in Africa.

In the African region, the core of human rights protection is found in the *African Charter on Human and Peoples' Rights*.[290] This regional development of human rights in Africa is quite a recent event. The ACHPR was not created until 1981, and did not enter into force until 1986. The drafting of the ACHPR goes back to 1979.[291] It is not clear what motivated the formation of the ACHPR in Africa. As mentioned earlier, the OAU was originally disinterested in human rights, being more focused on de-colonialism and issues of racism. But in the late 1970s there was a shift that resulted in the drafting of the ACHPR.[292] The reasons for this change are not of specific concern to the issue of proselytism, but it does shed some light on the general nature of human rights in the African region and the direction of future evolution of these rights. The traditional view is that the movement towards human rights came as a result of external forces (i.e. pressure from the United States government by linking foreign aid to human rights) and internal forces (as a response to harsh African dictatorships and intergovernmental conflicts), which made adopting a regional human rights treaty appear to be the best way

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[288] *Constitutive Act of the African Union*, 11 July 2000, 2158 UNTS 3 (adopted by the 36th ordinary session of the Assembly of Heads of State and Government of the OAS, entered into force 26 May 2001) [AU Act].

[289] The OAU Charter and the AU Act have an ambiguous relationship with international human rights protections. The OAU Charter referred to the UN Charter and the UDHR in the preamble, saying that they are a useful foundation for state relations and contain "principles of which we affirm our adherence", and Article 2 lists as one of the purposes of the OAU to promote international cooperation giving regard to the UN Charter and the UDHR. On the other hand, the principles outlined in Article 3 of the OAU Charter do not mention human rights but focuses on state sovereignty and the concept of non-interference with internal affairs. The AU Act provides a clearer place for human rights – as said before, it lists the protection of human rights in the preamble and as one of its guiding principles. Also, the AU Act changes the non-interference principle slightly (but significantly) in Article 4(g): "non-interference *by any Member State* in the internal affairs of another" (emphasis added).

[290] *African Charter on Human and Peoples' Rights*, 27 June 1981, 1520 UNTS 217, OAU Doc CAB/LEG/67/3/Rev 5, (1982) 21 ILM 58 (entered into force 21 October 1986) [ACHPR]. Ouguergouz argues that the adoption of the ACHPR "…can truly be regarded as the first major concession by African States in the area of human rights; it is the one which beyond any doubt marks the advent of a new era in the field of human rights in Africa" (Ouguergouz, *supra* note 286 at 5).

[291] See B Obinna Okere, "The Protection of Human Rights in Africa and the African Charter on Human and Peoples' Rights: A Comparative Analysis with the European and American Systems" (1984) 6:2 Hum Rts Q 141 at 144.

[292] Addo, *supra* note 14 at 345.

to resolve internal African conflicts and maintain its global international relationships.[293] This traditional view has come under attack lately, and the new theory proposed is that the ACHPR emerged from three factors: the desire for African states to find new grounds of legitimacy, the increased activity of African civil societies, and the influence of NGOs pressing for greater recognition of human rights.[294] The development of new grounds of legitimacy for human rights in Africa is of particular importance to the issue of religious proselytism because it emerges out of the interaction between cultures and religions. The exchange that occurs between cultures during religious proselytism is a core aspect of religious proselytism and is especially relevant in the African context, which will be discussed later.

The ACHPR, at Article 30, provides for the creation of the African Commission on Human and Peoples' Rights [African Commission], which is charged with promoting the rights in the ACHPR, interpreting their meaning and watching over their implementation.[295] The African Commission is able to receive communications directly from states party to the ACHPR or individuals affected by conduct of state parties, but is restricted from entertaining communications until local remedies have been exhausted.[296] One of the most important activities of the African Commission, especially for determining the meaning of the ACHPR, is the creation of decisions and reports regarding human rights issues referred to it.[297] Importantly, the African Commission is given the mandate to interpret the ACHPR in accordance with global principles of human rights law, including those embodied in the treaties of the United Nations:

> The Commission shall draw inspiration from international law on human and peoples' rights, particularly from the provisions of various African instruments on human and peoples' rights, the Charter of the United Nations, the Charter of the Organization of African Unity, the Universal Declaration of Human Rights, other instruments adopted by the United Nations and by African countries in the field of human and peoples' rights as well as from the provisions of various instruments adopted within the Specialised

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[293] Kofi Oteng Kufuor, *The African Human Rights System: Origin and Evolution* (New York: Palgrave MacMillan, 2010) at 16-18.
[294] See *ibid* at 16-36 (chapter 1).
[295] ACHPR, *supra* note 290 at Article 45.
[296] The Commission must hear communications from state parties, the procedure being prescribed in ACHPR, *supra* note 290 at Articles 46-54; the Commission may hear communications from non-state parties based on the rules laid out in Articles 55-59 (*ibid*). One of the main issues is whether local remedies have been exhausted (*ibid* at Articles 50 and 56(5)); in the case of non-state communications, the Commission will only hear a matter when a majority of its members decide the matter should be heard (*ibid* at Article 55).
[297] ACHPR, *supra* note 290 at Article 52.

> Agencies of the United Nations of which the parties to the present Charter are members.[298]

Although some have criticized the decisions of the African Commission as being too soft and unwilling to engage in difficult interpretive questions,[299] many scholars have argued that the interpretations of the African Commission have in fact strengthened the protections for human rights offered in the ACHPR – especially in the way it has imported concepts from the UN human rights regime.[300] Given its broad interpretive mandate and broad powers of investigation and reporting, the African Commission has a very important role in the development of human rights in the African region.

Another institution that is important to the implementation of human rights in Africa is the African Court on Human and Peoples' Rights [ACtHPR]. The ACtHPR was created on June 9, 1998, by a protocol to the ACHPR.[301] In many ways the creation of the ACtHPR is an important step forward in the evolution of human rights in Africa. Although there are many weaknesses of the organizing structure of the ACtHPR,[302] it is a proper adjudicative body charged with making authoritative judgments on human rights issues in the region.[303] The creation of the ACtHPR does not stop the functioning of the African Commission; rather it is intended to compliment the African Commission.[304] Unfortunately, the current ACtHPR jurisprudence does not contribute anything to the topic of religious freedom or the issue of religious proselytism. This is to be expected; given the youth of the court, the ACtHPR has not had the opportunity to decide cases

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[298] *Ibid* at Article 60. Also see Article 61, which refers to the principles of law generally recognized by states members of the African Union.

[299] For example, see Laurie S Wiseberg, "The African Commission on Human and Peoples' Rights" (1994) 22:2 Issue: A Journal of Opinion 34.

[300] For an extensive discussion of the African Commission's influence on the meaning of the ACHPR see Kufuor, *supra* note 293 chapter 2, especially pages 37-45.

[301] *Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights*, 9 June 1998, OAU Doc. OAU/LEG/MIN/AFCHPR/PROT.1 rev.2 (entered into force January 25, 2004) [Protocol Creating the ACtHPR]. For a detailed discussion of the drafting of the Protocol, see Julia Harrington, "The African Court on Human and Peoples' Rights" in Malcolm D Evans & Rachel Murray, eds, *The African Charter on Human and Peoples' Rights: The System in Practice, 1986-2000* (Cambridge: Cambridge University Press, 2002) 305.

[302] For some critical commentary on the ACtHPR, see Harrington, *supra* note 301. For example, Harrington said: "The Court Protocol is, fundamentally, a conservative document. It adds the minimum provisions necessary to distinguish it from the Commission as a more formal legal body with the theoretically binding judgments, but in several ways it seems to retract the promise of progressiveness held out by the African Charter." (*ibid* at 329).

[303] For a thorough analysis of the history and functioning of the ACtHPR, see Ouguergouz, *supra* note 286 at chapter IX.

[304] Protocol Creating the ACtHPR, *supra* note 301 at Article 2. For discussion on the relationship between the African Commission and the ACtHPR, see Harrington, *supra* note 301, especially at 316-318.

related to religious freedom or proselytism. Also, like the OAS, there are more egregious human rights violations and issues that currently occupy the focus of the ACtHPR and prevent it from developing a comprehensive jurisprudence on religious freedom. Since there are no cases dealing with the topic of religious proselytism, the following analysis will look at the wording of the instruments and some of the existing jurisprudence in attempt to project the likely course that the African regime will take in this regard.

3.2.2 Content of the ACHPR regarding proselytism

The general structure of the ACHPR is similar to all of the other major human rights instruments, and it contains many of the same principles of law. The ACHPR incorporates the notion of duties together with the idea of rights, which makes it more similar to the Inter American system than the ICCPR or the European systems of human rights.[305] The notion of individual duties also has a minor connection with the UN system of human rights, in that the UDHR provides at Article 29 (which is the general limitation section of the UDHR) that in addition to their rights individuals have duties to their communities. The feature of the ACHPR that is most commonly commented on is the non-individualistic focus on the community taken as the foundation for all of its rights.[306] This is quite different than the individualistic view taken by the other international human rights instruments – such as the UN covenants and the ECHR.[307] This may have an effect on the way in which the issue of religious proselytism is conceived under the ACHPR. It is not difficult to foresee the challenges raised by religious proselytism (i.e. challenges between the foundational truth claims of different religions) being perceived as threatening the well being of the community – or, at very least, not promoting its unity. Restrictions to religious proselytism may be justified in the African human rights regime on this ground. Although it is not clear what approach the African Commission and the

[305] Okere, *supra* note 291 at 156.
[306] Ouguergouz suggests that the collective nature of the protected rights is what sets apart the ACHPR as truly unique; however, he also emphasizes the linkage between the ACHPR and other human rights instruments – such as the links between the ACHR and UDHR – and argues that "…it is as a complement to its universal equivalent rather than in opposition to it that the special nature of the African Charter needs to be evaluated" (Ouguergouz, *supra* note 286 at 61).
[307] "For rights guaranteed under the Charter, there are correlative duties. The African conception of man is not that of an isolated and abstract individual, but an integral member of a group animated by a spirit of solidarity. This contrasts with the European conception of human rights." (Okere, *supra* note 291 at 148).

ACtHPR will take when applying the ACHPR to the issue of religious proselytism, it seems that the notion of 'community' provides a potential source of restrictions.

There are several Articles in the ACHPR potentially relevant to the issue of religious proselytism. The most obvious is the protection of religious freedom itself, which is found in Article 8: "Freedom of conscience, the profession and free practice of religion shall be guaranteed. No one may, subject to law and order, be submitted to measures restricting the exercise of these freedoms." Compared to the other major international human rights instruments, the guarantee of religious freedom in the ACHPR is quite vague. It does not state whether coercion is prohibited. It does not mention whether the freedom to profess and practice a religion includes the freedom to change religions. The idea of protecting manifestations of religion is replaced with 'profession' and 'practice' of a religion. However, this seems to be a difference without a real distinction with regard to the issue of proselytism – 'manifestation' of religion is virtually synonymous with 'practice' of religion. The only potential difference is that 'manifestation' more explicitly includes a public aspect, whereas the idea of 'practice' does not. The effect of the difference in the implication of the public is reduced by the fact that both terms 'manifestation' and 'practice' protects religious activities that are necessary to a religion. As such, protection of either religious 'manifestation' or 'practice' includes proselytism insofar as proselytism is a necessary activity for some religions. The only distinction between the terms 'manifest' and 'profess' is that the former has already been interpreted in international human rights law as including proselytism whereas the latter, in the context of the ACHPR, has not. Whether Article 8 of the ACHPR will protect proselytism as a form of religious practice ultimately depends on the interpretation given by the African Commission or the ACtHPR – which has not yet been done.

There are four major problems with Article 8. First, Article 8 does not elaborate on what constitutes a protected 'religion'. This is a particularly important issue in Africa, given the broad range of tribal rituals and practices that are quite distinct from the major world-religions (i.e. what practices are considered 'religious' as opposed to cultural?).[308] Secondly, Article 8 protects 'conscience' but does not protect 'thought', which introduces

[308] Ouguergouz, *supra* note 286 at 157.

confusion into the relationship between religious ideas and religious convictions. The failure to include protection for thought is also relevant to the issue of proselytism, in that there is a constitutive relationship between thoughts and expression – the former being constitutive of the substance of the latter.[309] Not providing for protection of thought, especially in relation to the protection of religion, potentially threatens the freedom to express religious ideas. Thirdly, and perhaps most significant for the issue of proselytism, Article 8 does not provide protection for the freedom to change religions – and the language used does not offer the same implication of the right to change religions as was the case under the ICCPR (where there was protection "to have or adopt a religion" in Article 18(1) and the prohibition of "coercion" in Article 18(2)). To the contrary, Article 29(7) of the ACHPR seems to oppose this implication by prescribing a duty on the individual "…to preserve and strengthen positive African cultural values" and "contribute to the promotion of the moral well being of society".[310] If adherence to a particular religion, or to follow particular religious practices and precepts, is perceived to be a cultural value and necessary for the moral well being of society, then the ability to change religions could be restricted without violating the rights guaranteed in the ACHPR. The final problem with Article 8 has to do with the internal limitation built into the right: that the exercise of the freedom of religion may be restricted "subject to law and order". The indeterminateness and imprecision of this limitation opens the door to all sorts of potential abuses by states, and it leaves the construction of the meaning of the limitation in the hands of the African Commission (which will be examined in more detail later).[311]

The ACHPR also protects the freedom of expression at Article 9. The freedom of expression protects both the "right to receive information" (9(1)) as well as "the right to express and disseminate his opinion within the law" (9(2)). The explicit right to receive information is potentially relevant to the issue of religious proselytism, as was seen in the earlier discussion of the Inter-American system, where the right to receive information was related to the process necessary to make a free choice regarding religious belief. Although the African Commission has not drawn this connection, the wording of the

[309] *Ibid* at 157.
[310] *Ibid* at 158.
[311] *Ibid* at 158-160.

ACHPR is open to this interpretation. The troubling aspect of Article 9 is the restriction in 9(2) to the freedom to disseminate opinions "within the law". The difficulty is that it does not prescribe substantive principles to guide the limit of the restrictions available to the state – it leaves the available restrictions virtually limitless.[312]

There are several general restrictions provided in the ACHPR, which apply to all of the rights guaranteed. Article 27(2) is the closest to the traditional formulation of a general limitation clause: "The rights and freedoms of each individual shall be exercised with due regard to the rights of others, collective security, morality and common interest." This is similar to the general restriction in the UDHR at Article 29(2), although the specific words used are different. All of Articles 27 to 29 are included in a section of the ACHPR titled "Duties", and all appear to provide restriction to the actual function of the rights guaranteed. Article 27 is by far the most discussed of all of these duties, but there still remains the question of the effect that the other 'duties' will have as limitations to the rights in the ACHPR. It is possible for the other duties to impact the practice of proselytism. For example, Article 28 says: "Every individual shall have the duty to respect and consider his fellow beings without discrimination, and to maintain relations aimed at promoting, safeguarding and reinforcing mutual respect and tolerance." Having a duty to reinforce mutual respect and tolerance may run contrary to proselytic activities, where the modus operandi of interaction is to convince people of some set of beliefs. Openly contradicting the personally held beliefs of other people may be construed as disrespectful. This duty may significantly limit religious proselytism. Currently no link has been made by the African Commission or ACtHPR between Article 28 and Article 8 – in fact there has been no notable mention of Article 28 at all.

Article 29 of the ACHPR, which explicates the duties owed by the individual, seems to be the most radical aspect of the limitations to the rights in the ACHPR. The three duties listed in Article 29 of the ACHPR most important to the issue of religious proselytism are: 29(3) "Not to compromise the security of the State whose national or resident he is"; 29(4) "To preserve and strengthen social and national solidarity, particularly when the latter is threatened"; and 29(7) "To preserve and strengthen positive

[312] Christof Heyns, "Civil and Political Rights in the African Charter" in Evans & Murray, *supra* note 301 137 at 142.

African values in his relation with other members of the society, in the spirit of tolerance, dialogue and consultation and, in general, to contribute to the promotion of the moral well being of society." These duties are particularly relevant to the issue of proselytism when considered in the context of the historical/cultural experience of the African continent, which will be discussed later. In light of the emphasis on the traditional African aspects of human rights, as was stated in the Preamble: "Taking into consideration the virtues of their historical tradition and the values of African civilization which should inspire and characterize their reflection on the concept of human and peoples' rights", the notion of social solidarity and well-being takes on a particularly non-Western nature. What exactly this means in the African context is not easy to determine, especially since the comments of the African Commission in this regard are extremely limited. One thing that it might mean in the context of religion is that the dignity of African religions must be affirmed, as a response to the social/political structures of colonialism surviving the post-colonial movement.[313] If this is the case, then the notion of proselytism will be dealt with in the African regime extremely differently than in Europe and in the United Nations; it will also be distinct from the Inter-American system (even though they have their own history of colonization, it is distinct from the colonial experience of Africa).

Some other very important Articles in the ACHPR are Articles 60 and 61. These say that the provisions of the ACHPR must be interpreted so as to be consistent with the other human rights principles of international law. Especially since all but one of the members to the ACHPR are signatories to the ICCPR, the rights protected in the ACHPR must be read as consistent with the principles of law emerging from that treaty (and their accompanying mechanisms, such as the HRC).[314] Theoretically this would require the ACHPR to be interpreted similarly to the UN regime regarding religious proselytism. It is doubtful that the ACHPR would actually be interpreted in this way, as it would ignore some of its most distinctive features. Perhaps this will nonetheless result in the ACHPR being applied more moderately than the wording of the text would otherwise suggest. On the other hand, given the vagueness and room for maneuverability mentioned earlier

[313] Makau Mutua, "Returning to My Roots" in Abdullahi Ahmed An-Na'im, ed, *Proselytization and Communal Self-Determination in Africa* (Maryknoll, NY: Orbis Books, 1999) 169 at 183 [Mutua, "Returning to My Roots"].
[314] Only Western Sahara is a member of the ACHPR and not of the ICCPR treaty.

regarding the UN religious proselytism standard, Articles 60 and 61 may be ineffective in limiting how radically the ACHPR will be applied.

3.2.3 Decisions and comments of the African Commission

One of the common criticisms of the ACHPR is that its built-in limitations clauses seem to subject the rights guaranteed in the ACHPR to the domestic laws of the individual states – a problem identified earlier with regard to Article 9. This weakness of the wording of the ACHPR was rectified by the African Commission, which said that the rights protected in the ACHPR cannot simply be overridden by domestic laws, because "[t]o allow national law to have precedent over the international law of the Charter would defeat the purpose of the rights and freedoms enshrined in the Charter."[315] The African Commission went on to emphasize the importance of the fact that there is no general derogation clause in the ACHPR – in the sense that times of emergency or threats to national security are not proper justification for suspending the rights protected in the ACHPR.[316] Rather, any limitation to a right protected in the ACHPR must be in accordance with the terms of Article 27, which requires:

> The reasons for possible limitations must be founded in a legitimate state interest and the evils of limitations of rights must be strictly proportionate with and absolutely necessary for the advantages which are to be obtained.[317]

In addition, limitations imposed on a right cannot effectively extinguish the right: "…a limitation may never have as a consequence that the right itself becomes illusory."[318]

There has been almost no commentary from the African Commission regarding the freedom of religion protected at Article 8 of the ACHPR. Much like in the OAS, the little information regarding Article 8 must be gleaned from the discussions of other rights. As such, the precise meaning of the protection of religious freedom, and its limitations, is ultimately unknown. The most direct statements regarding the freedom of religion can be

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[315] *Media Rights Agenda and Others v Nigeria* (1998), African Commission on Human and Peoples' Rights, Comm Nos 105/93, 128/94, 130/94, 152/96 at para 66, reprinted in the *Twelfth Activity Report of the African Commission on Human and Peoples' Rights – 1998-1999*, OAU Assembly of the Heads of State and Government, 35th Ordinary Sess, AHG/2 15 (XXXV) (1999) 52 [*Media Rights Agenda v Nigeria*].
[316] *Ibid* at para 67. The African Commission has repeated this interpretation on several occasions – see, e.g. *Commission Nationale des Droits de l'Homme et des Libertes v Chad* (1995), African Commission on Human and Peoples' Rights, Comm No 74/92.
[317] *Media Rights Agenda v Nigeria*, *supra* note 315 at para 69.
[318] *Ibid* at para 70.

found in the African Commission decision *Amnesty International and Others v Sudan*,[319] which dealt with several allegations of violations of the freedom of religion (amongst other human rights violations). A couple of the allegations made in this decision have some bearing on the issue of proselytism. First, it was alleged that the Muslim Shari'ah law was being applied to people who were not Muslim.[320] It was also alleged that the Sudanese government was discriminating against Christians in particular by expelling their missionaries and providing unequal distributions of public resources (including providing less food to Christians in prison).[321] The Sudanese government did not reply to the allegations in the communication, so the African Commission assumed the likelihood of the allegations.[322] It was decided that all of this together showed that there was a gross violation of Article 8 of the ACHPR.

The *Amnesty International v Sudan* decision relates to the issue of religious proselytism insofar as it shows that actions coercive towards peoples' religious beliefs and practices are unacceptable. A general prohibition on religious coercion surely supports the freedom to change religions, but it is not clear whether it also supports the free exchange of religious ideas or the freedom to propagate a set of religious beliefs. As has been seen earlier, the standard of coercion is often used both for and against religious proselytism. Unfortunately, the African Commission did not elaborate on its decision or comment on how the issue of these religious freedoms interacted with other legitimate social and legal interests – the balance of rights that has been central to the discussion of religious freedom (and proselytism) in Europe and the UN, was not addressed. The lack of elaboration was likely because the state of Sudan did not respond to the allegations, which makes a more in-depth statement on the issue difficult. On the other hand, one would expect, given the significance of the problem of inter-religious violence in Sudan, that the African Commission would take the opportunity to investigate the matter for itself and to provide more detailed commentary. Ultimately, the African Commission

[319] *Amnesty International and Others v Sudan* (1999), African Commission on Human and Peoples' Rights, Comm Nos 48/90, 50/91, 52/91, 89/93 [*Amnesty International v Sudan*].
[320] *Ibid* at para 73. The African Commission said that it was permissible for Shari'ah courts to be used to resolve issues pertaining to Muslims, but that everyone should have the ability to have their matter heard before a secular court.
[321] *Ibid* at paras 71-76.
[322] *Ibid* at para 75.

was satisfied to simply find a violation of Article 8 and leave the greater issue of the extent of freedom of religion and inter-religious conflict unresolved.

Related to proselytism, the African Commission has made some comments that buttress the strength of the protection of the right to free expression. The freedom of expression has been held by the African Commission to be a fundamental human right "which is also a cornerstone of democracy and a means of ensuring the respect for all human rights and freedoms."[323] The freedom of expression must not be limited unless in exceptional circumstances. For example, the African Commission said that challenges to state action through the media (encouraging public debate) could not be limited unless the expressions under question are actually inciting violence.[324] In addition, the African Commission has related the freedom of conscience/religion to the freedom of expression, such that the freedom of expression is seen to be vital to the full realization of the freedom of conscience (ACHPR, Article 8). This can be seen in the African Commission communication with Zambia in 1998, where the politically motivated deportation of two individuals was a violation of both Article 9 and 8 of the ACHPR.[325] Although this comment was not openly generalized to include the religious aspect of Article 8, the important connection between free expression and free religion remains (religious conviction as an aspect of the free choice of conscience).[326]

Although there are no comments from the African Commission that bear directly on the issue of proselytism, there are traces of the beginnings of an approach to this issue. The African Commission condemns inter-religious conflict and the imposition of religious practices and beliefs between religious groups, which could work either to

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[323] *Liesbeth Zegveld and Messie Ephrem v Eritrea* (2003), African Commission on Human and Peoples' Rights, Comm No 250/2002 at para 59.

[324] *Malawi African Association and Others v Mauritania* (2000), African Commission on Human and Peoples' Rights, Comm Nos 54/91, 61/91, 98/93, 164/97, 196/97 and 210/98 at para 102: "Communication 61/91 alleges that the trials on the Manifesto (paras. 3,4,5,6) and the other related cases (paras. 8 and 9) violate the right to freedom of expression and dissemination of ones' opinions, to the extent that the accused were charged with distributing a manifesto which provided statistics on racial discrimination and were calling for a dialogue with the government. The expression "within the laws" must be interpreted as reference to the international norms. To the extent that the Manifesto did not contain any incitement to violence, it should be protected under international law."

[325] *Amnesty International v Zambia* (1999), African Commission on Human and Peoples' Rights, Comm No 212/98 at paras 45-47, reprinted in *The Twelfth Activity Report of the African Commission on Human and Peoples' Rights*, *supra* note 315, 76.

[326] Ouguergouz argues that there is, and the African Commission recognizes, a dialectical relationship between the freedom of religion and freedom of expression (Ouguergouz, *supra* note 286 at 163-164.

protect or limit the practice of religious proselytism. On the one hand, it seems to support the right of individuals to change religions, as it establishes the right of the individual to determine what binds them religiously; on the other hand, it discourages contact between religions that results in the imposition of one's religion on another, which could justify restrictions to religious proselytism as an act that is coercive. It is important to note that these two positions are not necessarily in opposition to each other nor are they necessarily in opposition to the developing standard in international human rights regarding religious proselytism. The connection drawn between the freedom of expression and the freedom of religion may also strengthen the protection for religious proselytism. The wording of the ACHPR also contains terms that might strengthen or weaken the freedom to proselytize: on the one hand there are unique limitations provided (especially in Articles 27-29) regarding the protection of the community, which may result in significant limitations to religious proselytism; on the other hand, Articles 60 and 61 suggest that the ACHPR should be interpreted so as to be consistent with international human rights law.

Ultimately, the standard emerging in the AU stands on a precipice. It contains the potentiality of coming into conformity with the basic features of the 'coercion' principles relating to religious proselytism developing in the UN system. But it likewise contains the potential for being used more restrictively of religious proselytism.

3.2.4 The unique African experience – colonialism and communalism

Perhaps the greatest force in the AU that will influence the issue of religious proselytism is Africa's unique experience of colonialism. There is a complex relationship between Western and traditional religions in Africa, born through the violence exercised in the colonization of the continent. According to Mutua, the colonial program in Africa not only sought to gain political dominance but also to establish a worldview consistent with the colonial powers (i.e. European and Arab worlds).[327] As such, one of the central features of colonialism was the degradation and delegitimization of African religions (and

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[327] Mutua, "Returning to My Roots", *supra* note 313 at 174-179. For further discussion on the impact of colonialism on human rights in Africa, see Makau Mutua, "The Banjul Charter and the African Cultural Fingerprint: An Evaluation of the Language of Duties" (1995) 35 Virginia J Int'l Law 339 [Mutua, "The Banjul Charter"]; and Makau Mutua, "Proselytism and Cultural Integrity" in Tor Lindholm, W Cole Durham, Jr, Bahi G Tahzib-Lie, eds, *Facilitating Freedom of Religion or Belief: A Deskbook* (Leiden: Martinus Nijhoff, 2004) 651 [Mutua, "Proselytism and Cultural Integrity"].

cultures), which also displaced the African views of the ways in which an individual related to the universe and to the greater social community.[328] This belittlement of African religions in the colonial process was not undone in the post-colonial movement.[329] Rather, the institution of protection for individual religious freedom preserves the colonialist/western concepts of religion and maintains the view of African traditional religions as illegitimate.[330] In support of this argument, Mutua observed that most African state constitutions and laws do not recognize traditional African religions or provide for traditional African religious practices, although many provide specific reference to monotheistic religions (Christianity or Islam) and monotheistic religious practices and celebrations (Christmas, Ramadan, etc).[331]

This perspective has much to bear on the issue of religious proselytism in Africa. It could be argued that the protections of religious freedom that focus on the individual right to choose and maintain religious belief and practice maintain the colonial religions – like Christian and Muslim religions – and do nothing to address the forced overthrow of the traditional African religious world-view, and therefore offer inadequate protection for true religious freedom. If anything, the subversion of the African worldview is perpetuated in the individual protections of religious freedom, because the emergence of post-colonial African society is forced to conform to the institutional realities of European conceptions rooted in European worldviews/religions, which makes the maintenance of authentic African identity (expressed through culture, tradition and religion) untenable.[332] There is therefore an imbalance of power – originating in the colonial project and persisting in the post-colonial state – in the interactions between indigenous people

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[328] Mutua, "Returning to My Roots", *supra* note 313 at 179: "What most of these examples point to, however, is the delegitimation of African religions, and that spiritual universe, through the implementation by the state of norms and policies in education and other arenas of public life that are based on European, American, or Arab conceptions of society or modernization." Also see Mutua, "Proselytism and Cultural Integrity", *supra* note 327 at 657-660.

[329] Mutua, "Returning to My Roots", *supra* note 313 at 178-179.

[330] *Ibid* at 177-179.

[331] See *Ibid* at 177 for examples (with the notable exception of Benin, which was referred to by Mutua at 182).

[332] As such, Mutua is "…concerned by those dimensions of proselytizing religions that claim a right not merely to persuade individuals or groups of peoples of the truth as they see it but rather actively demonize, systematically discredit, and forcibly destroy and eventually replace non-universalist, non-competitive, indigenous religions. Quite often, indigenous religions, like all religions, anchor a total worldview, and their destruction usually entails a fundamental distortion of ethnic identities and history." Mutua, "Proselytism and Cultural Integrity", *supra* note 327 at 668.

(people of indigenous religions) and missionaries of foreign religions that must be taken into account in the legal regulation of proselytism.

In this view, freedom of religious proselytism should be approach with caution, because it helps perpetuate the denigration of African culture that began in the colonial period. The matrix of personal choice and freedom to maintain or reject traditional African religions is compromised from the start – as a result of the colonial experience it is more difficult for a traditional African religion to justify and defend itself as against Christianity or Islam. In the free-market of ideas, African religions are somehow excluded from being represented in the 'economy' of trade. If proselytism is to be allowed then there must first be an affirmation of African religions in the political and legal institutions of the continent. The affirmation of culture, tradition, family and the collective in the ACHPR is an important step in this direction.[333]

As a solution to the problem, Mutua and An Na'im suggest that although it is not possible to resurrect pre-colonial African religions and ideas it is necessary for those pre-colonial concepts (albeit changed by colonialism) to carry forward into the ongoing development of the continent.[334] The value of collectives and collective identities must be incorporated into the political/legal landscape in order to provide a source of identity, purpose and destiny for the African people, which coincides with their fundamental conceptions.[335] These ideas must be taken into account when discussing proselytism in Africa. Viewing religious proselytism solely as a matter of individual rights and freedoms (i.e. the right to proselytize and the freedom to accept or reject the proselytic message) is overly simplistic and fails to take into account the African experience. An Na'im suggests that communities must be consulted directly in determining the regulation of proselytism in Africa.[336] Proselytism is an important and beneficial practice,[337] but the strength of its impact on communities requires that it not be left unregulated.[338]

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[333] Mutua, "Returning to My Roots", *supra* note 313 at 183.
[334] See Mutua, "The Banjul Charter", *supra* note 327; and Abdullahi Ahmed An-Na'im, "Competing Claims to Religious Freedom and Communal Self-Determination in Africa" in An-Na'im, *supra* note 313 1 [An-Na'im, "Competing Claims"].
[335] Mutua, "The Banjul Charter", *supra* note 327 at 367.
[336] An-Na'im, "Competing Claims", *supra* note 334 at 20-21.
[337] "…despite its problematic nature and negative associations, proselytization is actually a vital part of the dynamism of spiritual and intellectual development of individual persons, as well as the social, political, material and artistic life of communities and societies at large. Proselytization is too integral and important

3.2.5 Conclusion

The regulation of proselytism must be aware of the historical and cultural issues inscribed in the African historical experience emerging from colonialism. The unique African experience certainly makes it more difficult to apply a universal set of guiding principles for regulating proselytism (i.e. what makes it 'proper' or 'improper'). These considerations are not in direct opposition to the principle of coercion regarding religious proselytism emerging from the international human rights regime. Rather, the African experience suggests that the notion of coercion must become more nuanced and take on a more complex character than merely protecting individual freedoms. To account for the African experience of colonialism, the issue of proselytism should also consider the structural inequalities between different religions – specifically between the larger global religions (such as Christianity and Islam) and traditional religions. This does not require the overthrow of the individual approach to human rights, but it does require giving a more layered meaning to the notion of coercion as a limitation to the freedom of religious proselytism. What Africa teaches us regarding religious proselytism is that there are strong historical and political experiences that affect the notion of fairness of the representations of religions. This is not to say that religious proselytism should be restricted prima facie, but rather that the limitations permitted to proselytism should be given space to respond to these unique historical and political experiences.

It is not possible to predict with absolute certainty what approach the African human rights regime will take regarding religious proselytism. However, from the analysis taken here, it seems that it will closely resemble the international human rights principles for the most part, but will likely be supplemented by considerations of structural inequalities between indigenous and non-indigenous African religions. If the principle of coercion is more completely adopted in the AU, which is eminently possible, it will likely incorporate some form of recognition of the loss of dignity of the African traditional religions or allow for the affirmation of collective identities. The difficulty will be in accounting for the issue of inequality without compromising the importance of

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to people's lives for it to be suppressed altogether, yet it is too problematic to leave totally unregulated for the powerful to manipulate and exploit at will. Accordingly, the question is not only how can proselytization be practiced subject to appropriate limitations, but also how can such regulation be effectively implemented in an orderly and peaceful manner?" (*ibid* at 8).

[338] *Ibid* at 13.

proselytism to the practice of freedom of religion – in terms of the freedom to promote and defend one's convictions as well as the ability for people to make free religious choices.

3.3 Communal Integrity and Religious Proselytism – Arab/Islamic Human Rights

3.3.1 Introduction to Islamic Human Rights

One of the difficulties of discussing Islamic human rights in relation to proselytism is that there are many different sources that one could examine to decipher what exactly is the "Islamic" human rights perspective. It is more difficult to determine which sources to consider when discussing Islamic human rights than for the other regions considered so far. This is because "Islamic" association is one of ideology and is not necessarily related to a geographical area – there is strong Islamic influence in the Middle East, in Africa and scattered throughout Asia. Since determining what is "Islamic human rights" enters into the realm of ideological exploration, a host of non-legal sources become potentially relevant. The obvious problem is that even a brief synopsis of all of the various sources of Islamic authority (both legal and quasi-legal) – ranging from important jurists, significant NGOs, to various groupings of Islamic states – would itself be a considerable undertaking.[339] To limit the number of sources under consideration, and in keeping with the approach taken throughout this project, I will focus on multilateral international instruments – i.e. treaties and declarations related to or emerging from recognized international organizations.[340]

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[339] See Ann Elizabeth Mayer *Islam and Human Rights: Tradition and Politics* (Boulder, Colorado: Westview Press, 2007) at 27-33 for a more thorough discussion of Islamic sources of human rights. Mayer shows that there it is impossible to speak of a single Islamic perspective on human rights, given the multiplicity and diversity of Islamic human rights sources. Mayer has said: "The question of how human rights protections relate to the Islamic tradition remains an intensely contested issue throughout the Muslim world" (*ibid* at 33); and "In summary, contemporary Muslim opinion is far too divided to provide a basis for making general pronouncements regarding where Islam stands on rights" (*ibid* at 35).

[340] Mayer uses the Universal Islamic Declaration of Human Rights [UIDHR] as one of the sources of Islamic human rights, in her book (*ibid* at 324). This document is important to Islamic conceptions of human rights insofar as it was complied by eminent Muslim scholars, jurists and representatives of Islamic movements and thought (see Preamble). However, it is not an international agreement – it is a theological statement of the Islamic perspective on human rights. For the purposes of this study the UIDHR is not a source warranting in-depth examination because it is not a legal document and does not emerge out of a recognized international state-based organization. Although it may have an effect on the laws of Islamic countries, it is not directly an expression of state attitudes or practices regarding human rights – it was not assented to by legal institutions in the same way as a treaty or a declaration from a recognized international state-based organization.

There are two main Islamic organizations in international law that fit the scope of my analysis: 1) the League of Arab States [LAS][341] and the Organization of Islamic Cooperation [OIC].[342] Both of these organizations have adopted instruments related to human rights: the former adopted the Arab Charter on Human Rights[343] and the later the Cairo Declaration.[344] These two organizations also represent two important but distinct aspects of Islamic human rights: the LAS is a regional organization, composed of Arab states in the Middle East and North Africa; on the other hand, the OIC is a purely ideological international association of Islamic based states. There is significant overlap between the members of these two organizations – the OIC being broader than the LAS. These Islamic organizations and their accompanying human rights instruments also have a strong relationship to the African human rights regional system, as several African states are members of both of the two Islamic organizations.[345]

The OIC is the most important international body representing Islamic interests. It has 57 state parties, which makes it the second largest international organization, next to the UN.[346] It is a body created to represent the international interests of Islamic states and Islamic ideals, and to promote the unity and success of its member states.[347] The OIC is similar to a regional treaty in structure and form, but it is different insofar as it is an association based on ideology rather than geography.[348] The OIC Charter clearly states

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[341] *Pact of the League of Arab States*, 22 March 1945, 70 UNTS 237 (Entered into force 29 August 1950).
[342] The Organization of Islamic Cooperation was formerly known as the Organization of Islamic Conference, as per the OIC official website: <http://www.oic-oci.org/home.asp>. I use the acronym 'OIC' to refer interchangeably to this body, irrespective of when the name was changed (as it is ultimately not important). The original Charter of the OIC was deposited with the UN in 1974 (*Charter of the Islamic Conference*, 4 March 1972, 914 UNTS 110). In 2008 a new Charter for the OIC was created: *Charter of the Organization of the Islamic Conference*, 14 March 2008, online: OIC official website <http://www.oic-oci.org/home.asp> [OIC Charter]. The OIC Charter replaced the original charter (see OIC Charter at Article 39(3)).
[343] *Arab Charter on Human Rights*, 22 May 2004, reprinted in (2006) 24 BU Int'l LJ 147 (entered into force 15 March 2008) [Arab Charter].
[344] *Cairo Declaration of Human Rights in Islam*, 5 August 1990, Adopted by the Nineteenth Islamic Conference of Foreign Ministers (Cairo), reprinted in UN World Conference on Human Rights Preparatory Committee, 4th Sess, Agenda Item 5, UN Doc A/CONF.157/PC/62/Add.18 (1993) [Cairo Declaration].
[345] Viljoen, *supra* note 285 at 12.
[346] As of January 2012, the organizational membership, according to the official website of each organization, is as follows: Council of Europe, 47 (online: <www.coe.int>); OAS, 35 (online: <www.oas.org/ >); African Union, 54 (online: <www.au.int>); LAS, 22 (online: <www.arableagueonline.org>); OIC, 57 (online: <www.oic-oci.org>); UN, 193 (online: <www.un.org>).
[347] OIC Charter, *supra* note 342 at Preamble, Article 1(1) and (2).
[348] *Ibid* at Article 3(2) requires member states to have a "Muslim majority", and to be approved as members according to the mechanisms of the OIC Charter.

that its mandate is to be supportive of the UN Charter, international law generally, and the protection of human rights in particular.[349] On the other hand, part of the mandate of the OIC is also to promote Islamic ideals, defend its universality, to combat defamation of Islam and to encourage inter-religious dialogue.[350] The OIC Charter says that part of the purpose of the OIC is also to safeguard the rights, dignity and religious and cultural identity of Muslim communities throughout the world, including those outside of the territories of member states.[351] The nature of some of these Islamic-focused principles conflict with the nominal support provided in favour of human rights. For example, maintaining the integrity of Muslim communities might imply imposing restrictions on proselytic activities, which might result in compromising the freedoms of religion and speech. Problems arise because the OIC asserts adherence to both causes – even though they may stand on opposite sides of an issue – without prescribing how these conflicts will be resolved (i.e. which principles will have priority) or how difficult issues will be navigated. Without clearly stating whether Islamic principles will have priority over or be subject to international human rights, ambiguity and uncertainty permeate the alleged commitment to supporting international human rights principles.

The LAS is the main geographical regional body in the Arab/Islamic world, having been formed in 1950 after the coming into force of the Pact of the League of Arab States. The LAS originally had only 6 member states; now there are 22 member states.[352] The purposes of the LAS are to foster unity, political coordination and collaboration between Arab nations – specifically in the areas of economics (trade, finances, etc), communications and transportation, culture, nationality (passports, visas, etc), social welfare and health matters.[353] There is no specific mandate in the Pact of the League of Arab States for the protection or promotion of international human rights. At the same time, however, there is a notable absence of proclamations of fidelity to the Islamic faith and to the protection of Muslim communities, which distinguishes it from the OIC. So, in its origin the LAS appears to be much more neutral with regard to human rights and Islamic religious principles.

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[349] *Ibid* at Preamble, Article 1(7) and 2(1).
[350] *Ibid* at Preamble, Article 1(11) and (12).
[351] *Ibid* at Article 1(16).
[352] See League of Arab States official website: (online) <www.arableagueonline.org>.
[353] See the Pact of the League of Arab States, *supra* note 341 at Article 2.

3.3.2 Content of the Cairo Declaration and Arab Charter regarding proselytism

The Cairo Declaration emerges from the OIC, having been adopted and issued at the Nineteenth Islamic Conference of Foreign Ministers in Cairo on August 5, 1990.[354] It is important to note from the outset that the Cairo Declaration is not a binding legal instrument – it is a declaration drafted by Islamic experts and adopted by the OIC, articulating what the OIC understands to be the Islamic perspective on international human rights. Given the vast support for the OIC amongst the Islamic international community (as mentioned earlier), the theory of Islamic human rights provided in the Cairo Declaration cannot be overlooked simply because it is not legally binding. However, the actual effect that the Cairo Declaration has on state behaviour is questionable, since it cannot be used as a standard of legal enforcement. The Cairo Declaration is perhaps best seen as an expression of Islamic ideology manifested in an international organizational context. It therefore likely expresses a view that is fundamentally shared by OIC member states, while not necessarily directing government action.

The Cairo Declaration is a controversial document, and has often been criticized as being incompatible with international human rights principles.[355] The controversial nature of the Cairo Declaration is evident in relation to religious freedom and proselytism. Of utmost significance, the Cairo Declaration does not provide specific protection for the freedom of religion. Some marginal protection of religion is found in Article 1, which prohibits discrimination on the basis of religious belief (amongst other things). The closest thing to recognition of religious freedom is found in Article 18:

> (a) Everyone shall have the right to live in security for himself, his religion, his dependents, his honour and his property.
>
> (b) Everyone shall have the right to privacy in the conduct of his private affairs, in his home, among his family, with regard to his property and his relationships…

Religion is not granted as a freestanding right, but rather as a part of a bundle of rights that individuals are guaranteed to hold "in security". Combining religion with the right to privacy in Article 18(b) shows that one's protection of his or her religious belief is

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[354] The OIC submitted the Cairo Declaration to the UN Preparatory committee for the World Conference on Human Rights asking to have it included as a contribution by the OIC to the conference (June 1993, UN Doc. A/CONF.157/PC/62/Add.19) containing a full text version of the Declaration.

[355] See Mervat Rishmawi, "The revised Arab Charter on Human Rights: A Step Forward?" (2005) 5:2 Hum Rts L Rev 361 at 367 [Rishmawi, "A Step Forward?"].

parallel to one's protection of his or her privacy. It is not that religion is relegated to the private sphere as such (which is essential to secularism), but rather that an individual has the right to protect and hold secure his or her religious beliefs. This could be interpreted loosely to mean either that an individual's religious beliefs are to be determined freely by the individual as of right (similar to Article 18(1) of the ICCPR), or it could be interpreted so as to prohibit activity that challenges or coerces someone in relation to his or her religious beliefs (similar to Article 18(2) of the ICCPR). Given the context in which the protection of religious freedom is found – as a matter of personal security – the latter interpretation seems more likely. Despite this, the precise meaning and effect of Article 18, especially with regard to the issue of religious proselytism, is difficult to determine. It might be interpreted as restricting religious proselytism that is 'coercive' (to allow individuals to 'secure' their religious beliefs without undue interference, which would be close to the developing trend in the greater international human rights system), or it might be interpreted as precluding proselytic activity altogether as a threat to individual religious security (or more particularly to the security of those of Muslim faith). Given the context of the purposes of the OIC discussed above, it is more likely that the latter interpretation is accurate. There is, however, a distinct ambiguity in the protection of religious freedom communicated in Article 18 of the Cairo Declaration, which renders its effect on the issue of proselytism equivocal.

Article 10 of the Cairo Declaration makes an important statement on religious freedom, with specific impact on the issue of proselytism:

> Islam is the religion of unspoiled nature. It is prohibited to exercise any form of compulsion on man or to exploit his poverty or ignorance in order to convert him to another religion or to atheism.

Article 10 provides specific restriction to proselytizing people of the Islamic faith. This principle is similar in structure to the Greek law criminalizing improper proselytism – it prevents coercion or exploiting poverty or ignorance to achieve conversion. There is also the unwelcome addition of protection only for those within the Muslim faith – it does not prevent coercing people to become Muslim or to convert people away from any other religion. The underlying concern of Article 10 is not for human rights but for the protection of the Muslim faith. Article 10 supports the view that the Islamic religion is superior, which is also one of the arguments used to defend the Islamic rules

criminalizing apostasy: a conservative interpretation of Islamic principles justifies punishing apostasy on the basis that no reasonable person would abandon the Muslim faith.[356] This same logic also promotes the argument that the promotion of other religions will only be harmful (threatening the strength of the 'perfect' Islamic religion) and should be banned.[357] The view of Islam promoted in Article 10 of the Cairo Declaration is quite clearly opposed to the proselytizing of Muslims, and, given the conservative logic that undergirds this perspective, it is also likely the case that any proselytism allowed of Muslims will be very limited – if indeed Islam is the 'unspoiled' religion, there is no value in anyone leaving Islam for any reason, and any conversion away from Islam would be suspected of using bribery or duress.[358] Article 10 helps shed some light on Article 18, showing that it should be interpreted as primarily protecting individuals (especially Muslims) from being proselytized rather than as a legitimate protection of the right to freedom of religion more generally.

The desire to protect the Muslim faith continues in Article 22 of the Cairo Declaration. Article 22 is also relevant to the issue of religious proselytism, as it provides freedoms and restrictions for the expression of one's opinions:

> (a) Everyone shall have the right to express his opinion freely in such manner as would not be contrary to the principles of Shari'ah.
>
> (b) Everyone shall have the right to advocate what is right, and propagate what is good, and warn against what is wrong and evil according to the norms of Islamic Shari'ah.
>
> (c) Information is a vital necessity to society. It may not be exploited or misused in such a way as may violate sanctities and the dignity of Prophets, undermine moral and ethical values or disintegrate, corrupt or harm society or weaken its faith.

Although Article 22 ostensibly recognizes the importance of the free exchange of ideas and protects the right of free expression, these protections are made subject to the principles of Shari'ah. The freedom of expression therefore cannot contradict Islamic beliefs, or at least contradict those beliefs in a way contrary to Islamic teachings. Ann Elizabeth Mayer rightly notes that one of the main problems with subjecting rights to the

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[356] See the comments of Sultanhussein Tabandeh discussed by Mayer, *supra* note 339 at 176-178. Also see Kamran Hashemi, *Religious Legal Traditions, International Human Rights Law and Muslim States* (Leiden: Martinus Nijhoff, 2008) at 76-77.

[357] This is precisely the view expressed by Saltanhussein Tabandeh, as discussed by Mayer, *supra* note 339 at 177.

[358] Mayer agrees with this argument, saying that Article 10 is related to a conservative interpretation of Islamic rules on apostasy and results in the view that every situation where someone converts from Islam to another religion would necessarily result from improper or coercive means and therefore not be allowed (see *ibid* at 189).

principles of Shari'ah is that it is an undefined and vague standard, which leaves the standard open to domestic interpretation.[359] Mayer argues that in a system subjected to Shari'ah it is likely that the ability to convert Muslims to other faiths would be restricted, as would any disparaging remarks regarding the prophet Mohammed, but the extent of these restrictions are vague and difficult to define precisely.[360] This ambiguity is objectionable because it provides the opportunity for Islamic states to interpret "Shari'ah" in a way favourable to their own laws, fashioning a veil of religious legitimacy for repressive practices. Recalling the perspective taken in Article 10 – the supremacy of Islam – it is clear that Article 22 will not permit expressions that assert another religion as greater than Islam, which is the core of proselytism. What is more is that Article 22(c) draws a connection between the preservation of Islamic teachings and the health of society. Correlating Islamic purism with maintaining social order has been a common justification for restricting proselytic activities (to varying degrees) in Islamic states.[361] Article 22 therefore does not likely protect religious proselytism, especially of Muslim adherents.

The vague subjection of human rights to the Shari'ah seen in Article 22 is an issue that permeates the whole of the Cairo Declaration. Article 24 says: "All the rights and freedoms stipulated in this Declaration are subject to the Islamic Shari'ah." In addition to this, Article 25 prescribes an interpretive scheme centred on the Shari'ah: "The Islamic Shari'ah is the only source of reference for the explanation or clarification of any of the articles of this Declaration." This requires the rights in the declaration to be determined in reference to Shari'ah *only* – no other source of interpretation is permitted, including the human rights principles developed through the United Nations. This is problematic for at least two reasons. First, it undermines the OIC Charter commitment to support the UN Charter and international human rights standards.[362] Secondly, the meaning of the standard of "Islamic Shari'ah" is not provided in the declaration, which empties the rights of their explicit meaning and replaces it with reference to a system external to the declaration itself. As mentioned earlier, the problem with the ambiguity of the "Shari'ah"

[359] See *ibid* at 178-179, where Mayer discusses the issue with regard to the UIDHR. The argument made by Mayer applies equally to the Cairo Declaration.
[360] *Ibid* at 178-179. Also see Hashemi, *supra* note 356 at 77-78.
[361] Hashemi, *supra* note 356 at 77.
[362] OIC Charter, *supra* note 342 at Article 1(7) and 2(1).

standard is that its meaning is open to the interpretation of domestic authorities, which allows them to adopt a self-serving interpretation that would justify the violations of human rights.[363] Mayer argues that this sort of ambiguity is common to all Islamic human rights schemes.[364]

This is a very important point regarding Islam and human rights generally: it is not necessarily the case that Islamic principles are opposed to human rights, or that following Shari'ah will lead to violations of human rights. Rather, the vagueness of Shari'ah standards in relation to human rights has allowed Islamic human rights to be interpreted by domestic authorities in a way contrary to the very notion of rights. This system of misinterpretation has resulted in an association between anti-human rights state action and Islamic law. Ann Elizabeth Mayer argues over and again that the apparent incompatibility between Islamic law and human rights is in fact merely an expression of the abuse of Islamic principles by oppressive regimes: "… human rights violations that seem at first blush to be tied to the Islamic tradition often turn out upon closer inspection to be intertwined with local politics."[365] For Mayer, the ambiguity and lack of independent interpretation and application of the rights (and qualifications) in the Islamic human rights instruments are the more direct causes of disrespect of rights, which means that the Islamic religious qualifications of rights are merely incidental. Although the Cairo Declaration has been criticized as incompatible with human rights it is not the case that it prescribes state activity that is contrary to human rights. Indeed some scholars have argued that Islamic principles are compatible with human rights. For example, Mashood Baderin argues that the foundational principles of Islamic law are not incompatible with the principles of human rights, and that if focus is placed on the similarity of these shared foundational principles then Islamic law can be used to develop human rights domestically in Muslim states.[366]

Although Mayer's argument has a certain appeal, it should not be overstated. Recall the obvious preferential protection in the Cairo Declaration provided to Muslims

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[363] Mayer, *supra* note 339 at 93.
[364] *Ibid* at 77.
[365] *Ibid* at 175.
[366] Mashood A Baderin, "The Role of Islam in Human Rights and Development in Muslim States" in Javaid Rehman & Susan C Breau, eds, *Religion, Human Rights and International Law: A Critical Examination of Islamic State Parties* (Leiden: Martinus Nijhoff, 2007) 321, especially at 328-329.

and the Islamic faith. Although the Cairo Declaration does not openly prescribe violations of human rights, it does 'stack the deck', so to speak, in a way that favours a more conservative approach to Islamic law; certainly the prevailing ambiguity fails to protect against human rights abuses. This appears to be especially true with regard to proselytism. Therefore, on the one hand the Cairo Declaration is a document without a clear standard, providing a bald appeal to engage religious principles in the political process. On the other hand, the Cairo Declaration sets itself up to be used against religious proselytism, especially proselytism of Muslims. It also does little to nothing to mitigate the application of certain conservative interpretations of Islamic law, such as laws punishing apostasy from Islam.

In many ways the Arab Charter is a significantly different instrument than the Cairo Declaration. The Arab Charter was originally adopted on September 15, 1994[367] by the League of Arab States and is the only Arab/Islamic regional international human rights treaty. The original Arab Charter never entered into force because it was not ratified by any of the members of the LAS.[368] It was often criticized as not conforming to the greater international human rights standards.[369] The LAS decided to modernize the original Arab Charter, and so arranged for its redrafting in 2003.[370] The first new draft by the Arab Commission was re-drafted by a panel of 'independent' experts, in order to bring it in line with UN human rights.[371] The new draft Charter was then referred back to the state parties, who made some final revisions – resulting in the version of the Arab Charter that is currently in force.[372]

The Arab Charter protects the freedom of religion and conscience at Article 30. The form used is most similar to Article 8 of the African Charter on Human and Peoples' Rights. In the Arab Charter, Article 30(1) provides a general protection for the freedom

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[367] *Arab Charter of Human Rights*, 15 September 1994, Council of the League of Arab States, 102nd Sess, Res 5437, (1997) 18 HRLJ 151 [original Arab Charter]. A full version of the document can also be found online: <http://www1.umn.edu/humanrts/instree/arabhrcharter.html>.
[368] Rishmawi, "A Step Forward?", *supra* note 355 at 362.
[369] *Ibid* at 361-362.
[370] LAS Council Res. No 6302, 24 March 2003. The Arab Commission on Human Rights, a body created by the LAS, was charged with the task of redrafting the Arab Charter.
[371] Mervat Rishmawi, "The Arab Charter on Human Rights and the League of Arab States: An Update" (2010) 10:1 Human Rights Law Review 169 at 170 [Rishmawi, "An Update"].
[372] Arab Charter, *supra* note 343. For a more detailed discussion of the drafting of the new Arab Charter and the recent developments in the League of Arab States, see Rishmawi, "A Step Forward?", *supra* note 355, and Rishmawi, "An Update", *supra* note 371.

of religion and conscience: "Everyone has the right to freedom of thought, conscience and religion and no restrictions may be imposed on the exercise of such freedoms except as provided for by law." There is no explicit protection to choose or to change one's religion. Article 30(2) provides for freedom to manifest one's religion in limited circumstances:

> The freedom to manifest one's religion or beliefs or to perform religious observances, either alone or in community with others, shall be subject only to such limitations as are prescribed by law and are necessary in a tolerant society that respects human rights and freedoms for the protection of public safety, public order, public health or morals or the fundamental rights and freedoms of others.

This is nearly identical to the limitations found in the ICCPR Article 18(3), the only addition being that restrictions must be necessary in a tolerant society that respects human rights and freedoms.

The weakness in the Arab Charter's protection of religious freedom, and what distinguishes it from the other international human rights treaties, is that it builds into the protection itself (in Article 30(1)) the vague standard that religious freedom can be restricted in ways "provided for by law". This limitation is similar to the limitations in the African Charter on Human and Peoples' Rights noted earlier, which were commonly called 'claw-back clauses', and can similarly be criticized for providing no substantive limit to the restrictions permitted to the right so long as they follow the merely formal requirement of being 'legal' domestically.[373] Whereas in the African human rights context there was a clear interpretation that substantive standards were to be read into the formal requirements,[374] such an interpretation has not been provided in the context of the Arab Charter. In addition, in Muslim states, where the law is often based on religiously defined Islamic principles, there is no basis on which to determine whether the domestic laws limiting religious freedom constitute a violation of the right to religious freedom. In the context of Muslim countries, allowing restrictions to religious freedom according to the standard "provided for by law" may in fact be a veiled reference to Islamic Shari'ah principles.[375]

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[373] Rishmawi, "An Update", *supra* note 371 at 171-172.
[374] See *Media Rights Agenda v Nigeria*, *supra* note 315.
[375] This is clearly the situation in the Universal Islamic Declaration on Human Rights, which was analyzed by Ann Elizabeth Mayer in her book *Islam and Human Rights: Tradition and Politics* as one of the sources of Islamic human rights (Mayer, *supra* note 339). Mayer identified an important disjoint between the Arabic original and the English translation in this document: where the original referred to "Shari'ah" the

The same issue arises with regard to the freedom of expression, which is protected at Article 32(1) of the Arab Charter:

> The present Charter guarantees the right to information and to freedom of opinion and expression, as well as the right to seek, receive and impart information and ideas through any medium, regardless of geographical boundaries.

It is noteworthy that the right to receive information is recognized alongside the right to freely express opinions. As was seen in the OAS context, such a view can be used to support an argument for expanding the freedom of religion by protecting the whole process of developing religious conviction (or of opinions more generally) – which likewise would provide greater freedom for religious proselytism. However, it is doubtable that such a conclusion would be accurate in the context of the Arab Charter, given the restrictions outlined in Article 32(2):

> Such rights and freedoms shall be exercised in conformity with the fundamental values of society and shall be subject only to such limitations as are required to ensure respect for the rights or reputation of others or the protection of national security, public order and public health or morals.

Restricting free expression on the basis of "fundamental values of society" is potentially problematic. This is especially so in the Arab/Islam context, where, as I have been arguing, it is foreseeable that states will interpret the 'fundamental values of society' as including the protection of Islam (or following Shari'ah, or protecting Muslim communities). Of course this will depend on the political and religious climate in each individual state, being more likely to occur in states with more conservative religious leanings. But the point is that such broad ambiguity in such an important limitation is a significant flaw in an international human rights treaty – human rights treaties should clarify a common standard, not promulgate indeterminacy. This also means that the protection of expression will not help protect religious proselytism but actually might restrict it further.

Other than these structural difficulties, there is nothing that suggests the Arab Charter contradicts the international human rights principles regarding religious freedom and proselytism. Although there is some language in the preamble that may cause concern – such as references to "…the fact that the Arab homeland is the cradle of

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translation referred to "law", hence providing a misleading sense of what the "law" actually meant in the context of Islamic states (*ibid* at 178). It is my argument that even without such a clearly misleading interpretation, there is still the same result with the requirements of law for Muslim states, where the legal order is based on (or heavily influenced by) Islamic principles.

religions and civilizations…", to the importance of the revelations of the Islamic religions, and providing nominal support to the Cairo Declaration – the religious freedom guaranteed seems to be generally consistent with the religious freedom protections found in the other international human rights mechanisms discussed so far. Of particular importance in the Arabic/Islamic context, the Arab Charter, unlike the Cairo Declaration, does not show a strong preference for the Islamic religion. Also unlike the Cairo Declaration, the Arab Charter does not make a general statement subjecting the protected rights to the Shari'ah. To the contrary, the Arab Charter emphasizes the importance of other human rights instruments:

> Nothing in this Charter may be construed or interpreted as impairing the rights and freedoms protected by the domestic laws of the States parties or those set force in the international and regional human rights instruments which the states parties have adopted or ratified…[376]

This means that the principles that have developed in the UN human rights system will apply where the Arab Charter member involved is also a member of the ICCPR. There are a few notable state members of the Arab Charter that are not members of the ICCPR, including United Arab Emirates, Brunei, Malaysia, Oman, Qatar, and Saudi Arabia. Although the UN standard is not consistently applied to all Arab Charter members, it is remarkable that the Arab Charter does not set itself in opposition to the UN international human rights principles but is willing to recognize the legitimacy of these principles and allow their application in the Arab context.

It is difficult to say with certainty how the issue of proselytism fits into the Arab Charter. It appears that the standard will not differ significantly from the UN standard – given the absence of particular Islamic restrictions to human rights as seen in the Cairo Declaration. In addition, the basic structure of rights in the Arab Charter relevant to religious proselytism is similar to those that have led to the development of the standards in the UN context. On the other hand, there is enough space left in the wording of the Arab Charter for the conservative Islamic perspective to creep in, which may result in significant limitations to religious proselytism. Only time will show whether the application of the Arab Charter is in fact consistent with the developing international standard in the UN regarding the issue of religious proselytism.

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[376] Arab Charter, *supra* note 343 at Article 43.

One of the most significant deficiencies with both the Arab Charter and the Cairo Declaration is that there is no well-developed mechanism for interpreting and applying the respective instruments. This criticism is particularly significant for the Arab Charter, since it is a binding international legal treaty without a mechanism to effectively interpret or apply it.[377] The Arab Charter does create a Committee on Human Rights,[378] but its function is severely restricted. The Committee is charged with the task of writing reports on the adherence of the member states to the Arab Charter.[379] The difficulty is that the Committee is only able to consider self-reported information provided by each member state every 3 years.[380] There is no power provided for state parties or for individuals to refer matters to the Committee or to provide information to the Committee for consideration. With this limited information, and limited opportunity to actually apply the protected human rights principles, the interpretive powers of the Committee are greatly restricted. The Committee has engaged in discussions with the OHCHR and other international NGOs to determine ways that the Arab Charter and Committee could engage with the international community regarding the development of human rights. Apparently, these meetings went quite well, and the Committee has expressed an intention to engage NGOs in its proceedings, and to publish its opinions on the state reports.[381] Mervat Rishmawi, an Islamic human rights scholar, expressed guarded optimism in his review of the Committee created under the Arab Charter, saying that it has the difficult task of breaking the perception that the Arab region is dominated by religious and cultural concerns if it is serious about advancing human rights.[382] It will be particularly interesting to see how the Committee deals with issues related to religious proselytism in the future – whether it will continue to support the developing international standards or whether it will defer to the domestic powers to deal with according to their traditions and laws. Either result seems plausible.

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[377] Mohammed Amin Al-Midani & Mathilde Cabanettes, "Arab Charter on Human Rights 2004" (2005) 24:2 BU Int'l LJ 147 at 149.
[378] See Arab Charter, *supra* note 343 at Article 45; also see Article 48 for an outline of the role of the Committee. For a more thorough discussion of the recent formation of the Committee, see Rishmawi, "An Update", *supra* note 371 at 172-175.
[379] Arab Charter, *supra* note 343 at Article 48(3)-(4).
[380] *Ibid* at Article 48(2).
[381] Rishmawi, "An Update", *supra* note 371 at 174-175.
[382] *Ibid* at 178.

In June 2011 the OIC also created an "Independent Permanent Commission on Human Rights",[383] which was given the mandate to: "…promote the civil, political, social and economic rights enshrined in the organization's covenants and declarations and in universally agreed human rights instruments, in conformity with Islamic values."[384] The ambiguity already plaguing the Cairo Declaration creeps into the OIC IPCHR, insofar as 'Islamic values' is not defined and its determination is assumedly left to the domestic authorities. In addition, Article 8 of the OIC IPCHR Statute makes the OIC IPCHR submissive to the OIC states as well as to the Islamic Ummah. So, the independence of the OIC IPCHR is dubious. How it will deal with issues of proselytism is almost unquestionable: it will pander to the preferences of the member states, likely avoiding any condemnation of individual state practices and also probably offering greater religious legitimation for state actions that restrict religious proselytism.

3.3.3 Conclusion

With regard to proselytism, the Islamic sources discussed provide a bit of a mixed bag. On the one hand, the Cairo Declaration does not provide any significant protection for the freedom of religion and restricts all of the protected rights to the principles of Islamic Shari'ah. Since Shari'ah is not defined in the Cairo Declaration, in order to determine how the issue of proselytism will be dealt with one would have to examine the interpretation of Islamic religious and legal doctrines developing in each individual state. The Arab Charter provides a much less controversial approach to the issue of proselytism. Unfortunately, the protections of freedom of religion and the permitted limitations to the freedom of religion are quite vague and indistinct in the Arab Charter. As such, the Arab Charter does not really add anything new to the discussion of religious proselytism – it might be applied in a way similar to the UN standards regarding proselytism or it might

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[383] The Independent Permanent Commission on Human Rights was created in June 2011, through the *Establishment of the OIC Independent Permanent Commission on Human Rights*, OIC Council of Foreign Ministers, 38th Sess, Res No 2/38-LEG, OIC/CFM-38/2011/LEG/RES/FINAL (2011) [OIC IPCHR]. The OIC IPCHR is governed by the *Statute of the OIC Independent Permanent Commission on Human Rights*, OIC/IPCHR/2010/STATUTE (2011), OIC Council of Foreign Ministers, 38th Sess, OIC/CFM-38/2011/LEG/RES/FINAL (2011), annex 7 [OIC IPCHR Statute].

[384] OIC Charter, *supra* note 342 at Article 15. Oddly, Article 8 of the IPCHR statute, *supra* note, makes the IPHCR submissive to the OIC states as well as to the Islamic Ummah – an odd blending of international law and religious authority.

be applied in line with conservative Islamic religious principles regarding proselytism and apostasy.

Given the lack of interpretive mechanisms and the lack of opportunity to develop meaningful commentary regarding the issue of proselytism in the Cairo Declaration and Arab Charter, the issue will likely remain unresolved for the foreseeable future. Although Islamic conservatism is alive and well in various Islamic states, making it likely that both the Cairo Declaration and the Arab Charter will be interpreted by some states so as to restrict religious proselytism, there is also within Islamic thought views that are in favour of maintaining solidarity with international human rights, which might result in state practices more open to allowing religious proselytism. Unfortunately, neither the Cairo Declaration nor the Arab Charter provides a clear voice directing the Arab/Islamic community in either direction, resulting in incoherence of the Islamic standard of human rights regarding religious proselytism.[385]

It is also difficult to say what contribution the Islamic human rights regime can make to the international human rights conception of religious proselytism. The problem with the Islamic approach is that it is unwilling to recognize the value of religions other than Islam. The human rights model emerging from the Islamic world is, in some ways, more theological than legal, insofar as it asserts the value of Islam over all other worldviews. Hence, the delicacy and complexity of the issue of religious proselytism is ignored completely. In the Islamic human rights regime, it ultimately does not matter whether people change religions or proselytize each other, so long as they are not converting away from the Muslim faith and the Muslim faith is not being challenged. The great lesson to learn here is that a human rights standard regarding religious proselytism must guard itself against being used for political and ideological purpose. The weakness in the Islamic and Arab treaties is that they leave important terms of limitations and interpretation undefined, which makes misuse of the regional standard extremely likely (and ultimately uncontrollable). Allowing for political and ideological influences in regulating religious proselytism destroys any hope of developing an effective standard for the limitation of human rights abuses.

[385] Mayer, *supra* note 339 at 194.

3.4 Asian Values and Religious Proselytism

3.4.1 Introduction to Asian regional human rights

Currently there is no regional human rights treaty pertaining to the whole of the Asian continent. There seem to be at least a couple reasons for this. First, the continent of Asia is extremely diverse in terms of geography, religion, culture and history, which makes it very difficult to find a common articulation and unified approach to human rights.[386] The Asian continent does not share a historical experience that would lead it to develop a strong system of human rights (as the second World War has done in Europe).[387] Secondly, the legal sensibility that has developed in many Asian countries does not lend itself to legal institutions and norms of general application. In the 1990s an international discussion regarding the promotion of human rights in Asia turned sideways when Asian states began to articulate their opposition to the developing international human rights regime and its place in Asia – spawning what has been referred to as the "Asian Values debate".[388] The most succinct description of the 'Asian Values' regarding human rights is the 1993 Bangkok Declaration of Asian states, which was created by a group of Asian states meeting in advance of the Vienna World Conference on Human Rights.[389] The view emerging from this was one of regional and cultural particularism, state sovereignty and non-interference in domestic matters, which militated against the imposition of international human rights.[390] Although in many ways the "Asian Values" debate has ended – many academics pointing to the 1997 financial crisis in Asia as the end of the debate[391] – it still reveals the fundamental suspicion with which many Asian countries regarded, and still regard, the issue of human rights. This helps explain why the development of governmental human rights institutions in Asia has been resisted.

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[386] Wictor Beyer, *Assessing an ASEAN Human Rights Regime: A New Dawn for Human Rights in Southeast Asia?* (Master's Thesis, Lund University, Faculty of Law, 2011) [unpublished] at 1-2 and 19-21.
[387] Tan Hsien-Li, *The ASEAN Intergovernmental Commission on Human Rights: Institutionalizing Human Rights in Southeast Asia* (Cambridge: Cambridge University Press, 2011) at 3.
[388] For more detail on the "Asian Values" debates, see Beyer, *supra* note 386 at 25-27. Also see Randall Peerenboom, "Beyond Universalism and Relativism: The Evolving Debates About Values in Asia" in Dinah L. Shelton, ed, *Regional Protection of Human Rights* (Oxford: Oxford University Press, 2008) 1057.
[389] *Report of the Regional Meeting for Asia of the World Conference on Human Rights, Bangkok*, UN Doc A/CONF.157/ASRM/8 (1993) [Bangkok Declaration].
[390] For example, see the references provided by Tan, *supra* note 387 at 1-3.
[391] Yung-Ming Yen, "The Formation of the ASEAN Intergovernmental Commission on Human Rights: A Protracted Journey" (2011) 10:3 J Hum Rts 393 at 398.

Considering the difficulty with forming human rights in the greater Asian region, it has been suggested that human rights could more successfully be developed through sub-regional organizations.[392] One such organization, which has shown signs of the beginnings of the institutionalization of human rights, is the Association of Southeast Asian Nations [ASEAN]. Given the lack of other sources of human rights in Asia, and given the scope of this project, the focus of the discussion regarding Asian human rights will be on the ASEAN regime.

The ASEAN was established in 1967 pursuant to the ASEAN Declaration, being originally composed of 5 member states: Indonesia, Malaysia, the Philippines, Singapore and Thailand.[393] The primary purposes of the ASEAN, as outlined in the ASEAN Declaration, was to assist the member states in economic, social and cultural development, to collaborate on issues of mutual interest, to promote peace and cooperation, and to follow the principles of the United Nations.[394] Human rights were not included in the purview of the ASEAN in its origins and did not factor into its activities for a large portion of its existence.[395] The ASEAN went through a phase of restructuring in the early 21st century, and in 2007, on the 40th anniversary of the formation of the ASEAN, the ASEAN Charter replaced the ASEAN Declaration as the constitutive document of the organization.[396] There are currently 10 signatories to the ASEAN Charter: Brunei Darussalam, Cambodia, Indonesia, Lao People's Democratic Republic, Malaysia, Myanmar, Philippines, Singapore, Thailand and Viet Nam. Under the ASEAN Charter the organisation morphed into a more rule-based body to closer resemble the European Union.[397] The purposes of the organization were expanded in the ASEAN Charter. Most notably, respect for and the development of human rights were added as

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[392] Tan, *supra* note 387 at 3.
[393] *Declaration Constituting an Agreement Establishing the Association of South-East Asian Nations (ASEAN)*, 8 August 1967, 1331 UNTS 235 [ASEAN Declaration]. The ASEAN Declaration is sometimes called the Bangkok Declaration, since it was signed in Bangkok; I avoid using this term to avoid confusing the ASEAN Declaration with the 1993 Bangkok Declaration, *supra* note 389, regarding "Asian Values" and human rights.
[394] ASEAN Declaration, *supra* note 393 at 236-237.
[395] Tan, *supra* note 387 at 2.
[396] *Charter of the Association of Southeast Asian Nations,* 28 November 2007, UN Reg No I-46745, 30 October 2009, reprinted in (2008) 12 SYBIL 263 [ASEAN Charter].
[397] See James Munro, "The Relationship Between the Origins and Regime Design of the ASEAN Intergovernmental Commission on Human Rights (AICHR)" (2011) 15:8 Int'l J Hum Rts 1185 at 1189. Also see Tan, *supra* note 387 at 140-141, where the author notes the distinct move of the ASEAN to closer resemble the EU while also emphasizing the differences retained in the ASEAN organizational structure.

purposes of the ASEAN organization.[398] Apparently, there was a significant amount of conflict between the ASEAN members when negotiating what role human rights should play in the new ASEAN Charter.[399] In addition to respect for human rights as a value of the ASEAN, the ASEAN Charter also provided for the creation of a body dedicated to human rights: Article 14(1) says: "In conformity with the purposes and principles of the ASEAN Charter relating to the promotion and protection of human rights and fundamental freedoms, ASEAN shall establish an ASEAN human rights body." The human rights body was not created simultaneously to the institution of the new ASEAN Charter. Rather, it was not until July 20, 2009, that the ASEAN Foreign Ministers, at their 42nd meeting in Phuket, Thailand, approved of the creation of the ASEAN Intergovernmental Commission on Human Rights [AICHR], pursuant to Article 14 of the ASEAN Charter, along with its constitutive document (called the Terms of Reference).[400]

Other than the vague references in the ASEAN Charter to respect and develop human rights, the AICHR is the cornerstone of human rights in the ASEAN. The purpose of the AICHR is to promote and protect the human rights of the ASEAN people, bearing in mind regional and national particularities, to respect different historical, cultural and religious backgrounds, and to uphold the international human rights standards prescribed in the UDHR and the 1993 Vienna Declaration and Program of Action.[401] For the most part the mandate of the AICHR, as outlined in Article 4 of the ToR, is to be an informational and promotional body with no actual power to ensure state compliance with human rights.[402] This is echoed at other points of the ToR, that the AICHR is to take a "non-confrontational" approach to the promotion and protection of human rights.[403] It is difficult to speak of the enforcement of human rights in the ASEAN context since there is not yet a set of standards specific to the ASEAN body. The human rights regime in the

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[398] For example, ASEAN Charter, *supra* note 396 at Article 1(7), says one of the purposes of ASEAN is: "to…promote and protect human rights and fundamental freedoms, with due regard to the rights and responsibilities of the Member States of ASEAN." In addition, Article 2(2) says that the ASEAN member state are to take as one of their guiding principles "(i) respect for fundamental freedoms, the promotion and protection of human rights, and the promotion of social justice; (j) upholding the United nations Charter and international law, including international humanitarian law, subscribed to by ASEAN Member states."
[399] Munro, *supra* note 397 at 1189.
[400] *Terms of Reference of ASEAN Intergovernmental Commission on Human Rights*, ASEAN Foreign Ministers, 42nd Mtg, 20 July 2009, online: ASEAN official website <http://www.asean.org> [ToR].
[401] *Ibid* at Article 1.1-1.6.
[402] Yen, *supra* note 391 at 400.
[403] ToR, *supra* note 400 at Article 2.4.

ASEAN is still in its infancy. In recognition of this, the AICHR is to take an "evolutionary" approach to its mandate.[404] To this end, the ACIHR is charged with the task of developing a declaration of human rights that will define the human rights standard for the ASEAN members, and to promote the building of capacities to effectively implement human rights obligations.[405]

The emerging ASEAN human rights regime has come under heavy criticism. One of the main criticisms is that the AICHR ToR essentially protects the notion of "Asian Values" by incorporating the principles of state independence, state sovereignty and non-interference in domestic issues, rather than developing meaningful human rights.[406] Some have taken a more optimistic view of the AICHR, observing that the ToR provides room for the AICHR to become stronger and to better define the objective human rights standard expected of ASEAN members.[407] Munro indicated that two of the ASEAN members participating in the creation of the AICHR expressed the view that the powers and mandate of the AICHR should be interpreted liberally.[408] This is supported by the "evolutionary" approach prescribed in the ToR, as well as by the references to the creation of a declaration on human rights and the need to develop capacities to ensure the implementation of human rights. The lack of adjudicative authority is certainly different than the approach taken in Western human rights organizations, which have focused on binding human rights instruments and courts. However, Munro argues that the non-confrontational approach taken in the AICHR may actually be more productive in engaging the ASEAN member states to participate in the human rights regime and to develop a commitment to the normative structure of human rights, by avoiding the alienation of its members.[409] A final criticism of the ASEAN human rights regime is that its emerging structure is merely mimicking the pattern of regional bodies and human rights mechanisms elsewhere as a result of international pressure. The result of this

[404] *Ibid* at Article 2.5.
[405] *Ibid* at Article 4.2 and 4.4.
[406] See Yen, *supra* note 391 at 397; and Beyer, *supra* note 386 at 30. For example, Articles 2.1(a), 2.2, 2.3 and 1.4 of the ToR, *supra* note 400, are essentially a reproduction of the Bangkok Declaration, *supra* note 389, Articles 5, 7, 9 and 8, respectively.
[407] See Tan, *supra* note 387, and Beyer, *supra* note 386.
[408] Munro, *supra* note 397 at 1190-1191.
[409] *Ibid* at 1194.

mimicry is that it creates a gap between the institutional structures and local realities.[410] Munro argued quite convincingly:

> ASEAN did not just create this body to respond to its own internal needs, but perhaps more importantly, it created the AICHR because regional human rights bodies are nowadays a 'standard' part of regional communities. Where there is an established global model for regional communities, the mere omission to create such a include a regional human rights body in the revamped ASEAN framework would have sent a message to the world that ASEAN is not interested in human rights. Whether ASEAN deliberately sought to avoid sending such a message due to pragmatic material concerns, or whether it felt social pressures to avoid pariah status, is unclear. What is clear, however, is that there was a global cultural script on the appropriate structure and functions of regional communities, and ASEAN felt compelled to operate within that script.[411]

3.4.2 Proselytism in the ASEAN human rights regime

Unfortunately, due to the youth of ASEAN human rights there is no way to say how the issue of proselytism will be dealt with. As it currently stands, there is no legal instrument regarding the protection of human rights, and hence no explicit guarantee of any of the rights relevant to proselytism – no guarantee of religious freedom or freedom of expression. Although the AICHR has been charged with creating a declaration on human rights, at this point there is very little on which to speculate how the issue of proselytism will be dealt with in the future.

There are some general provisions in the ASEAN organizational regime that provide minimal support for the freedom of religious proselytism. For example, the ASEAN Charter and the AICHR ToR establish as one of the guiding principles the respect for different cultures, languages and religions of the ASEAN people.[412] The AICHR also recognizes the most general human rights principles in international law – upholding the international human rights standards in the UDHR, and to respect international human rights principles generally.[413] These provisions could be interpreted as providing broad protection for the freedom of religion and the freedom to change religions (both being protected under the UDHR). Support of religious freedom in this degree suggests at least general recognition of the freedom to engage in religious proselytism, and also would prevent restrictions being placed on proselytism in order to simply prevent people from changing religions (i.e. apostasy).

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[410] *Ibid* at 1203-1204.
[411] *Ibid* at 1207.
[412] ASEAN Charter, *supra* note 396 at Article 2(2)(1), and ToR Article 2.1(g).
[413] ToR, *supra* note at Article 1.6 and 2.2.

On the other hand, there are also provisions in the ASEAN system that go against the freedom of religious proselytism. For example, the purposes of the AICHR seems to support the relativism at the core of the 'Asian Values' debate,[414] as it includes in the description of the AICHR's purposes Article 1.4:

> To promote human rights within the regional context, bearing in mind national and regional particularities and mutual respect for different historical, cultural and religious backgrounds, and taking into account the balance between rights and responsibilities.[415]

This Article opens the door for the recognition and protection of rights to be heavily influenced by local religious, cultural and historical realities. Given the fact that four of the ten members of the ASEAN are not members of the ICCPR, as well as the fact that 3 of them are members of the OIC, opens the door for Article 1.4 of the ToR to be interpreted in a way that heavily restricts religious freedom. This will likely have a deep impact on the practice of religious proselytism, as its confrontational nature is often perceived to be a threat to existing local social systems. For example, the Malaysian constitution specifically prohibits inter-religious proselytism in order to protect national security and public order.[416] Also, given the poor human rights records of several of the ASEAN member states, the protections offered in the ASEAN Charter (Article 2(2)), which were reflected in the AICHR ToR (Article 2.1), for state sovereignty and the principles of non-intervention in domestic matters opens the door for broad restrictions on religious proselytism.[417] The openness seen in the early life of human rights in the ASEAN organization seems vulnerable to some of the same difficulties in the Islamic/Arab regime, where vague standards results in the human rights standard being misused as a source to legitimate a political or ideological agenda, which may result in further human rights violations rather than bringing positive change.

3.4.3 Conclusion

It is true that the ASEAN organization has made significant steps towards protecting human rights in recent years, and that rapid and significant changes to human

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[414] Yen, *supra* note 391 at 400-401.
[415] ToR, *supra* note at Article 1.4.
[416] See Hashemi, *supra* note 356 at 58 and 83.
[417] Yen, *supra* note 391 at 401.

rights protections are possible (as was seen in the OAS and AU).[418] It is also possible to view the growing ASEAN human rights regime in positive or negative terms.[419] It is undeniable that the current structure is not adequate to realize and protect human rights in the region; but an optimistic view can see the possibility for the current structures to grow into substantive and effective protectors of human rights. Unfortunately, the way in which the ASAEN organization will in fact develop is purely a matter of speculation. This, together with the near-total absence of any reference to the protection of religious freedom and freedom of expression, means that there is nothing that can be said with certainty regarding the ASEAN approach to religious proselytism. However, if state practice is any indication, there will not likely be any great freedom for religious proselytism in the ASEAN human rights regime in the near future.

There is therefore a significant void left regarding the analysis of religious proselytism in terms of regional international law. To develop an understanding of the issue of proselytism in Asia would require an analysis of the laws and practices of individual countries in the region, which is outside of the scope of this project. The ongoing development of the ASEAN organization and conception of human rights raises questions regarding all of the international legal human rights treaties – including the question of how much of the developing mechanisms are an authentic reflection of the regional local realities and how much are mere mimicry of some dominant discourse. Ultimately this touches on the core question of the universality of international human rights, and whether one standard can adequately address the local complexities of a particular problem. With regard to the issue of religious proselytism, it is necessary to incorporate into the developing standards the flexibility necessary to account for regional particularities. The question is whether the emerging international standards regarding religious proselytism are sufficiently flexible to have such a universal application.

CONCLUSION

At the beginning of this thesis, I set out the goal of identifying commonly held issues, concerns and approaches in the various human rights instruments that are relevant

[418] *Ibid* at 394-395.
[419] For a pessimistic view, see *ibid*. For an optimistic view, see Tan, *supra* note 387 and Beyer, *supra* note 386.

for understanding religious proselytism in an attempt to see what a global conception of religious proselytism might look like. As was anticipated, the conception of religious proselytism emerging from the analysis is somewhat vague, fragmentary and rudimentary in character. However, there are still some common features and important points of overlap between the different regimes, which reveal a broad picture of the global conception of religious proselytism in human rights and show some general principles important for the continued development of the universal human rights standard. In conclusion, I hope to identify some of these emerging issues and points of overlap between the regimes discussed, and to show how these points of overlap contribute to the global conception and developing human rights standard regarding religious proselytism. In what follows, I will consider some of the common and dissonant elements regarding the conception of religious proselytism emerging from the analysis. What is remarkable, and which I hope to demonstrate, is that there is a unifying theme running through the dissonant elements of the various regimes that is constitutive of and essential to the global conception of religious proselytism and its ongoing development.

First, an important distinction should be made. It is clear from this study that different historical, cultural and social realities have had a profound influence on the ways in which religious proselytism is conceptualized. The 'Western' human rights institutions – the United Nations, European and Inter-American regimes – in many ways stand in stark contrast to the 'non-Western' human rights institutions (and developing bodies) – the African, Islamic/Arabic and Asian regimes. The former have developed approaches to religious proselytism based on the structures of individual rights, the separation of the public and the private spheres and in response to historical experiences of the World Wars and other religious wars and totalitarianism in Europe. The latter stand distinct to this, focusing less on the individual and more on matters related to communal interests (social, cultural and religious issues), developing in response to the various domineering programs (perceived and actual) of 'the West' such as historical colonialism, historical religious conflicts and the ongoing pressures of globalization. Despite these differences there are issues and concepts regarding religious proselytism that transcend the distinction between the individual and communal approaches.

As a starting point, there are several common features regarding the conception of religious proselytism that emerge from the analysis of the international and regional human rights regimes discussed in this thesis. It is important to note that these common features are relatively basic in character, which is likely because most of the discussions and issues regarding religious proselytism are related to its limitations as opposed to its constitutive elements. It is also important to note that these common features are not always openly discussed in the various human rights regimes, being more clearly referred to in the individualist regimes than the communalist regimes. However, the general character of these principles seems to be assumed as the basic framework for addressing issues related to religious proselytism. At the most basic level, religious proselytism is conceived of primarily as a matter of religious freedom. Acts of proselytism are acknowledged to be a part of religious practice but are not usually given explicit protection. Protection for religious proselytism is most often provided by implication under the freedoms of religion, or based on principles of non-discrimination. The common conception of religious proselytism tends to focus on the targets of proselytism, seeking to preserve their freedom of religious choices. Acts of religious proselytism are perceived as both facilitating and threatening the free choice of religion –facilitating it by providing options and information relevant to making a choice (this is sometimes related to the freedom of expression), and threatening it by attempting to compel a person to choose a particular religion. It is as though religious proselytism is generally seen as a reality that society must live with, or that it is somehow necessary to having a free democratic society, but that its place in society should be restricted. Most regimes make a distinction between 'proper' and 'improper' forms of religious proselytism, allowing the former and restricting (or punishing) the latter.

There are several points of disagreement regarding the conception of religious proselytism that are primarily related to the limitations that should be placed on it in order for it to properly fit into society. These issues are often seen not only with regard to acts of religious proselytism in particular but also with regard to the bigger picture of the process of religious conversion as a whole. There are two main discourses that arise throughout the international and regional human rights regimes: colonialism and protectionism. These discourses represent complex sets of concerns, considerations and

views regarding religious proselytism emerging from particular historical, ideological and cultural experiences. In this context, colonialism has to do with identifiable power structures (political and cultural), both nationally and internationally, that favour certain religions. The concern here is that the existence of these power structures compromises the freedom of people when choosing a religion. Usually the colonialism discourse is with regard to specific historical experiences, as is the case in the African human rights regime, which is working against the remnants of the colonization of that continent accomplished predominantly by European powers. On the other hand, protectionism deals with the desire to protect certain religious communities and social groups from the threat of losing their collective cohesion as a result of the conversion of individuals to other religions. The protectionism discourse is not only with regard to religious communities but also cultural communities, since the conversion to a new religion sometimes results in the adoption of new cultural practices or new social attitudes.

In a way, protectionism is closely related to colonialism insofar as both are trying to guard against the influence of external global forces. However, protectionism is distinct from colonialism in that it is not rooted in the demonstrable effects of power inequalities on the ability of people to make free choices, but focuses instead solely on maintaining the integrity of a community for its own sake. Considerations of colonialism raise legitimate human rights concerns as to the influence of certain power structures on individuals in relation to their interaction during proselytic activities. In order to prevent a form of structural discrimination against some indigenous and local religions, account should be taken of the residual structural influence of colonialism when regulating religious proselytism in certain areas. To the contrary, protectionist limits to proselytism for the sake of insulating a religious or social community from change is more concerned with issues of religious and ideological truth than about the freedom of those involved. The clearest example of the negative aspect of protectionism can be seen in the Cairo Declaration, where at Article 10 proselytism was prohibited only when targeting those of the Islamic faith.[420] Because of this, considerations of protectionism are much more difficult to fit within the conception of religious proselytism as a matter of human rights. Protectionism has a strong affinity with arguments of cultural relativism and religious or

[420] See section 3.3.2, above.

ideological truth. Although protectionism raises some very important issues pertaining to the nature of human rights these issues fall outside of the scope of this project. For the purposes of this project it is important to distinguish between issues that can be represented in a global human rights conception of religious proselytism and those that cannot – the latter should be seen as dissenting to the emerging global conception of religious proselytism in human rights.

Although considerations related to colonialism and protectionism arise largely in the communal-based approaches to human rights, similar concerns can also be identified in the individual-based approaches to human rights. Hence, the distinction between individualist and communalist conceptions of religious proselytism is not absolute. For example, the general principle underlying the issues of colonialism – that there is an imbalance of power between the parties affecting the ability of the targeted person to make a free choice of religion – can also be seen in the UN and European notions of 'improper' proselytism.[421] Both cases are consistent with each other insofar as they are concerned with protecting against forces that would compromise free religious choices. The danger of protectionism is also relevant here: the notion of 'improper proselytism' is in opposition to the global conception of religious proselytism when its application is based not on preserving religious freedom but on the simple resistance to change or maintenance of homogeneity. It is important to keep this distinction in mind when considering the various arguments identified throughout this project in the various regimes, as similar sounding arguments may in fact have very important fundamental differences – what may seem to be a legitimate concern may in fact be done for illegitimate reasons. Although an international human rights standard regarding religious proselytism should take into account the legitimate colonialist issues, caution is necessary to ensure that protectionist ideas do not creep in.

This directly affects considerations regarding the structure of the human rights principles regulating religious proselytism. There is a problem common to all of the international and regional human rights regimes, regardless of whether they are individual or communal based: they all leave space for ideological and political intrusion, which can lead to the failure of the system to protect the freedoms and rights of those involved. This

[421] See sections 1.5 and 2.2.2, above.

problem was identified throughout the project and with particular relevance to the communalist regimes.[422] Many similar difficulties also exist in the individualist regimes, albeit for different reasons and in different degrees. For example, the concept of 'improper proselytism' used in both the United Nations and European human rights regimes, as well as the notion of the protection of 'religious feelings' in Europe, are open to the same criticisms issued against the communalist regimes.[423] In both cases the standards are vague and indeterminate, which opens them up to being abused by domestic state authorities and used to justify limitations to proselytism that would otherwise be a violation of human rights. The argument made by Ann Elizabeth Mayer (in the context of the Islamic human rights system) applies here: it is not the particular elements of the approach taken to a human rights standard that necessarily results in opposition to or violations of human rights, but rather it is the vagueness of the standards employed that allow for the standard to be (mis)used to support political programs that are offensive to human rights.[424] This relates to the distinction between colonialist and protectionist views, in that a vague standard regarding the restriction of proselytism enables the standard to be used as a tool for the mere protection of a community without concern for the freedoms of those involved. The pervasiveness of the problems emerging from vague and unclear standards show the importance of forming an international conception of religious proselytism in as objective terms as possible. Focus should be placed on demonstrable coercion and the factual realization of the freedoms of those involved – both for the target of proselytism to choose their religious adherence as well as for the proselytizer to share his or her religious beliefs. Structures resulting in imbalances of power should be accounted for (such as the residual influence of colonialism), but such accounting should be specific and limited so as not to open the door to domestic misuse and abuse of the standard.

Much of what has been said so far operates with regard to the concerns and reactions of society when responding to religious proselytism, but many of the same

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[422] Such as with the deference to Shari'ah in the Cairo Declaration (section 3.3.2, above), the protection of communal integrity in the ACHPR Articles 27-29 (section 3.2.2, above), and the deference to state sovereignty and regional particularity in culture, religion and society in the ASEAN ToR Article 4.1 (section 3.4.2, above)

[423] See sections 1.5, 2.2.2 and 2.2.3, above.

[424] See references in notes 363 and 365.

principles also apply on the individual level. It is commonly held that a person proselytizing another should not be allowed to force or coerce them into changing their religion. This is not controversial; the difficulty comes when defining the standard of 'coercion'. The notion of coercion can be used either to guard the religious freedom of the individual or it can be used to protect social groups. In either case it is the underlying motivation for this protection that is essential to determine its legitimacy – is the notion of coercion intended to ensure the freedom of the person or the group, or is it intended to maintain the status quo and simply prevent change? It is important to also consider whether despite good intention the actual effect of the formulation of the protection leaves the standard vulnerable to misuse. The situation here is analogous to the difference between colonialist and protectionist approaches discussed above. Unfortunately, no clear definition of 'coercion' emerges from the sources examined in this study; but as has been argued to this point, what does clearly emerge from the analysis is that coercion should not be based on vague and indistinct notions capable of being manipulated by domestic authorities. The notion of coercion in individual acts of proselytism should therefore also focus on demonstrable compromises to the freedom of the targeted individual to choose their religious allegiance. Using standards like allowing restrictions to proselytism only when the person targeted by the proselytic action complains, as has been suggested in the UN regime, would be consistent with this global human rights conception of religious proselytism.[425] The goal that seems to emerge from the analysis is that a universal standard regarding religious proselytism should account for the issues of abuses of power while also preventing the standard from being used to legitimate various political and ideological agendas.

The following final comments are with regard to the difficulties related to the method chosen in this particular study, and some possibilities for future research.

[425] The comments here would apply to missionary activities, as well as to local proselytism. Missionary activities present a difficult situation because they potentially involve both colonial structural issues as well as individual relational issues – it must be evaluated whether there is a structural influence affecting the freedom of the targeted individuals, as well as whether the methods used by the missionaries compromise the freedom of the targeted individuals. The analysis undertaken in this project does not provide a clear standard for drawing lines regarding these issues, but rather offers the general framework being discussed – that the focus must be on objective and demonstrable factors relating to the freedoms of the individuals involved. The determination of more particular standards will have to be undertaken in future research.

As has been identified in this conclusion, one of the main limitations of this study is that it leaves unanswered many of the very interesting and important questions raised. The analysis in this project of the various international and regional human rights regimes has uncovered some overlapping issues and ideas, which provides a global picture of religious proselytism as a matter of human rights and provides a rudimentary set of principles that should guide the formation of an international standard on the matter. But there remains a whole host of theoretical and practical questions to be addressed. Most importantly, there remains open for discussion the precise way in which the varying interests pertaining to religious proselytism should be balanced.

Unfortunately, the open-endedness of some of the issues discussed in this project is the direct and a natural result of the method chosen, and is largely due to deficiencies in the sources examined. The scope of the sources examined in this study was limited intentionally to the international and regional human rights regimes in order to gain a broad and general understanding of the issues and concepts related to religious proselytism as a matter of human rights. Unfortunately, the sources available through the organizations examined proved to be quite limited insofar as there was a lack of direct commentary on, and a lack of cases involving specific situations of, religious proselytism. This was particularly noticeable when examining the African, Islamic/Arab and Asian human rights regimes. This under-development in the sources may be because of the nature of the regimes, the newness of their legal human rights components or due to their preoccupation with other human rights issues. Regardless, these limitations produced a greater focus on the contextual issues than on individual instances of religious proselytism. As a result it is impossible to resolve the important issue of finding the proper balance between the various interests involved in religious proselytism. In order to resolve this, it would be necessary to expand the scope of sources examined to include at least the domestic laws regarding religious proselytism in these regions. Such an expansion would be ambitious, and would help answer some of the unresolved questions in this project, but it would not resolve all of the issues raised. Another limitation of this project is that it focused almost exclusively on the doctrinal analysis of the various human rights regimes. Given the importance of the historical and theoretical issues to the conception of religious proselytism, further research on these topics would significantly

enhance our understanding of the issues raised in this thesis. Adding such an analysis to the discussion would provide a more complete view of the different regions and the various social policies pertaining to religious proselytism.

In conclusion, proselytism remains an important issue of human rights and continues to provide ample opportunity to view the intersection of various legal, social and cultural issues. This thesis has taken the important first step of exploring the broad global conception of religious proselytism as a matter of human rights, but there are several remaining questions and issues that require further research to continue to develop our understanding of religious proselytism. This thesis has proven fruitful in finding significant overlap in the issues throughout the globe regarding religious proselytism, and offers promise for developing a deeper understanding of the complex relationship between religion, society and the law and how that relationship can best be represented in international human rights laws. Continued research on this topic will surely be rewarding, as it continues to delve deeper into the some of the most interesting and foundational questions regarding religious freedom.

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